

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

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A.S.No. 487 OF 1995

Between:

Sham Rao and others

... Appellants/ Defendants 1,9,10 & 12

And

Mahadevi, D/o Sangappa (died LRs Respondents 11 to 16) and others

... Respondents

DATE OF JUDGEMENT PRONOUNCED: 23-07-2015

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SUBMITTED FOR APPROVAL:

HON'BLE SRI JUSTICE M. SATYANARAYANA MURTHY

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

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***THE HONOURABLE SRI JUSTICE M. SATYANARAYANA MURTHY**

+A.S. No. 487 of 1995

%23-07-2015

#Sham Rao and three others

1,9,10 & 12

....Appellants/defendants

Vs.

\$ Mahadevi and nine others

.... Respondents/plaintiffs 1 & 2

!Counsel for the Appellants: P. Ramachandra Reddy

Counsel for the Respondents: T.N.M. Ranga Rao

<Gist :

>Head Note:

? Cases referred:

1. 2014 (4) ALD 1 (DB)
2. 2004 (1) ALD 18 (SC) = AIR 2003 SC 4548
3. AIR 1982 BOMBAY 72
4. AIR 1970 SC 833
5. AIR 1967 AP 257
6. 1993(3) ALT 21
7. (2008) 15 SCC 673
8. AIR 1958 SC 706
9. AIR 1969 AP 242 (V.56 C 76)
10. AIR 2011 SC 2906
11. AIR 1988 SC 881
12. AIR 1976 SC 807
13. 2015 (2) ALD 331
14. 1995 SUPP (2) SCC 428
15. 2007 (1) ALT 253
16. AIR 2012 SC 1727
17. AIR 1934 PC 23
18. AIR 1964 SC 1254
19. (1995) 6 SCC 309

HON'BLE SRI JUSTICE M. SATYANARAYANA MURTHY

A.S. NO. 487 OF 1995

J U D G M E N T :

Defendants 1, 9, 10 & 12 filed this Appeal against the Decree and Judgment dated 31.1.1995 passed in O.S.No. 80 of 1984 by the Subordinate Judge, Sangareddy at Medak District, whereby the suit was decreed for partition of schedule property into five equal shares declaring that the plaintiffs are entitled to 1/5th share each in the schedule property.

2. For convenience, the ranks given to the parties before the trial Court will be adopted through out this judgment.

3a) The plaintiffs filed the suit for partition of schedule property into five equal shares and to allot one such share to each of them alleging that Sangappa S/o Siddaramshetty, who was the common ancestor of the parties, died intestate about 14 years ago leaving behind, his five daughters as his heirs. Plaintiffs 1 and 2 and defendants 1 and 2 are his daughters. His other daughter Chandamma died about 10 years ago leaving behind defendants 3 to 8 as legal heirs, to succeed her estate.

3b) Shivamma wife of Sangappa predeceased to him. Late Sangappa was the native of Hangerga "K" Village, Narayankhed Taluk and exclusive owner of plaint 'A' & 'B' schedule properties. After the death of Sangappa the plaintiffs 1 and 2, D1, D2 and Chandamma become entitled to equal shares. After the death of Chandamma her 1/5th share was devolved upon D3 to D8 in equal shares.

3c) After the death of Sangappa, his daughters have been in joint possession and enjoyment of the suit schedule property along with children of Chandamma D3 to D8.

3d) The schedule property was not divided by metes and bounds and they are in joint possession and enjoyment of schedule property. Defendant No. 12 is the husband of D1 and D9 to D11 are their children. With illegal motive they tried to dispose off some of the properties to third parties to deprive the plaintiffs to claim their due share, on coming to know the same, the plaintiffs demanded defendants for partition and separate possession but they did not co-operate for the same. However, the plaintiffs obtained certified copies of revenue records in March 1984 and they learnt that D1 and D2 managed the revenue authorities, got mutated their names in the revenue records. The mutation of names of D1 and D2 and Defendants 9 to 12 in the revenue records will not create any interest or title to the property. The plaintiffs are entitled to 1/5th share each in the suit schedule property. Hence they sought for a decree for partition of the schedule property into five equal shares and allot one such share to each of the plaintiffs.

3e) Defendant Nos. 2 to 8 remained ex-parte. Defendants 1, 9, 10, 11, and 12 resisted the claim of the plaintiffs by filing written statement, denying material allegations of plaint while admitting the relationship between parties and ownership of the property of Sangappa and death of Sangappa about 15 years back in the month of November 1970.

3f) The defendants denied the contention of plaintiffs that the property of Sangappa devolved upon plaintiffs and D1 and D2 and late Chandramma and asserted that they were never in joint possession and enjoyment of the property.

3g) As per desire of plaintiffs, D1 and D2, and late Chandramma and D12, the suit lands were recorded in the name of D9 and D10. Therefore, the plaintiffs are estopped from claiming

any share in the suit properties. The first daughter of late Chandramma and the plaintiffs were given in marriage to others. When the 4th daughter, defendant No. 1 and 5th daughter D2 were born, late Sangappa gave up his hopes to beget any male child through his wife. Therefore, Sangappa has taken D12 in illatom adoption as per the custom prevailing in the community with an agreement that for all purposes D-12 has a right on par with natural son and he has to marry his fourth daughter Veeramma, serve the family and help him in day to day affairs. Late Sangappa own and possessed suit schedule 'A' & 'B' immovable properties and some gold in which D-12 is entitled to half share during the life time of Sangappa. Thus D-12 after the marriage with D1 is living with late Sangappa serving him in day to day affairs with his wife like his natural son. Sangappa belonged to Lingayath community and a custom is prevailing in that community to take a person in illatom adoption. Thus, D-12 is an illatom son-in-law of Sangappa.

3h) After the death of Sangappa, there was a panchayat between the plaintiffs, D1, D2 and late Chandramma on 12.11.1970. In the said panchayat Maruthi Rao, husband of plaintiff No. 2, Veershetty husband of plaintiff No. 1, Kantappa husband of late Chandramma, Sarpanch of Village Hangarga 'K' and some village elders and other villagers, considering all the properties, the Panchayatdars have passed an award of partition which was scribed by Maruthi Rao husband of plaintiff No. 2 and was accepted by plaintiffs 1 & 2, D2 and late Chandramma. In the said award it was admitted that D-12 is the illatom son-in-law of late Sangappa. It was also admitted in the said award that D-12 and his children alone are entitled for the immovable property of late Sangappa. It was also decided in the said award that name

of D-12 has to be mutated in the revenue records in the place of D-9 and D10. Late sangappa left behind him 10 tulas of gold and Rs. 3,000/- cash and it was agreed that in lieu of the share of the plaintiffs, late Chandamma and D2 are to be given each five tulas of gold. D1 and D-12 were not given any share in the gold and an amount of Rs. 3,000/- was paid to Nagashetty son of Chandamma in lieu of the services rendered by him to late Sangappa. Thus, the Panchas participated and partitioned the properties left by late Sangappa, according to which plaintiffs and D2 are not entitled to any share in the suit 'A' and 'B' schedule properties and in lieu of their share they were given five tulas gold each to plaintiffs and D2 and hence, they are estopped from claiming any partition as on the date of filing the suit.

3i) It is further contended that Sangappa executed a Will bequeathing land in S.No. 106 an extent of Ac. 20.6 guntas of Hangaraga 'K' Village to Sukhabhasini, daughter of defendants 1 & 12 and she is in possession and enjoyment of the said land for the last more than 12 years. D9, D10 and D12 are in exclusive possession and enjoyment of suit schedule properties right from the death of late Sangappa and their possession was admitted by plaintiffs and D2 and late Chandamma. As per wishes of late Sangappa, D9 and D10 are in exclusive possession and enjoyment of suit schedule 'A' and 'B' properties, adverse to the rights and interest of plaintiffs and defendants 2 and late Chandamma, continuously without interruption and therefore, plaintiffs suit is hopelessly barred by limitation and prayed to dismiss the suit.

4. Basing on the above pleadings the trial Court framed the following issues:

1. Whether the plaintiffs are entitled for partition and separate possession as prayed for?

2. To what relief?

The trial Court also framed the following additional issues on 15.9.1989 and on 1.9.1993:

1. Whether there is a custom of illatom adoption in the caste and family of the parties?
2. Whether D12 was taken as illatom son-in-law with an agreement that he will have rights like natural born son? If so what is its effect?
3. Whether there was earlier partition on 12.11.1970 as pleaded by D1, D9, D10 and 12 and whether it is legal and valid?
4. Whether late Sangappa executed will deed bequeathing S.No. 106 in favour of D11?
5. Whether the suit is barred by limitation?

5. During the course of trial, on behalf of plaintiffs PWs 1 & 2 were examined and Exs. A1 to A14 were marked, on behalf of defendants DWs 1 to 4 were examined and Exs. B1 to B-25 were marked.

6. Upon hearing argument of both the counsel, considering oral and documentary evidence, the trial Court disbelieved the partition of property by way of award passed by the Panchas and Will allegedly executed by Sangappa in favour of Sukhabhasini daughter of D1 and D12 and also disbelieved perfection of title by adverse possession in the name of D9 and D10, passed a decree in favour of the plaintiffs entitling each of the plaintiffs 1/5th share along with D1 and D2 and branch of deceased Chandramma.

7. Aggrieved by the Decree and Judgment passed by the trial Court, the defendant Nos. 1, 9, 10 and 12 preferred the present appeal on various grounds, mainly on the ground that the trial Court did not appreciate the pleadings and evidence on record

and totally ignored the Will in favour of Sukhabhasini daughter of D1 and D12, the trial Court also did not consider the evidentiary value of Ex. B1 dated 12.11.1970 and disbelieved the partition of the property.

8a) The trial Court also did not answer the issue of limitation and perfection of title by adverse possession by D9 and D10, committed an error in passing of preliminary decree for partition of property into five equal shares and allotment of one such share to plaintiffs 1 & 2 and prayed to set aside the decree and judgment of the trial Court and dismiss the suit, while, allowing this appeal.

8b). During the course of arguments, learned counsel Md. Hasifuddin, appearing on behalf of Sri M. Rama Rao, learned counsel appearing for appellants/defendants 1,9, 10 & 12 contended that since the property was partitioned under Ex. B-1, the plaintiffs were given 5 tulas of gold under the award of partition passed by the Panchayatdars thereby the plaintiffs are not entitled to claim any share.

8c) It is also contended that by virtue of Will executed by Sangappa in favour of Sukhabhasini bequeathing Ac. 20.06 guntas, she is entitled to claim Ac. 20.06 guntas property out of schedule property and thereby plaintiffs are not entitled to claim any share in the said property.

8d) It is further contended that 12th defendant was taken in illatom adoption and thereby he will become a member of the family on par with other children and is entitled to half share in the property. But the trial Court did not accept the illitom adoption assigning its own reasons erroneously. Therefore, the decree and judgment of the trial Court are not based on any legal evidence and prayed to set aside the same dismissing the suit while allowing this appeal.

9a) Per contra, the counsel appearing for plaintiffs Sri T.N.M. Ranga Rao, would contend that the alleged award marked as Ex. B1 is inadmissible in evidence and if it is excluded from consideration, there is nothing on record to establish the alleged partition of the property. Therefore, the trial Court rightly disbelieved the previous partition pleaded by the defendant under Ex. B1 and the finding of the trial Court does not call for any interference by this Court.

9b) It is also contended that in the absence of production and proof of Will allegedly executed by Sangappa in favour of Sukhabhasini daughter of D1 and D12 bequeathing Ac. 20.06 guntas of land, the alleged bequeath cannot be accepted and the trial Court rightly disbelieved the same.

9c) Illatom adoption was not recognized by law and unless a custom is prevailing in the caste of a particular individual, the illatom adoption cannot be accepted and he will not acquire the status of son in the family to claim any share. Therefore, the plaintiffs are entitled to claim 1/5th share in the property since the alleged partition, Will and illatom adoption are not valid under law and prayed to confirm the preliminary decree passed by the trial Court while dismissing the appeal.

10) Considering rival contentions, perusing oral and documentary evidence including the decree and judgment under challenge before this Court, the points that arise for consideration are:

- (1) **Whether Ex. B-1 is an award of partition, admissible in evidence in the absence of any agreement to refer the issue to the arbitrators, if not, whether the partition pleaded by the defendants be accepted?**
- (2) **Whether the Will allegedly executed by Sangappa bequeathing Ac. 20.06 guntas in favour of Sukhabhasini daughter of D1 and D12 is true, valid and genuine, if so, Ac. 20.06 guntas of land be excluded**

from partition?

- (3) Whether any custom is prevailing in the caste of Sangappa to take third person in illatom adoption, if so, the alleged illatom adoption of D12 is true and correct and D-12 is entitled to claim any share in the schedule property?
- (4) Whether schedule property is a Hindu undivided coparcenary property, if so, are the plaintiffs entitled to claim 1/5th share each in “A” and “B” Schedule property?

11. **POINT NO. 1:**

The suit is filed for partition of “A” and “B” Schedule property and the defendants set up previous partition basing on the award passed by the elders, marked as Ex. B1 dated 12.11.1970. Where as, the contention of plaintiffs’ counsel is that the award is inadmissible in evidence and mere marking of Ex. B1 as an exhibit before the trial Court is of no consequence. Since it is marked only for reference in judgment, admissibility can be questioned at any time. Similar Question was considered by a Division Bench of this Court in ***IVRCL Assents & Holdings Ltd., Hyderabad V. A.P. State Consumer Disputes Redressal Commission, Hyderabad and another***^[1], wherein this Court held that admissibility of document can be questioned at any time placing reliance on the earlier judgments of Apex Court reported in ***R.V.E. Venkatachala Gounder V. Arulmigu Viswesaraswami and V.P. Temple and another***^[2], wherein the Apex Court held as under:

“Ordinarily an objection to the admissibility of evidence should be taken when it is tendered and not subsequently. The objections as to admissibility of documents in evidence may be classified into two classes:- (i) an objection that the document which is sought to be proved is itself inadmissible in evidence; and (ii) where the objection does not dispute the admissibility of the document in evidence but is directed towards the mode of proof alleging the same to be irregular or insufficient. In the first case, merely because

a document has been marked as 'an exhibit', an objection as to its admissibility is not excluded and is available to be raised even at a later stage or even in appeal or revision. In the latter case, the objection should be taken before the evidence is tendered and once the document has been admitted in evidence and marked as an exhibit, the objection that it should not have been admitted in evidence or that the mode adopted for proving the document is irregular cannot be allowed to be raised at any stage subsequent to the marking of the document as an exhibit. The later proposition is a rule of fair play. The crucial test is whether an objection, if taken at the appropriate point of time, would have enabled the party tendering the evidence to cure the defect and resort to such mode of proof as would be regular. The omission to object becomes fatal because by his failure the party entitled to object allows the party tendering the evidence to act on an assumption that the opposite party is not serious about the mode of proof. On the other hand, a prompt objection does not prejudice the party tendering the evidence, for two reasons: firstly, it enables the Court to apply its mind and pronounce its decision on the question of admissibility then and there; and secondly, in the event of finding of the Court on the mode of proof sought to be adopted going against the party tendering the evidence, the opportunity of seeking indulgence of the Court for permitting a regular mode or method of proof and thereby removing the objection raised by the opposite party, is available to the party leading the evidence. Such practice and procedure is fair to both the parties. Out of the two types of objections, referred to hereinabove, in the later case, failure to raise a prompt and timely objection amounts to waiver of the necessity for insisting on formal proof of a document, the document itself which is sought to be proved being admissible in evidence. In the first case, acquiescence would be no bar to raising the objection in superior Court."

12. In view of the principle laid down in the above judgment, the objection as to the admissibility of a document in evidence can be raised at any time and mere marking of a document in evidence would not take away the right of the party to challenge the same since marking of document is only for convenience of reference, whereas admitting of a document in evidence is marking a document after applying the judicial mind, in view of the judgment of the Apex Court in ***R.V.E. Venkatachala Gounder V. Arulmigu Viswesaraswami and V.P. Temple and another (supra-2)***. But here award dated 12.11.1970 was marked as Ex.B-1, admissibility of document was not questioned. However, in view of the principles laid down by the Apex Court referred above, the admissibility of Ex. B-1 is challenged before me. Even in the trial Court also the admissibility was challenged during the

course of arguments placing reliance on the law laid down by the Apex Court and this Court.

13. As seen from Ex. B-1, it is only an award passed by the Panchaytdars in the Village but the nomenclature of the document is not decisive to decide the nature of the transaction. However, it is contended in the written statement that Panchayatdars passed an award for partition of schedule property and the document reads as under:

“Award of Gramsabha by Panchas of Village Hangirga Khurd Taluq Narayankhed, District Medak, A.P. dated 12th November, 1970.

In respect of and in the name of Sangappa S/o Sidramappa Molga, Hagirga Khurd.

We the panchas under the Chairmanship of Sri Ra, Rao Naik of Sirgapur (1) Veerappa Sarpanch (2) Sri Hanmanth Rao, Patwari of Abinda (3) Sri Ramshetty Sheri @ Gang Shetty Sheri (4) Sri Pundlik Rao of Chimkode (5) Sri Narayan Patel (6) Sri Manik Gonda Dhanger (7) Sri Sangaramappa of Ratnapur (8) Galaiah Hurijan and (9) Ramchander Naik Lambada and others who participated in the arbitration, the following decision is given and has been executed accordingly.

(1) There are five daughters through Sangappa Molga deceased by name (1) Smt. Chandamma w/o Kantappa Markhal (2) Smt. Mahadevi W/o Veer Shetty Hangirga (3) Smt. Shankaramma W/o Maruthi Rao (4) Smt. Veeramma W/o Sham Rao who during the life of the deceased has created wakf over the house and movable properties, she being issueless and created the wakf to continue the family stand (5) Smt. Rangamma W/o Manik Rao devni.

(2) Now, the panchas, as per the will and pleasure of the deceased and for the purpose of his spiritual satisfaction the properties both movable and immovable which has been created wakf as detailed in.

(4) Therefore we have kept the said wakf properties as such.

Now there are (1) Manmathappa aged 15 years and (2) Dhanrajappa aged 3 years are the sons of Smt. Veeramma w/o Sham Rao and the future issues if any have been declared by us are entitled to the entire properties left by the deceased pattedar.

(3) The daughters of deceased at serial Nos. 1,2, 3 and 5 and their husbands have freely agreed to give the movable and immovable properties of the deceased to the issues of daughter at Serial No. 4 without any share of others. They ceased to be having any right or interest with the properties i.e., lands and houses of the deceased in future. In case of any objection, the same will be deemed as null and void.

However, in favour of four daughters (5) tulas of gold is given to each of the said four daughters. Thus total 20 tulas of gold has been given to them. They have pleased for the same. It will be the duty of the issues of daughters of serial No. 4 to behave the remaining daughters in good manner and according to the traditions.

Nagshetty S/o Kantappa Markhal has served his maternal grand father during his childhood therefore a sum of Rs. 3,000/- (Rupees three thousand) shall be paid to him in lieu of his services

within a period of one month and obtain receipt of such payment.

Hence this award passed by us, the panchas herein according to our definite opinion and with the consent of all as final and absolute. This will be used as an authority in future. In future the daughters and their husbands are required to protect the properties of the deceased and get the said properties mutated in favour of the issues of daughter at serial NO. 4 from the competent department by initiating the necessary proceedings and get the patta transferred in favour of grand sons of deceased through daughter serial No. 4. All are supposed to be happy hereditary. Hence, this award is made which is true and be as an authority”

14. In view of the contents of document Ex. B-1, it is only an award of partition passed by Panchayatdars of the Village of Hangirga 'K' but the very reference of dispute to Arbitrator in the absence of any agreement between the parties for reference is in question.

15. Section 2(a) of the Arbitration Act, 1940 defined the "arbitration agreement", which means a written agreement to submit present or future differences to arbitration, whether an arbitrator is named therein or not. So the reference to arbitrator shall be proceeded by an agreement of arbitration as defined under Section 2(a) of the Arbitration Act and in the absence of such an agreement for reference, the arbitration award is invalid.

In **M/s Gangaram Ratanlal v. M/s Simplex Mills Co. Ltd**^[3], the High Court of Bombay held as under:

“Arbitration agreement must be one as defined in Section 2(a) of Arbitration Act and hence must be in writing. If that sine qua non is absent, the result would be that the initial lack of jurisdiction on the part of the arbitrator cannot be cured by oral acquiescence on the part of the party and any admission of liability by such party before the arbitrator can avail the other side nothing as it is made before an authority who, for want of an arbitration agreement as defined in Section 2(a) initially has no jurisdiction to act as arbitrator and is, therefore, incompetent to make an award. Lack of jurisdiction goes to the root of the matter; it is not merely an irregularity which can be cured by oral acquiescence.”

16. In another Judgment rendered in **Satish Kumar and others v. Surinder Kumar and others**^[4], the Apex Court ruled as follows:

“The award is not a mere waste paper but has some legal effect. It is final and binding on the parties and it cannot be said that it is a waste paper unless it is made a rule of the Court. The conferment of exclusive jurisdiction on a Court under the Act does not make an award any the less binding than it was under the provision of the Second Schedule of the Code of Civil Procedure. The award is, in fact, a final adjudication of a Court of the parties’ own choice, and until impeached upon sufficient grounds in an appropriate proceeding, an award, which is on the face of it regular, is conclusive upon the merits of the controversy submitted. As between the parties and their privies, an award is entitled to that respect which is due to Judgment of a court of last resort.

The award does create rights in property but those rights cannot be enforced until the award is made a decree of the Court. It is one thing to say that a right is not created, it is an entirely different thing to say that the right created cannot be enforced without further steps. For the purpose of Section 17(1)(b) of the Registration Act, all that is necessary is whether the award purports or operates to create or declare, assign, limit or extinguish whether in present or future any right, title or interest whether vested or contingent of the value of one hundred rupees and upwards to or in immovable property.”

17. In **M. Venkataratnam and another V. M. Chelamayya and another**^[5], this Court reiterated the principles laid down by the Apex Court.

18. In **Montey Appalaraju & another V. Kotteti Talupulamma @ Tallamma & others**^[6], the same question about the admissibility of an award passed by the Arbitrator came up before the Single Judge of this Court, wherein it was held as follows:

“The document in question is an unregistered one executed on one rupee worth non-judicial stamp paper. The crucial test that has to be made in the case of the document sought to be admissible is to read the contents of the document and also to see the capacity of the persons who have signed the document. On a perusal of the contents of the document it is clear that some limited rights are conferred in respect of some properties on the parties. Sec. 35 of the Indian Stamp Act lays down that instruments not duly stamped are inadmissible in evidence. Under Schedule 1 Article 12 of the Indian Stamp Rules (Andhra Pradesh), an award is liable for stamp duty as a bond. Section 17 of the Indian Registration Act prescribes that an award creating rights in immovable property worth more than Rs. 100 is compulsorily registerable. Section 49 of the Indian Registration Act deals with the effect of non-registration of documents and as per clause © of the said section a document which requires registration under Section 17 when not registered cannot be received as evidence. From a reading of the contents of the document, it has to be construed that it is an award and the argument that it is a family arrangement cannot be accepted”.

19. If the principles laid down in the above judgment are applied to the present facts of the case, the document marked as Ex. B-1, on due consideration of contents, which can be said to be an award passed by the arbitrator i.e., Panchayatdars of the Village. Even in the written statement, the defendants contended that the Panchayatdars passed the award directing partition of the property referred therein.

20. In view of the principles laid down by the Apex Court and other Courts, to validate the reference to award passed by the arbitrators, there must be an agreement in writing under Section 2(a) of the Arbitration Act between the parties to arbitration.

21. Here, nothing is on record to establish the existence of arbitration agreement as defined under Section 2(a) of the Arbitration Act. But the reference is only oral. Therefore, in the absence of any arbitration agreement, the reference is not a valid reference. At the same time the Apex Court in **Satish Kumar and others** (supra-4) consistently held that it is final and binding on the parties and it cannot be said that it is a waste paper unless it is made a rule of the Court. Thus the document is required to be registered. Ex. B1 is an unregistered and un-stamped document and it was not made as a rule of Court as required under the provisions of the Arbitration Act, 1940.

22. Admittedly, Ex. B1 is un-registered, not duly stamped document and the award is not made as rule of the Court, therefore, the award does not create any right in the property. On this ground alone, the arbitration award marked as Ex. B-1 is invalid.

23. The learned counsel further contended that unless the award is stamped and registered under the provisions of the

Registration Act, and Stamps Act, the same cannot be received in evidence in view of bar under Section 49 of the Registration Act, thereby such award marked as Ex. B-1 would not confer any right or title in immovable property and he placed reliance on the judgment reported in **M. Venkataratnam and another** (supra 5) wherein the Division Bench of this Court held that if the records made by the Panchayatdars were not documents which are mere acknowledgement of partition already made, they would have been compulsorily registerable under Section 17 (1) (b) of the Registration Act, 1908 and therefore the award falling under Section 17(1)(b) of the Registration Act cannot be received in evidence for the purpose of making the award as rule of the Court under Section 17 of the Act, 1908.

24. In the instant case, the award marked as Ex. B1 is neither registered nor made as rule of the Court. Hence, the award, which is marked as Ex. B1 in evidence, but it appears from the record that no objection was raised before the Court when the award is marked as Ex. B1 and the trial court, did not consider the admissibility of the award in evidence, applying its mind.

25. According to Section 36 of Indian Stamp Act, when a document is marked without an objection, it cannot be questioned at any point of time during trial. The bar under Section 36 of Indian Stamp Act, 1899 is only with regard to admission of insufficiently stamped documents but no similar provision is contained in the Registration Act which says that once the document is marked, it cannot be questioned at a later stage like Section 36 of Indian stamp Act. Therefore, the admission of award in evidence can be questioned at any time for want of registration.

26. Learned counsel for the plaintiffs rightly contended that Ex.B.1 is inadmissible for want of registration under Section 17 (1)(b) of Registration Act and it would not confer any title to the property. This contention is supported by the Judgment of the Apex Court and Division Bench of this

Court. Hence, this objection can be sustained even at the stage of the appeal.

27. The learned counsel for the defendants while contending that the document marked as Ex. B-1 is a settlement deed, not required to be registered and he placed reliance on the judgment reported in **Ranganayakamma and another vs. K.S. Prakash (dead) by LRs and another**^[7], and **Nani Bai, Appellant v. Gita Bai Kom Rama Gunge, Respondent**^[8]. He also placed reliance on **Chinnappareddigari Pedda Muthyalareddy, Appellant vs. Chinnappareddigari Venkatareddy and others, Respondents**^[9], **State Bank of India and another Vs. M/s Emmsons International Ltd., and another**^[10], and **Roshan Singh and others, Appellants v. Zile Singh and others, respondents**^[11]

28. In **Roshan Singh and others** (supra –11), the Apex Court had an occasion to deal with the memorandum of partition by way of family arrangement, held that “distinction between partition of ancestral properties and subsequent memorandum of partition embodying factum of partition and concluded that the memorandum was only family arrangement and its registration was not necessary”. In **State Bank of India and another** (supra-10), the Supreme Court held that the entire contents of the document have to be looked into to decide the admissibility of a document. Similarly in **Chinnappareddigari Pedda Muthyalareddy** (supra-9), this Court held as under:

“In our view where a partition takes place, the terms of which are incorporated in an unregistered document, that document is inadmissible in evidence and cannot be looked for the terms of the partition. It is in fact the source of title to the property held by each of the erstwhile coparceners. That document, though unregistered, can however be looked into for the purpose of establishing a severance in status, though that severance would ultimately affect

the nature of the possession held by the members of the separated family who from thence onwards, hold it as co-tenants.”

29. The law declared by this Court and the Apex court in the above judgments is not applicable to the present facts and circumstances of the case. The very nature of the document marked, as Ex. B1 is an award passed by the Panchayatdars and in the written statement filed by the defendants, they themselves admitted that the award was passed by the village elders. Even on looking at the contents of the document Ex. B1, it is only an award passed by the village elders.

30. In **Ranganayakamma** (supra 7), the Apex Court held that a family settlement need not be registered. Similar view was expressed by the Apex Court in earlier judgment reported in **Nani Bai**, (supra-8), wherein the Apex Court held that family partition need not be registered. Similar view was expressed by the Apex Court in **Kale and others, Appellants v. Deputy Director of Consolidation and others**^[12]. The law declared by the Apex Court in the above judgments is not applicable for the reason that Ex. B1 is an award, as both of the defendants themselves in the written statement agreed and the documents also disclose that it was only an award of Panchayatdars acting as arbitrators. Therefore, the contention of the defendants that document Ex. B1 is admissible under law is without any substance.

31. Apart from inherent defect of non registration of Ex.B.1 award, still the award is not made as a rule of the Court under the provisions of the Arbitration Act, 1940 and unless and until it is made as a rule of the Court, the award is not enforceable under law and it would not create any right in immovable property. On this ground also, the claim of the defendant basing on the award marked as Ex.B.1 cannot be sustained. Hence, I hold that the award marked as Ex.B.1 dated 12.11.1970 would not confer or create

any right in immovable property and it is inadmissible in evidence, and thereby the partition pleaded by defendants cannot be accepted. Therefore, the finding of the trial Court is hereby confirmed holding Point No.1 in favour of the plaintiffs and against the defendants.

32. POINT NO.2 :

One of the contentions of the defendants is that during the life time of Sangappa, he executed a Will in favour of Sukhabashini daughter of D1 and D12 bequeathing Ac. 20.06 guntas of land but the trial Court disbelieved the alleged bequeath for non-production of Will before the trial Court. When the defendants set up a Will, it is for them to produce the Will before the Court. The defendants did not disclose any details of the Will, including date of execution and did not produce the Will so as to claim right in the said property of 20.06 guntas of land.

33. When a Will is propounded by defendants, it is for them to prove the Will by producing primary evidence besides proof of the same as required under Section 68 of Indian Evidence Act.

34. Will is a compulsorily attestable document. But the defendants miserably failed to produce the Will, which is a primary evidence and did not examine any of the attesters to substantiate the claim of the defendants that Ac. 20.06 guntas was bequeathed in favour of Sukabashini daughter of D1 and D12 by Sangappa during his life time in sound disposing state of mind. In the absence of production of Will and examining any of the attesters, as required under Section 68 of the Indian Evidence Act, the contention of the defendants cannot be accepted. Hence, the trail court on the sole ground that the Will was not produced before it, disbelieved this contention. Even now there was no improvement in the case with regard to proof of Will except the oral evidence adduced before the trial Court

regarding bequeath of property. Hence, I find no illegality in the finding recorded by the trial Court with regard to bequeath in favour of Sukhabashini, warranting interference by this Court. Hence, I find that the Will propounded by the defendants is not in existence and the property allegedly bequeathed in favour of Sukhabashini daughter of D1 and D12 i.e. Ac. 20.06 guntas of land cannot be accepted and the trial court rightly held this point against the defendants while passing the decree and judgment in favour of plaintiffs. Accordingly the point is answered.

35. POINT NO. 3:

Plaintiffs 1 & 2, D1 and D2 and Chandramma are the daughters of Sangappa. Admittedly, Sangappa was the owner of the schedule property and consequent upon the death of Sangappa in the year 1970 intestate, plaintiffs, D1 and D2 and legal heirs of Chandramma who predeceased Sangappa, became entitled 1/5th share in schedule property. But consistently defendants set up illatom adoption of D-12, who is not a member of the family and according to the agreement D-12 has to marry Veeramma- D1 and he has to assist Sangappa in his day to day affairs. The agreement was not placed before the trial Court or before this Court and it is not known whether it is oral or written. However, unless the custom prevailing in the community, permits illatom adoption, the same cannot be accepted and the counsel for the plaintiffs while disputing the illatom adoption, submitted that no custom is prevailing to take a third party as illatom adoption and he placed reliance on a judgment reported in ***R. Sudhakar Reddy V. J. Govinda Reddy***^[13], wherein this Court held that

“it is further held that unless a custom is prevailing in the particular caste

or region, the illatom adoption of a third party cannot be accepted. Custom if recognized by a group of persons or area etc., is a source of law. Jurisprudentially custom is a known source of law and an integral part of the Lex non-script or unwritten law having law creating efficacy. It commends itself to the national and social conscience as principles of justice and public utility.”

36. In view of the principles laid down in the above judgment, unless custom is prevailing in the particular caste to take any person in illatom adoption, it is difficult to accept the illatom adoption set up by the defendants and the same cannot be accepted.

37. In the instant case, defendants examined DWs 1 to 4 to substantiate the contention of defendants with regard to illatom adoption, but curiously, none of the witnesses did testify anything about prevailing custom to take illatom adoption of a third party in the caste of Sangappa. The trial Court after appreciation of evidence found that none of witnesses testify about the prevailing custom in Lingayaths caste or in the area where they are living to take a third person in illatom adoption so as to treat such a person as member of the family on par with natural son. In the absence of proof of prevailing custom in the community of Lingayaths to take a third person into illatom adoption, the alleged illatom adoption pleaded by the defendants cannot be accepted. Thus, the trial Court after appreciation of oral evidence of DWs 1 to 4 disbelieved the custom prevailing in the caste of Lingayaths or in the area where the parties are living and declined to accept the contention of the defendants that illatom adoption of D-12 and to claim share in the property of the Sangappa after his death.

38. Even after appreciation of entire material including oral and documentary evidence by this Court, afresh uninfluenced by the findings of the trial Court, I find no iota of evidence to believe

the prevailing custom of taking third person in illatom adoption and therefore, the finding of the trial court does not suffer from any legal infirmity warranting interference by this Court. Hence, the finding of the trial Court is hereby accepted and accordingly, this point is held in favour of plaintiffs and against the defendants.

39. POINT NO.4:

Plaintiffs claimed a preliminary decree for partition of the property to divide the property into five equal shares and allot one such share to each of them. Sangappa was the owner of "A" and "B" Schedule property and consequent upon his death in the year 1970 plaintiffs 1 and 2, D1 and D2 and legal heirs of Chandramma, who predeceased Sangappa became entitled to claim share in the property, who are in the joint possession of the same. The defendants disputed the very existence of joint family by setting up previous partition marked as Ex. B-1 and execution of Will in favour of Sukhabashani by Sangappa bequeathing Ac. 20.06 guntas of property to her and that she is in continuous possession and enjoyment of the same. They also set up an illatom adoption of D-12. But the trial court disbelieved the partition in Ex. B-1 and the Will allegedly executed by Sangappa in favour of Sukhabashini and also illatom adoption.

40. After re-appreciating the facts of the case with reference to the evidence available on record, this Court already recorded findings on Point Nos. 1 to 3 disbelieving the partition pleaded by the defendants by marking Ex.B1, so also, the Will allegedly executed by Sangappa during his life time, under point Nos.1 and 2 and the illatom adoption under point No. 3. The contentions of the defendants in the appeal do not stand to any legal scrutiny, even after re-appraisal of entire evidence.

41. Curiously, the joint family own and possessed large

extent of land and before the Tahsildar under Andhra Pradesh (Ceiling on Agricultural Holdings) Act, 1961, (for short "the Act") legal heirs of deceased Sangappa filed their declaration setting up the plea of partition. But the primary authority, Revenue Divisional Officer, Land Reforms disbelieved the alleged partition pleaded by the defendants and passed an order marked as Ex. A5. During the enquiry before the Tahsildar the statement of declarants were recorded and they are marked as Exs. A2, A3, A4 and Ex. A1 is objections filed in CC 3386/N/75 and CC3387/N/75 and CC 3388/N/75. In the objections the defendants set up the plea of partition while admitting that there was no partition in their statements marked under Exs. A2, A3 & A4. The Primary authority under Land Reforms Act disbelieved the plea of partition and held that it is only a joint family property and passed an appropriate order under the original of Ex. A-5. This order was not challenged before the Appellate Authority as per the material available on record. Ex. A1 is the objection petition in CCs referred, supra. A2 is the statement of Veeramma-D1 W/o D12. In her statement before the Additional Revenue Divisional Officer under the Land Reforms Act, she testified that Sangappa was blessed with five daughters namely, Smt. Chandramma, Smt.Mahadevi, Smt.Shankaramma, Smt. Veeramma and Smt. Rangamma. He own and possessed Ac. 207.00 at Hangirga 'K' Village and after his death Veeramma and other five daughters succeeded to the property and all her sisters are entitled to equal share in the above land under the Hindu Succession Act. Since her sisters ignored elder sister, her son asked about filing of declaration she admitted that she would look after the legal matters. As per the advice of her husband declarations were filed but she does not know what the declarations contain. The evidence of Veeramma before the

Revenue Divisional Officer is totally silent about the partition of the property, more over partition under Ex.B1. Similarly, Rangamma and Nagashetti were examined and their certified copies of depositions were marked as Exs. A3 & A4. Their statements are totally silent as to the partition pleaded by the defendant covered by Ex. B1. Finally, the Revenue Divisional Officer passed the common order under the original of Ex. A5 declaring standard holding of each individual.

42. When the defendants admitted about the existence of joint family in the year 1975 when they were examined before the Additional Revenue Divisional Officer under Land Reforms Act, in the enquiry held by him, the defendants now cannot resile from their statements and they are estopped to contend otherwise than they testified before the Revenue Divisional Officer. Even otherwise, when the defendants made a statement before the Revenue Divisional Officer and gained advantage under land reforms proceedings, they cannot now contend otherwise.

43. A similar question came up before the Apex Court in **Digambar Adhar Patil v. Devram Girdhar Patil**^[14], wherein the Apex Court held as follows:

“in which the effect of proceedings under the Land Reforms Legislation and the proceedings under the Tenancy Act was considered by the Supreme Court. In that case the appellant was a tenant claiming rights under Bombay Tenancy and Agricultural Lands Act, 1948. His application under [Section 32-G](#) of the said Act before the Tenancy Tribunal praying to determine the price to be paid to the land owners for the purchase of Ac.8-26 guntas was rejected on the ground that the tenant was already holding land in excess of ceiling limit. The order of the Tenancy Tribunal was reversed by the Bombay High Court. Before the Supreme Court, there was a claim on behalf of the minor son of the tenant to an extent of Ac.7-34 guntas and the claim of the tenant's brother in whose favour there was an alleged partition under which the brother was given some land. Reliance was placed on the statement made by the landowner before the Tenancy Tribunal as well as the documentary evidence in support of partition. The Supreme Court accepted the oral evidence of the landowner before the Tenancy Tribunal as conclusive and held that if the land, which fell to the share of the brother of the tenant, is excluded, the latter would be

within the ceiling area entitled to purchase the land from the land owners as claimed. Accordingly, the judgment of the High Court was confirmed. The facts before the Supreme Court in that case disclose that the statement made by the land owner before the Tenancy Tribunal should be given due weight while determining the rival rights of the owner and the tenant....

....Applying the principle in Digambar Adhar case (supra), it be almost held that the Land Reforms Tribunal while determining the holding of late Hari Kishan Prasad relied on the factum of an extent of Acs. 150-96 being in possession of the protected tenants and to that extent gave benefit to the declarant. A declarant who makes a statement and gets benefit out of such statement in getting excluded that land from his holding would not be permitted to turn around at a later stage; in this case at the stage of issue of ownership certificate to the protected tenant to resile from the statement made before the Land Reforms Tribunal. The same would amount to fraud on public administration.”

44. Relying on the decision referred above in **Mashetty Venkatesham and others Vs. Joint Collector, and others** ^[15], this Court held that :

“the parties could not be permitted to plead one legal relationship before land ceiling authorities and another relationship when matter comes to Civil Court. As a matter of public policy, parties could not be permitted to raise pleas, which were contrary to cases set up by them or their predecessors in title before land ceiling authorities. However, a declarant who made a statement and gets benefit out of such statement in getting excluded that land from his holding would not be permitted to turn around at a later stage. Moreover, first petitioner claimed property to be joint family property and did not demour when 1/4th share was computed to his share in land ceiling proceedings. Therefore, his legal heirs could not be permitted to take a different stand before authorities under RoR Act.”

45. From the principles laid down by the Apex Court and this Court, it is clear that a party before the land reforms tribunal having pleaded that there exists a joint family now precluded from raising a plea that there was a partition, since the parties cannot be allowed to approbate and reprobate basing on the principle of estoppel. Defendants having gained advantage of allowing the holding treating the declarants as joint family members now cannot be permitted to resile from their statement recorded by the Revenue Divisional Officer in the land ceiling proceedings to defeat the right of the plaintiffs. Hence, the plea of defendants that the property was partitioned earlier under Ex. B1 is

disbelieved and the property is still being continued as joint family property, thereby after the death of Sangappa, plaintiffs 1 and 2, D1 D2 and L.Rs of Chandramma, who predeceased Sangappa are entitled to equal share. Thus, plaintiffs 1 and 2 are entitled to $\frac{1}{5}^{\text{th}}$ share each, D1 and D2 are entitled to $\frac{1}{5}^{\text{th}}$ share each and L.Rs of Chandramma D3 to D8 are entitled to $\frac{1}{5}^{\text{th}}$ share each in total.

46. This Court being Court of first appeal has to reappraise the entire material afresh and decide the lis before it. After, re-appraisal of entire evidence, I find no infirmity warranting interference by this Court with the finding of the trial court, about previous partition, illatom adoption and Will pleaded by the defendants.

47. Feeble attempt is made by the defendants that suit for partition is barred by limitation and that the defendants perfected their title by adverse possession.

48. The main argument of the counsel for the defendants is that since the date of Ex. B-1, defendants, D9 and D10 are in possession and enjoyment of the property and they perfected their title by adverse possession. In fact there is no pleading in the written statement as to when they claimed hostile title and continuing in possession thereafter for a more than statutory period. In the absence of any specific plea as to the date of claiming hostile title, it is difficult for me to accept that the defendants are continuing in possession and enjoyment of the property claiming hostile title to the knowledge of the plaintiffs. More over, plaintiffs and defendants are the co-sharers and possession of one co-sharer is the possession of all, unless, there is evidence of exclusion of one of the co-sharers from enjoying the property. Mere separate living is not sufficient to

conclude that the other co-owners are excluded from enjoying the property under Article 110 of Limitation Act. The limitation of 12 years starts from the date of exclusion of one of the co-sharers from enjoying the property from the date of knowledge of such exclusion. There is nothing on record to establish that the plaintiffs were excluded from enjoying the property to their knowledge. However, their specific contention is that they perfected their title by adverse possession. When the defendants claiming perfection of title by adverse possession, necessary pleadings are required to be made in the written statement. The importance of pleadings was discussed in **Maria Margarida Sequeria Fernandes Vs. Erasmo Jack De Sequeria**^[16], the Apex Court held as under:

“61. In civil cases, pleadings are extremely important for ascertaining the title and possession of the property in question.

62. In order to do justice, it is necessary to direct the parties to give all details of pleadings with particulars. Once the title is prima facie established, it is for the person who is resisting the title holder's claim to possession to plead with sufficient particularity on the basis of his claim to remain in possession and place before the court all such documents as in the ordinary course of human affairs are expected to be there. Only if the pleadings are sufficient, would an issue be struck and the matter sent to trial, where the onus will be on him to prove the averred facts and documents.

71. Apart from these pleadings, the court must insist on documentary proof in support of the pleadings. All those documents would be relevant which come into existence after the transfer of title or possession or the encumbrance as is claimed. While dealing with the civil suits, at the threshold, the court must carefully and critically examine the pleadings and documents.

72. The Court will examine the pleadings for specificity as also the supporting material for sufficiency and then pass appropriate orders.”

49. In view of the principles referred above, it is the duty of the defendants to plead and prove the requirements, which are essential for claiming adverse possession; otherwise, the defendants are not entitled to defend the claim of the plaintiffs. In

one of the oldest judgments of Privy Council in **Secretary of State for India Vs. Debendra Lal Khan**^[17], the Privy Council observed that the ordinary classical requirement of adverse possession is that it should be ‘nec vi, nec clam, nec precario’ and the possession required must be adequate in continuity, in publicity and in extent to show that possession is adverse to the competitor. Thus, the three requirements mentioned in the above judgment are sine-qua-non to defend the claim of the plaintiffs basing on the adverse possession, but here there is absolutely no pleading and evidence to establish those three requirements.

50. In **S.M. Karim Vs. Bibi Sakina**^[18], the Apex Court held as under:

“Adverse possession must be adequate in continuity, in publicity and extent and a plea is required at the least to show when possession becomes adverse so that the starting point of limitation against the party affected can be found. There is no evidence here when possession become adverse, if it at all did and a mere suggestion in the relief clause that there was an uninterrupted possession for “several 12 years” or that the plaintiff had acquired “an absolute title was not enough to raise such a plea. Long possession is not necessarily adverse possession and the prayer clause is not a substitute for a plea”.

51. In **R. Chandevarappa and others vs. State of Karnataka and others**^[19], a similar question came before the Apex Court and the Apex Court laid down the principles regarding adverse possession and necessity of pleadings and held as under:

“The question then is whether the appellant has perfected his title by adverse possession. It is seen that a contention was raised before the Assistant Commissioner that the appellant having remained in possession from 1968, he perfected his title by adverse possession. But the crucial facts to constitute adverse possession have not been pleaded. Admitted the appellant came into possession by a derivative title from the original grantee. It is seen that the original grantee has no right to alienate the land. Therefore, having come into possession under colour of title from original grantee, if the appellant intends to plead adverse possession as against the State, he must disclaim his title and plead his hostile claim to the knowledge of the State and that the

State had not taken any action thereon within the prescribed period. Thereby, the appellant's possession would become adverse. No such stand was taken nor evidence has been adduced in this behalf. The counsel in fairness, despite his research, is unable to bring to our notice any such plea having been taken by the appellant."

52. In view of the law declared by the Apex Court and Privy Council, I find no sufficient pleading and evidence to establish the requirements to claim perfection of title by adverse possession and therefore, the trial court rightly rejected the claim of the defendants on the ground of perfection of title by adverse possession.

53. Similarly, bar of limitation will arise only when the plaintiffs were excluded from enjoying the property under Article 110 of Limitation Act. In the absence of any pleading and evidence about the exclusion of plaintiffs from enjoying the property, the plea of limitation would not arise. Hence, I find no substance in the contention of the counsel for the defendants.

54. In view of my findings on Points 1 to 4, I find no merits in the appeal and deserves to be dismissed.

55. In the result, the appeal is dismissed, confirming the decree and judgment passed in O.S.No. 80 of 1984 by the Subordinate Judge Court, Sangareddy at Medak District, dated 31.1.1995. In the circumstances, each party shall bear their own costs. Consequently, miscellaneous petitions, pending if any, in this appeal shall stand closed.

M. SATYANARAYANA MURTHY, J

DATE: 23.07.2015

KA

L.R Copy to be marked Y/N

^[1] 2014 (4) ALD 1 (DB)

- [\[2\]](#) 2004 (1) ALD 18 (SC) = AIR 2003 SC 4548
- [\[3\]](#) AIR 1982 BOMBAY 72
- [\[4\]](#) AIR 1970 SC 833
- [\[5\]](#) AIR 1967 A.P 257
- [\[6\]](#) 1993 (3) ALT 21
- [\[7\]](#) (2008) 15 SCC 673
- [\[8\]](#) AIR 1958 SC 706
- [\[9\]](#) AIR 1969 AP 242 (v.56 c 76)
- [\[10\]](#) AIR 2011 SC 2906
- [\[11\]](#) AIR 1988 SC 881
- [\[12\]](#) AIR 1976 SC 807
- [\[13\]](#) 2015 (2) ALD 531
- [\[14\]](#) 1995 Supp (2) SCC 428
- [\[15\]](#) 2007 (1) ALT 253
- [\[16\]](#) AIR 2012 SC 1727
- [\[17\]](#) AIR 1934 PC 23
- [\[18\]](#) AIR 1964 SC 1254
- [\[19\]](#) (1995) 6 SCC 309