HON'BLE SRI JUSTICE M. SATYANARAYANA MURTHY

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APPEAL SUIT No.1642 OF 1996

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JUDGMENT:

1. Aggrieved by the decree and judgment dated 22.12.1994, passed in Original Suit No.125 of 1976 by the Principal Subordinate Judge, Ongole, Prakasam District (For short, 'the trial Court'), the unsuccessful plaintiff therein preferred this Appeal.

2. The appellant herein was the plaintiff and the respondents herein were the defendants before the trial Court. For convenience of reference, the ranks given to the parties in O.S. No.125 of 1976 will be adopted throughout this judgment.

3. Initially, the suit was filed against defendants 1 to 21; later, defendants 22 to 25 were impleaded, as per the order of the trial Court in I.A. No.167 of 1986 dated 09.08.1990 and, later, defendants 26 to 29 were impleaded as per order in I.A. No.504 of 1990 dated 09.08.1990. Admittedly, the suit was filed against 29 defendants, however, defendants 27 and 28 were deleted *vide* order of the trial Court dated 22.06.1992, as they were already on record as defendants 11 and 12.

4. During pendency of the Appeal, the Appeal stood dismissed for default, against respondents 4 and 26, *vide* Court order dated 22.10.2008 and, against respondents 11, 14 and 16 to 22, *vide* Court order dated 09.02.2010.

5. Nageswara Rao (Plaintiff), Subba Rao and Seshagiri Rao (10th defendant), are the sons of one Appaswamy @ Musalaiah. Sowbhagyamma, Lakshmamma (D-18), Sampathamma (D-19), Shuseelamma (D-20), Koteswaramma (D-21) and Poudasu Rajamma and Valisetti Ammanamma are the 7 daughters of Appaswamy. 1st defendant is the wife, defendants 2, 6, 7, 9 are the sons and defendants 3 to 5 and 8 are the daughters of late Subba Rao. Defendants 11 and 12 are the sons, 26th

defendant is the wife and 29th defendant is the daughter of 10th defendant. 13th defendant is the daughter-in-law of 10th defendant. 14th defendant is the husband of Rajamma, daughter of Appaswamy. Defendants 15 to 17 are the children of Ammanamma, daughter of Appaswamy. Defendants 18 to 21 are the daughters of Appaswamy. Defendants 22 to 25 are the legal heirs of 14th defendant.

6. Plaintiff filed the suit for partition of plaint A, B, B-1, C and D schedule property into 11/40 shares and allot one such share; for partition of plaint E schedule property into 10 shares and allot one such share to him alleging that the plaintiff, Subba Rao and 10th defendant are the sons of Appaswamy. The said Appaswamy also had 7 daughters referred hereinabove. The said Appaswamy inherited plaint A schedule property from his ancestors. Thus, plaint A schedule property is the coparcenary property of the plaintiff, Appaswamy and his two sons. While so, the said Appaswamy died intestate in the year 1973; his wife also died intestate in the month of June, 1976; consequent upon the death of Appaswamy, his wife Venkata Subbamma, plaintiff, Subba Rao, Seshagiri Rao and their sisters became entitled to a share in the plaint A schedule property. During the life time of Appaswamy, he used to ply double bullock-cart for hire and his wife used to sell she-buffaloes and milk. With the surplus income from cultivation and other sources, Appaswamy acquired some land and house property. During the life time of Appaswamy, due to his old age, Subba Rao, who was independent and competent, took the management of the plaint A schedule property and with the income derived from A schedule property, which is a fertile yielding land, raised valuable crops like Virginia tobacco and coriander leaves *etc.,* and started mutton business which is a joint family business by obtaining license in his individual name and with the income derived from the mutton business, Subba Rao, acquired huge property in his name described in B schedule and other property in the name of his wife, described in B-1 schedule. Similarly, 10th defendant, utilizing the income from plaint A schedule and the rent income, started mutton business and purchased plaint C schedule property in his name. Thus, plaint B, B-1 and C schedule property is acquired from joint family business. After death of Subba Rao, the joint family accumulated funds were invested in the name of Subba Rao and 10th defendant and some of the funds available with 10th defendant are in the shape of bonds, cash and other movables

are described in plaint D schedule. After the death of Subba Rao, his 1/4th share in the joint family property devolved upon his wife *i.e.,* 1st defendant and children, defendants 2 to 9. After the death of Appaswamy, his interest in the joint family property *i.e.,* 1/4th share devolved upon his widow Venkata Subbamma and the surviving children who are the plaintiff, defendants 1 to 10, 13, 18 to 21 and the heirs of deceased daughters. Rajamma, who is the 2nd daughter of Appaswamy, died leaving her husband, 14th defendant and son Chitti Babu, who died intestate even prior to his marriage and, hence, the interest of Rajamma devolved upon the 14th defendant alone, who is her husband. Ammanamma, who is the 3rd daughter of Appaswamy, died leaving her husband Raghavulu and children, defendants 15 to 17; consequent upon the death of Raghavulu, his share also devolved upon defendants 15 to 17. After the death of Venkata Subbamma in the month of June, 1976 her share devolved upon the plaintiff and defendants 2 to 21. The plaintiff's mother Venkata Subbamma was entitled to immovable and movable property. She disposed of immovable property during her life time and by the date of her death, she possessed outstanding amount to a tune of Rs.13,000/- in the form of bonds and gold jewellery weighing about 45 sovereigns; she used to live with the 10th defendant, who was in custody of the movables of Venkata Subbamm. While Venkata Subbamma was staying with 10th defendant, he did not take care of her health, therefore, she went to the house of 13th defendant about 15 days prior to her death and she suffered paralysis, however recovered from it; again, after she went to the house of 13th defendant, she suffered severe attack with paralysis and became unconscious; while so, the defendants 1 to 10 and 18 brought a jeep forcibly took Venkata Subbamma to the house of 10th defendant and removed all the jewellery on her person. When the plaintiff, his wife and brother-in-law protested for removal of jewellery on the person of Venkata Subbamma, they were being assaulted by the defendants 1, 2, 10 and 18. Thereafter, Venkata subbamma died. Thus, 10th defendant was in custody of the entire jewellery and movables which are described in E schedule. After death of Venkata Subbamma, her E schedule property got devolved upon her legal heirs *i.e.,* plaintiff and other defendants and as such the plaintiff is entitled to 1/10th share, defendants 1 to 9 are entitled to 1/10th share, 10th defendant is entitled to 1/10th share, defendants 15 to 17 are entitled to 1/10th share and defendants 13, 14 and 18 to 21 each are entitled to 1/10th share. The plaintiff who was away from the village on account of his employment, married daughter of 13th defendant; 1st defendant is the daughter of one Kandaswamy, who is the elder brother of 13th defendant's husband. After death of Venkata Subbamma, the plaintiff demanded for partition of plaint A to E schedule property but the defendants 1 to 10 did not co-operate for amicable partition since there are disputes between 13th defendant and her children on the one hand and Kandaswamy on the other hand. Kandaswamy supported 10th defendant in the said dispute and thereafter due to criminal cases Kandaswamy prevailed upon defendants 1 and 10 not to co-operate for partition. Kandaswamy is a powerful and influential person and defendants 1 and 10 are under his thumb, since 10th defendant married daughter of 18th defendant, 18th defendant also supported defendants 1 to 10. Due to non co-operation, the plaintiff was forced to file the instant suit for partition of the schedule property as stated hereinabove.

7. Defendants 1 and 10 filed common written statement denying the material allegations of the plaint while admitting the relationship among the parties to the suit and the intestate death of Appaswamy and Subba Rao; they denied the management of schedule property during life time and after the death of Appaswamy, plying double bullock-cart on hire by Appaswamy, sale of she-buffaloes and vending milk by Venkata Subbamma and Appaswamy and acquisition of property both movable and immovable *etc.,* with the income derived from A schedule property. It is specifically contended that Appaswamy never carried on any business and acquired any property; A schedule property is the ancestral property, possessed, inherited by Appaswamy during his lifetime; the income from the ancestral property was meagre and, in fact, with the meagre income, Appaswamy could not maintain both ends meet and as he became old, could not render any assistance to his family. The plaintiff was the only brother who was somehow educated and got an employment in Railways in 1961 and set-up his family separately. As the income from the ancestral property was insufficient to maintain their family, Subba Rao and 10th defendant had to resort to their mode of living to eke out their livelihood by their self efforts. Therefore, Subba Rao started mutton business in his individual capacity obtaining license from the concerned authorities and with the income from the mutton business, acquired B schedule property in his

name. The property described in B-1 schedule is the exclusive property of 1st defendant, purchased with the contributions given by her father, Kandaswamy, her husband, Subba Rao and from out of the jewels which she had. The income from A schedule property is not sufficient to acquire B and B-1 schedule property in their separate names. It is specifically contended that the Subba Rao was never in management of A schedule property and other family property and there was a division in status among the brothers and each brother were living separately eking out their livelihood. Subba Rao started mutton business in the year 1950, obtaining license in his name and he was also trading in horses, used to purchase horses in Maharashtra State and sell them at Ongole for profit and he was trading in goats and exporting them to Madras and other places. He also used to purchase bids for daily collections held by Municipality for the mutton market and thus on account of his own luck, fortune and labour, he purchased the B schedule property out of his self exertions. Thus, B and B-1 schedule property is the exclusive and self acquired property of Subba Rao and the 1st defendant. The plaintiff has nothing to do with B, B-1 schedule property and has no right to claim any share therein.

8. Coming to C schedule property, it is the absolute property of 10th defendant and not acquired with the aid of joint family nucleus. 10th defendant having separated from the joint family during the life time of Appaswamy, started mutton business obtaining license from the concerned authorities, with the income derived from the business, he acquired C schedule property. Thus, C schedule property is the exclusive and absolute property of 10th defendant and the plaintiff and 13th defendant has nothing to do with the property described in C schedule annexed to the plaint. The defendants denied investment of funds in promissory notes and bonds and contended that 10th defendant is the absolute owner of those bonds and the articles found by the Commissioner during his inventory exclusively belongs to 10th defendant. The joint family did not possess B and E schedule property and D schedule property was never in existence. Therefore, the plaintiff is not entitled to claim any share in the schedule property.

9. It is further contended that after death of Venkata Subbamma, her property devolved upon her children *i.e.,* plaintiff, defendants 1 to 10, 13, 15 to 21 and the heirs of deceased daughters. It is specifically contended that during life time of Venkata Subbamma, the plaintiff prevailed upon her and got conveyed Ac.2.00 cents of agricultural and in the name of his wife nominally and benami for his own benefit though he is a Railway employee by the date of alleged conveyance thereby deprived the daughters to get any share in the property. The defendants denied possessing outstanding amount to a tune of Rs.10,000/- in the form of bonds in the name of Venkata Subbamma and jewellery weighing 45 sovereigns of gold. As the plaintiff unlawfully took away the jewellery of Venkata Subbamma, the 10th defendant and others gave a report to the Police; the plaintiff also gave a complaint alleging that he was assaulted by the 10th defendant and others. Thus, there was criminal litigation between the parties. The allegation that E schedule property devolved upon the plaintiff and others and that the plaintiff is entitled to 1/10th share is false as the plaintiff is in unlawful possession of jewellery of Venkata Subbamma having committed theft, forcibly removed from her body, liable to render on all accounts of gold jewellery removed from the body of Venkata Subbamma. As the property shown in the schedule is not Hindu Coparcenary property except A schedule, A schedule alone is liable to be partitioned and the plaintiff is not entitled to claim any share in B, B-1, C, D and E schedules.

10. Defendants 2 to 9 and 11 and 12 filed separate memos adopting the written statements filed by the defendants 1 and 10.

11. 18th defendant, while adopting the written statements filed by defendants 1 and 10, filed written statement specifically contending that she is entitled to her legitimate share in A schedule, jewellery of her mother and other movables which were stealthily taken away by the plaintiff before her death. The plaintiff has no right to claim any share in B, B-1, C and D schedule property and prayed for dismissal of the suit.

12. 20th defendant filed written statement specifically contending that she filed a suit, against Venkata Subbamma and others for specific performance of agreement of sale executed by Appaswamy, her father, on 29.06.1973, in O.S. No.612 of 1976 on

the file of District Munsif Court, Ongole, which was decreed on 31.08.1978 and she has no objection for partition of plaint schedule herein and for allotment of her share.

13. 21st defendant filed written statement admitting the relationship among the parties but denied that B and B-1 schedule property is the joint family property and stated that Subba Rao, husband of 1st defendant, had his own mutton business and also carried on taxi business for some time. In fact, the plaintiff and 1st defendant obtained some agreement of sale of house property and land belonging to Venkata Subbamma, which agreement is not binding on her and also stated that there is a decree against Venkata subbamma and attachment before judgment was effected therein. Hence, the property which is in the hands of plaintiff have to brought into the fold of E schedule and the plaintiff taking advantage of his stay with 13th defendant, stealthily obtained pronotes and jewellery of his mother *i.e.,* bangles weighing 12 sovereigns and gold chain along with pronotes worth Rs.10,000/- and finally prayed to dismiss the suit, contending that she is entitled to a share in the property of Venkata Subbamma.

14. 26th defendant filed written statement, adopting the written statement of 10th defendant, wherein she admitted the relationship among the parties while admitting that lorry bearing No.AAT-4445 shown in Item-4 of C schedule is the self acquired property of 10th defendant and it is not joint family property and prayed to dismiss the suit.

15. Defendants 27 to 29 filed a memo dated 04.02.1991, adopting the written statement filed by 26th defendant.

16. 10th defendant filed additional written statement denying the material allegations of the plaintiff, after amendment of the plaint, and contended that the lorry bearing No.AAT-4445, shown in C schedule, was not purchased with the joint family nucleus and it is his self acquired property purchased from one K. Ramanaraju for Rs.67,900/-, paid advance of Rs.40,000/- on the date of agreement and paid the due amount in instalments on 11.01.1979 and 09.03.1979 and finally after paying the balance amount in the month of May, 1979, the vehicle has been transferred in his name. Thus, the lorry bearing No.AAT-4445 is not purchased with the joint family

nucleus and, hence, the plaintiff is not entitled to claim any share in Item-4 of C schedule property and prayed to dismiss the suit.

17. Defendants 1 to 9, 11, 12, 18 and 26 filed memos adopting the additional written statement of 10th defendant.

18. Basing on the above pleadings, the trial Court framed the following issues, including 4 additional issues:

> 1. Whether the division in status in the year 1967 setup by the defendants is true?
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> 2. Whether the relationship of the parties' set-up in the plaint is true?
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> 3. Whether late Subbarao or 10th defendant was in the management of the joint family properties?
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> 4. Whether A and B schedule properties are the self acquired properties of Subbarao or whether they are coparcenary properties?
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> 5. Whether B schedule property belongs to the joint family of Appaswamy and his sons?
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> 6. Whether the C schedule property is in separate possession of the defendants or whether it is the joint family property?
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> 7. What if any are the outstandings and movables which are liable to be partitioned?
>
> 8. Whether late Venkata Subbamma died possessing of the properties described in the E schedule?
>
> 9. Whether the suit is not maintainable on account of multifariousness?
>
> 10. To what relief?

Additional issues:

1. Whether Item-4 of plaint C schedule was the self acquired property of 10th defendant?

2. Whether it is not in possession of defendants 26 to 29?

3. Whether the purchaser who is in possession, is a necessary party?

4. To what relief?

19. During course of trial, on behalf of the plaintiff, PWs.1 to 4 were examined and marked Ex.A-1. On behalf of defendants, DWs.1 to 65 were examined and marked Exs.B-1 to B-39.

20. Upon hearing argument of both the counsel, considering oral and documentary evidence available on record, the trial Court decreed the suit in part granting decree for partition of plaint A schedule property while declining to grant partition of plaint B to E schedule property.

21. Aggrieved thereby, the unsuccessful plaintiff preferred the instant Appeal on various grounds. The main contentions raised in the grounds of appeal are:

a) Admittedly, plaint A schedule property is the ancestral property of Appaswamy, father of plaintiff, Subba Rao and 10th defendant;

b) The said Subbarao and 10th defendant started mutton business, by obtaining licenses in their individual names though it is a family business, acquired property with the aid of joint family nucleus but the trial Court did not consider this specific contention;

c) It is specifically contended that when the plaintiff is able to establish sufficient nucleus to acquire plaint B to E schedule property, the burden will shift to the defendants to prove that the property is the separate property of Subba Rao, 1st defendant and 10th defendant and his wife and children that they have got independent source of income to acquire the property but the defendant 1 and 10 and their children miserably failed to establish the source of income to acquire plaint B to E schedule property. In such case, the suit is liable to be decreed granting partition of plaint B to E schedule property but the trial Court on erroneous appreciation of evidence on record concluded that the plaintiff is not entitled to claim partition of plaint B to E schedule property and the same is liable to be set-aside;

d) It is further contended that the trial Court ought not to have dismissed the claim over E schedule property, which was the exclusive property of Venkata Subbamma, in which the plaintiff is entitled to 1/10th share. Finally, it is contended that failure to implead the other sisters of the plaintiff as parties to the suit *i.e.,* non-joinder of necessary parties to grant a decree for partition of plaint E schedule property is an apparent error, the trial Court on erroneous appreciation of facts with reference to law declined partition of plaint E schedule property, therefore, the same is liable to be set-aside;

e) The trial court did not consider the entire oral and documentary evidence in proper perspective, committed a grave error in dismissing the suit and requested this Court to reappraise the entire evidence on record to come to an independent conclusion and decree the suit as prayed for;

22. The Appeal was preferred against 26 respondents but as the notices were not served on respondents 4, 11, 14, 16 to 22 and 26; this Court dismissed the Appeal against the respondents 4 and 26 *vide* its order dated 22.10.2008 and against respondents 11, 14 and 16 to 22 for default *vide* Court order dated 09.02.2010 and till today no steps were taken to get the dismissal orders set-aside.

23. During course of argument, Sri M.V.S. Suresh Kumar, learned counsel for the plaintiff-appellant, would contend that voluminous evidence on record established the source of income to acquire plaint B to E schedule property but the observation of the trial Court that A schedule is a dry land would not yield sufficient income to

acquire B to E schedule property is *ex-facie* erroneous.

24. If the actual income from A schedule property is taken into consideration, the trial Court would not have dismissed the suit; apart from that, deceased Appaswamy was plying double bullock-cart on hire and earned substantial amount. Similarly, Venkata Subbamma also carried on business of sale of she-buffaloes, vending milk for the benefit of joint family and thereby the income earned by Venkata Subbamma and Appaswamy was pooled and due to senility of Appaswamy, elder son Subba Rao and thereafter the 10th defendant took over the management of schedule property, started mutton business one after the other, obtaining licenses in their individual names; Subba Rao acquired B to D schedule property in his name and in the name of his wife and 10th defendant acquired C schedule property in his name, though the business exclusively belongs to joint family. Therefore, B to D schedule property is the joint family property for all practical purposes; since Subba Rao, 1st defendant and 10th defendant has no independent source of income. Therefore, the finding of the trial Court regarding nature of acquisition of B to D schedule property is erroneous and the same is liable to be set-aside. It is further contended that the dismissal of claim over E schedule property *i.e.,* movables belonging to Venkata Subbamma due to non-joinder of proper and necessary parties is erroneous for the reason that the other daughters of Venkata Subbamma, *i.e.,* sisters of the plaintiff were no more or not available to the process of the Court. Therefore, the finding of the trial Court that E schedule property cannot be partitioned due to non-joinder of necessary parties is a patent error committed by the trial Court. Consequently, the said finding is liable to be set-aside. Finally, it is contended that when the trial Court did not appreciate both oral and documentary evidence with reference to law and committed an error, this Court is under obligation to reappraise the entire evidence to come to an independent conclusion and prayed to allow the Appeal setting-aside the decree insofar as denial of claim in B to E schedule property and pass a decree in his favour for partition of B to D schedule property into 11/40th share and E schedule property into 10 shares and allot one such share to him.

25. Sri T. Rajendra Prasad, N. Krishna Rao and M.V. Durga Prasad, learned counsel for defendants-respondents, would contend that the Appeal is liable to be

dismissed on the sole ground that the Appeal stood dismissed for default against many of the respondents, who contested the suit before the trial Court and allowed dismissal orders to attain finality and in their absence, against whom the Appeal stood dismissed for default, the claim of the plaintiff cannot affectively be decided, hence, the Appeal is liable to be dismissed.

26. Apart from the above contention, learned counsel for the defendants-respondents further contended that the plaintiff is living separately since long time and acquired property both in his name and in the name of his wife by working as a employee in Railways at different places; the business carried on by Subba Rao and 10th defendant is their exclusive business and the same cannot be said to be a joint family business for the reason that the joint family never carried on mutton business. The said Subba Rao and 10th defendant also obtained licenses to carry on mutton business in their individual capacity but not on behalf of the joint family.

27. ‘A’ schedule ancestral property is purely a dry land would not fetch any income much less sufficient income to acquire B to D schedule property. When the plaintiff approached the Court claiming that B to D schedule property is the joint family property or acquired with the joint family nucleus, the initial onus of proof is on the plaintiff to establish that the Hindu Undivided Coparcenary possessed ancestral property and that the joint family has got sufficient nucleus to acquire B to D schedule property. If the plaintiff is able to establish that the Hindu Undivided Coparcenary Property possessed sufficient means or sufficient nucleus then only the burden will shift to the defendants and their legal heirs to establish that the property is their individual property but the plaintiff miserably failed to establish that the Hindu Undivided coparcenary property possessed B to D schedule Property.

28. There is no presumption that the schedule property possessed by any member of the Hindu Undivided Coparcenary property is the joint family property or acquired with the joint family nucleus. The individual members of the Hindu Undivided Coparcenary may possess or acquire separate property and merely there was no partition in writing, the Court cannot presume that the property acquired by late Subba Rao, 1st defendant and 10th defendant is the Hindu Undivided Coparcenary

property. Dismissal of claim of the plaintiff over E schedule property is totally in accordance with law since the necessary parties *i.e.,* daughters of Venkata Subbamma were not impleaded as parties to the suit and on this ground alone, the claim of the plaintiff over E schedule property is liable to be dismissed.

29. Even according to the oral and documentary evidence on record, A schedule property is only a dry land fetching no income. The plaintiff only produced EX.A-1, No.2 adangal for the fasli 1385-87 (1975-77) to prove the yielding of food crops and commercial crops and with the income derived from A schedule property, B to D schedule property was acquired. Ex.A-1 discloses that the A schedule property yielding meagre income which is not sufficient even to cater to the needs of the family and to meet their daily necessities. In such case, the plea of the plaintiff that with the aid of income derived from A schedule property, Subba Rao, 1st defendant and 10th defendant acquired the property with the joint family nucleus is unbelievable. The trial court rightly appreciated the evidence and came to an independent conclusion that B to D schedule property is the separate property of late Subba Rao, 1st defendant and 10th defendant, which finding needs no interference by the trial Court.

30. Finally, it is contended that the trial Court basing on the evidence of PW.1, itself concluded that the plaintiff miserably failed to establish that the Hindu Undivided Coparcenary Property possessed sufficient nucleus to acquire B to D schedule property; consequently, the question of shifting the burden to the defendants to establish that it is the separate property of defendants does not arise and that the finding of the trial Court is based on oral and documentary evidence, does not call for interference of this Court and supported the finding of the trial Court in all respects and prayed to dismiss the Appeal *in toto*.

31. Considering rival contentions, perusing the decree and judgment under challenge, oral and documentary evidence the points that arise for consideration are:

1) Whether the Appeal deserves to be dismissed on the sole ground that the Appeal was dismissed against the respondents 4 and 26 *vide*

Court order dated 22.10.2008 and dismissed against respondents 11, 14, 16 to 22 *vide* Court order dated 09.02.2010?

2) Whether the Hindu Undivided Coparcenary possessed sufficient nucleus to acquire B to D schedule property?

3) Whether the mutton business carried on by Subba Rao and 10th defendant, obtaining licenses in their names is the joint family business? If so, acquisition of any property with the aid of income from business carried on by Subba Rao and 10th defendant be presumed as Hindu Undivided Coparcenary Property? If so, is the plaintiff entitled to claim share in B to D schedule property?

4) Whether the claim in respect of E schedule property is liable to be dismissed on the ground of non-joinder of necessary parties? If not, whether the plaintiff is entitled to claim 1/10th share in E schedule property?

32. **POINT No.1**: Initially, the suit was filed against defendants 1 to 21; later, defendants 22 to 25 were impleaded as per the order of the trial Court in I.A. No.167 of 1986 dated 09.08.1990 and, later, defendants 26 to 29 were impleaded as per order in I.A. No.504 of 1990 dated 09.08.1990. Admittedly, the suit was filed against 29 defendants, however, claim against defendants 27 and 28 was dismissed by the trial Court on 22.06.1992 in view of the memo filed by the plaintiff. The instant Appeal is filed before this Court against respondents 1 to 26 after deleting defendants 27 and 28 but the Appeal against respondents 4, 11, 14, 16 to 22 and 26 was dismissed for default *vide* separate orders on 22.10.2008 and 09.02.2010 and the same attained finality as no steps were taken to set-aside the dismissal orders by the plaintiff-appellant. After death of Subba Rao, defendants 1 to 9 succeeded his estate. However, the Appeal against G. Indira, 4th defendant, daughter of Subba Rao, was ended in dismissal. The claim of the said Indira and defendants 1 to 9 is that B to D schedule property is the exclusive and absolute property of late Subba Rao and the 1st defendant; when the Appeal was dismissed against 4th defendant, Indira, who succeeded the estate of Subba Rao along with defendants 1 to 3 and 5 to 9, the claim of the plaintiff over B to D schedule property cannot effectively be decided.

33. Similarly, during pendency of this Appeal, 10th defendant Seshagiri Rao died and his legal heirs were brought on record as defendants 11, 12, 13, 26 and 29. Their contention in the suit is that C schedule is the exclusive property of Seshagiri Rao; 10th defendant, who died during pendency of the suit but the Appeal against 11th respondent, was dismissed for default. Similarly, the plaintiff also impleaded respondents 14, 16 to 22 and 26 as persons interested in the property but the Appeal was dismissed against them. Respondents 16 to 22 also raised a separate defence in the suit. When the Appeal was dismissed against several respondents referred above, the claim of the plaintiff against them cannot affectively be decided in their absence.

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

35. When similar question came up before the Apex Court in ***Kanakarathanammal Vs. V.S. Loganatha Mudaliar***, in para 15 of the judgment, it was held as follows:

> "It is unfortunate that the appellant's claim has to be rejected on the ground that she failed to implead her two brothers to her suit, though on the merits we have found that the property claimed by her in her present suit belonged to her mother and she is one of the three heirs on whom the said property devolves by succession under Section 12 of the Act. That, in fact, is the conclusion which the Trial Court had reached and yet no action was taken by the appellant to bring the necessary parties on the record. It is true that under Order 1, Rule 9 of the Code of Civil Procedure no suit shall be defeated by reason of the mis-joinder or non-joinder of the parties, but there can be no doubt that if the parties who are not joined are not only proper but also necessary parties to it, the infirmity in the suit is bound to be fatal. Even in such cases, the Court can under Order 1, Rule 10, Sub-rule 2 direct the necessary parties to be joined, but all this can and should be done at the stage of trial and that too without prejudice to the said parties plea of

> limitation. Once it is held that the appellant's two brothers are co-heirs with her in respect of the properties left intestate by their mother, the present suit filed by the appellant partakes of the character of a suit for partition and in such a suit clearly the appellant alone would not be entitled to claim any relief against the respondents. The estate can be represented only when all the three heirs are before the Court. If the appellant persisted in proceedings with the suit on the basis that she was exclusively entitled to the suit property, she took the risk and it is now too late to allow her to rectify the mistake. In Naba Umar Hazra v. Radhashyam Mahish MANU/PR/0053/1931 the Privy Council had to deal with a similar situation. In the suit from which that appeal arose, the plaintiff had failed to implead co-mortgagors and persisted in not joining them despite the pleas taken by the defendants that the co-mortgagors were necessary parties and in the end, it was urged on his behalf that the said co-mortgagors should be allowed to be impleaded before the Privy Council. In support of this plea, reliance was placed on the provisions of Order 1, Rule 9 of the Code. In rejecting the said prayer, Sir George Lowndes who spoke for the Board observed that 'they are unable to hold that the said rule has any application to an appeal before the Board in a case where the defect has been brought to the notice of the party concerned from the very outset of the proceedings and he has had ample opportunity of remedying it in India".

36. Even in the earlier decision of this Court in ***Uppu Jhansi Lakshmi Bai Vs. Venkateswara Rao***, it was held as follows:

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

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

38. In ***K. Bhaskar Rao Vs. K.A. Rama Rao***, a learned judge of this Court while dealing with a suit for partition, where the defendants in the written statement raised the plea of non-joinder of the two sisters of the parties for which the plaintiff stated in his rejoinder that as they were already married and were given sufficient share in the form of cash and articles, they were not necessary parties, the plaintiff came up with

an application to implead the sisters as parties in the first appeal, this Court rejected the request holding that the defect of non-joinder of necessary parties being fatal, the same cannot be cured by impleading them in the appeal and upheld the dismissal of the suit on the ground of non-joinder of necessary parties by the trial Court. The decisions reported in ***Naba Kumar Hazra and another Vs. Radhashyam Mahish and others***, ***Chenthiperumal Pillai Chanthanamuthu Pillai Vs. D.M. Devasahayam*** and ***Loganatha Mudaliar***[2] were on the similar question of proposition that non-joinder of necessary party is a fatal defect and the suit for partition is liable to be dismissed even on that ground alone.

39. In another decision of the Apex Court in ***The State of Punjab Vs. Nathu Ram***, the Apex Court discussed about the scope of Order I Rule 9 of C.P.C. and held that when the parties to the appeal died during pendency of the appeal, their legal heirs have to be brought on record and in their absence, the Appeal is not maintainable.

40. According to Order I Rule 9 of C.P.C. no suit shall be defeated by reason of the misjoinder or non-joinder of parties and the Court may, in every suit, deal with the matter in controversy so far as regards the rights and interests of the parties actually before it. It follows, therefore, that if the Court can deal with the matter in controversy so far as regards the rights and interests of the appellants and the respondents other than the deceased respondent, it has to proceed with the appeal and decide it. It is only when it is not possible for the Court to deal with such matter, that it will have to refuse to proceed further with the appeal and therefore dismiss it.

41. In view of the principles laid down by the Apex Court and this Court in the decisions referred supra, the Appeal is liable to be dismissed on the sole ground that the Appeal was not prosecuted against respondents 4, 11, 14, 16 to 22 and 26, who are entitled to claim share along with other respondents or through one of the sharers. In their absence the claim of the plaintiff cannot be decided. On this ground alone the Appeal is liable to be dismissed.

42. Mr. M.V.S. Suresh Kumar, learned counsel for the plaintiff-appellant, would contend that though the Appeal is dismissed against several respondents, there is

sufficient representation in the Appeal and on this ground the Appeal cannot be dismissed; whereas, the learned counsel for the defendants-respondents would contend that dismissal of Appeal and attaining finality of dismissal orders against respondents 4, 11, 14, 16 to 22 and 26 is sufficient to dismiss the entire Appeal *in toto*. No doubt, in a suit for partition all the persons entitled to claim share must be impleaded otherwise, the suit is liable to be dismissed. Undoubtedly the plaintiff impleaded all the persons who are claiming share in the property before the trial Court but unfortunately the Appeal was not properly prosecuted against respondents 4, 11, 14, 16 to 22 and 26 and allowed to dismiss the Appeal against them, which attained finality. As a general rule, in the absence of a party, the claim against such party cannot be decided since it amounts to depriving the parties to put forth their defences against each other and the claim of the plaintiff in the Appeal is decided in their absence, it amounts to violation of principles of natural justice. In the instant case, 4^{th} respondent claiming right in B schedule property being the legal heir of late Subba Rao contended that it is the exclusive and absolute property of late Subba Rao. When the Appeal is dismissed against her, the claim of the plaintiff in B schedule cannot be decided. Similarly, the Appeal was dismissed against respondents 4, 11, 14, 16 to 22 and 26, who are the legal heirs of 10^{th} defendant, who are claiming exclusive ownership over C schedule property but due to dismissal of the Appeal against them, the claim of the plaintiff over C schedule property cannot be effectively decided in their absence. Therefore, the contention of learned counsel for the plaintiff-appellant that there is sufficient representation of the branches of Suba Rao and Seshagiri Rao, 10^{th} defendant, before the trial Court is not sufficient to decide the claim of the plaintiff-appellant over B, B-1 and C schedule property, in the absence of respondents 4, 11, 14, 16 to 22 and 26, against whom the Appeal ended in dismissal attained finality. Accordingly, the point is answered in favour of the defendants-respondents and against the plaintiff-appellant.

43. **POINT Nos.2 & 3:** Since both these points are interconnected, they are answered by way of common discussion. The main basis for claiming relief of partition of schedule property is that the joint family possessed sufficient nucleus to acquire B to D schedule property. The undisputed fact is that A schedule property is the ancestral property of Appaswamy, father of the plaintiff, Subba Rao and 10^{th} defendant; whereas, defendants 1 to 9 contended that B and B-1 schedule property

is the exclusive property of Subba Rao and 1st defendant and after death of Subba Rao, the property devolved upon defendants 1 to 9 being the legal heirs, thereby, the plaintiff is not entitled to claim any share in B and B-1 schedule property. Similarly, 10th defendant, Seshagiri Rao, during his life time filed written statement contending that C schedule property is his exclusive property and after his death; his legal heirs raised the same contention. When the plaintiff contended that the B to D schedule property is acquired with joint family nucleus, the initial onus of proof is on the plaintiff to establish that the joint family possessed sufficient nucleus to acquire B to D schedule property by adducing cogent and satisfactory evidence. When the plaintiff established that the joint family possessed sufficient nucleus to acquire the property, the onus of proof will shift to the defendants to prove that B to D schedule property is the exclusive property of late Subba Rao, 1st defendant and Seshagiri Rao, having independent source of income to acquire them.

44. To substantiate the contentions of the plaintiff, the plaintiff himself was examined as PW.1 besides examining PWs.2 to 4. PWs.2 and 3 are the supporting defendants of the plaintiff. The evidence of PW.1 is an important piece of evidence to establish that B to D schedule property was acquired with the aid of joint family nucleus. According to PW.1, his father, Appaswamy, inherited A schedule property from his father due to allotment of A schedule property to his share in the partition among his brothers; he also used to ply bullock cart and sell milk; his mother also used to sell milk, earned huge amount from agriculture, milk business and from hiring charges of bullock cart and with the income derived from different sources referred above, Subba Rao and 10th defendant acquired B to C schedule property with the aid of joint family nucleus. It is further case of the plaintiff that his father became old, unable to maintain the family, management of the family was entrusted to his brother, Subba Rao, who was an intelligent and till his death, he managed the family property and after his death, his mother looked after the affairs of the family and other brother, 10th defendant, also used to help her in the family management; that apart, A schedule property is a fertile agricultural land and his father was raising commercial crops like tobacco, coriander *etc.,* earned substantial amount from that land. Thus, the examination-in-chief of PW.1 is totally supporting his case regarding

the sufficiency of joint family nucleus to acquire B to D schedule property but Subba Rao and 1st defendant purchased property in their individual names and obtained sale deeds. Similarly, 10th defendant also obtained registered sale deeds in his name though the source of income was from the joint family property. Therefore, B to D schedule property is only joint family property liable for partition.

45. He further testified that during life time of Subba Rao, he started joint family mutton business, which is the family business along with 10th defendant; for some time later, 10th defendant also established separate mutton business stall and it is only a joint family business though licenses were obtained in their individual names; they earned huge profits in the joint family mutton business and as such Subba Rao and defendants 1 and 10 acquired B to D schedule property. Therefore, he is not entitled a share in the said property. In the cross-examination, PW.1 admitted that he was employed in Railways in 1960 and mostly worked at Renigunta, Chittoor District. The other brothers Suba Rao and 10th defendant are only semi-literates, who studied only up to VIII standard.

46. The oral evidence of PW.1 did not disclose the income earned by his father by plying double bullock cart; on the other hand, in the rural areas the agriculturists used to possess double bullock cart for cultivation of their lands and for other agricultural purposes. Therefore, mere possessing of double bullock cart is not sufficient to conclude that Appaswamy earned huge income to acquire the schedule property. Similarly, the evidence of PW.1 further shows that his mother and father used to sell milk, earn Rs.20 to Rs.30/- per day from the milk business, as per his admission at Page 11 of cross-examination; whereas, PW.2, who is the daughter of Appaswamy, testified that his mother and father used to earn Rs.15 to Rs.20/- per day by sale of milk. Even according to the plaintiff, his parents carried on milk business for 20 years up to 1958. Therefore, by the date of acquisition of B to D schedule property, his parents were not carrying milk business so as to invest the same in acquiring the property. Similarly, father of the plaintiff, Appaswamy, became old and unable to manage the family and allegedly entrusted the family affairs to Subba Rao, but did not disclose at least the year of such entrustment to Subba Rao and his father, Appaswamy, died in the year 1970, when he was aged 8 years.

Therefore, by 1950 itself Appaswamy became old attained 60 years of age. In such a case, it is difficult for an old man to ply double bullock cart and earn income thereon, more particularly, when he was not able to manage the family. Therefore, the contention of the plaintiff that his father earned huge income from hiring of bullock cart and sale of milk is not acceptable.

47. In the evidence, PW.1 improved his case by asserting that his father used to cultivate the land of others on lease and testified in his cross-examination that Appaswamy cultivated 4 or 3 acres of land belonging to one Kuruganti man at Ongole but did not file any piece of evidence to prove such cultivation. In fact, according to the admissions of the plaintiff, Appaswamy was unable to manage the property. In such case, the question of cultivation of others land on lease is improbable to the natural circumstances. Therefore, the same cannot be accepted. Thus, the plaintiff miserably failed to establish cultivation of land by Appaswamy, earning income thereon and even he did not disclose the year or years of cultivation and names of the landlords. If really, Appaswamy cultivated the land, his name would appear in cultivation account for the relevant years as an occupant and entry of occupation as lessee but for the reasons best known to the plaintiff, he did not produce the cultivation account of the village to substantiate his contention. Therefore, the plaintiff's contention that his father's earning income from cultivation of others land is not accepted. Yet, the plaintiff testified that during life time of his father, he let out two out of three tiled houses to different tenants on a monthly rent ranging from Rs.60 to Rs.70/- but he pleaded ignorance about the details of the tenants who occupied the houses. However, in the cross-examination, it is elicited that the parents of PW.1, Subba Rao, 10th defendant and others were living in Item No.9 of A schedule property followed by a suggestion that 10th defendant was living in Item 12 for the last two or three years and that 2nd defendant is living in item 12 from 1962 and that his parents and late Subba Rao lived in Item 9 during his life time but the suggestion was denied by PW.1. However, the family of Subba Rao, 10th defendant and Appaswamy consisted large numbers, it is not possible to reside in one house unless it is a big house consisting of many rooms but no evidence is brought on record to prove the rooms of tiled house. In such a case, it is difficult to believe that the entire alleged joint family resided in one house with their huge number of children. Therefore, the contention of the plaintiff that his father let out two

tiled houses to tenants in the village is not satisfactorily established and it is improbable to the surrounding circumstances of the case.

48. According to PW.1, in 1950, Subba Rao started joint family business of sale of mutton but the license was obtained in his name. According to the admissions of PW.1 his father Appaswamy was an agriculturist cultivating A schedule property plying bullock cart on hire etc., vending milk but never stated that his father carried on mutton business to accept that the business carried on by Subba Rao was joint family business. However, suggestions were put to PW.1 that it is the separate business of Subba Rao but denied by him. PW.1 admitted that Subba Rao used to export goats but the export business is only a joint family business. In any view of the matter, it is clear from the evidence of record that Subba Rao carried on goats export business, sale of horses *etc.,*

49. PWs.2 and 3 are no other than the defendants 21 and 20 who supported the plaintiff in all respects regarding source of income but their evidence cannot be accepted for the reason that they were married by the date of alleged acquisition of property described in B to D schedule and living separately. At best, their evidence is only with regard to source of income to acquire B to D schedule property. The evidence of PWs.2 and 3 is almost supporting the evidence of PW.1 except variation in the income from milk business. The evidence of PWs.2 and 3 does not inspire confidence of this Court for the reason that PW.1 married the daughter of 13th defendant and they are closely related to one another. The plaintiff produced Ex.A-1 to establish that the property shown in A schedule yielding good crops and thereby earned substantial amount to acquire B to D schedule property. As seen from Ex.A-1, Appaswamy raised maize and other dry crops and the land was classified as a dry land. Therefore, the income from the agricultural land shown in A schedule property by raising maize, jowar is insufficient to acquire B to D schedule property. The contention of the plaintiff from the beginning is that his father Appaswamy used to produce Virginia tobacco, coriander crops *etc.,* It is common knowledge of every one that in dry lands tobacco and coriander crops cannot be raised as the land would not be fit for raising such crops. Even assuming for a moment, that father of plaintiff, Appaswamy, raised tobacco and coriander and other commercial crops in the land, there must be relevant entries in No.2 adangal, now No.3 adangal, which is

known as cultivation account of the village, wherein, the nature of crops raised by the farmers will be mentioned. Obviously for different reasons, PW.1 did not produce the cultivation account of the agricultural lands shown in A schedule to prove that his father raised tobacco and coriander crops at any time and earned huge income thereon. In the absence of proof for production of such evidence, I am unable to agree with the contention of the learned counsel for the plaintiff-appellant regarding the source of income from A schedule to acquire B to D schedule property. That apart, the other source of income is from hiring bullock cart and milk vending business but no iota of evidence is produced to prove the income from those two sources to acquire B to D schedule property. On the other hand, it is an admitted fact that Subba Rao and 10th defendant carried on mutton business but failed to establish that it is a joint family business and admitted that licenses were obtained by Subba Rao and 10th defendant in their individual names and his father never carried on mutton business. Therefore, the mutton business carried on by the Subba Rao land 10th defendant cannot be said to be a joint family business. If really, it is a joint family business continued by Subba Rao and 10th defendant, his father might have carried on similar business at least for some period during his life time and in fact the family of the plaintiff is not a business family and it is purely an agricultural family. Therefore, I am unable to accept the contention of the plaintiff-appellant that 10th defendant and Subba Rao carried on joint family mutton business. Merely because Subba Rao and 10th defendant continued as members of the joint family, the business carried on by them cannot be said to be a joint family business.

50. Sri T. Rajendra Prasad, learned counsel, would contend that any individual member of a joint family can carry on business and the same cannot be treated as a joint family business, drawn the attention of this Court to a decision of the Apex Court in ***G. Narayana Raju (dead) by his legal representative V. G. Chammaraju and others***, wherein in para 3 it was held as follows:

> "It is well established that there is no presumption under Hindu Law that a business standing in the name of any member of the joint family is a joint family business even if that member is the manager of the joint family.

> Unless it could be shown that the business in the hands of the coparcener grew up with the assistance of the joint family property or joint family funds or that the earnings of the business were blended with the joint family estate, the business remains free and separate."

51. The Apex Court laid down the above law based on the principles earlier laid down in ***Bhuru Mal Vs. Jagannath***, ***Pearey Lal Vs. Nanak Chand*** and ***Chattanatha Karayalar Vs. Ramachandra Iyer***. He also placed reliance on another Division Bench judgment of Madras High Court in ***Lakshmi Ammal Vs. Meenakshi Ammal and others***, wherein in para 6 it was held as follows:

> "There is no presumption in Hindu Law that a business standing in the name of member of a Hindu family is joint family business even when that member is the manager or the father, and that unless it could be shown that the business in the hands of the coparcener grew up with the assistance of the joint family or the joint family funds the business remains separate."

52. In another decision of this Court in ***Modadugu Venkata Subbamma and another Vs. Kanamarlapudi Rattaiah and others***, it was held as follows in para 28:

> "Business carried on by plaintiffs 1 and 2, members of joint family and it is contended by them it is separate business. The burden lies on the defendant who alleges that the said business to be joint to prove existence of such state of affair. Merely because the receipts issued in the name of first plaintiff and second plaintiff were produced by D-1, no inference be drawn that it is joint family business. D.1 failed to discharge the burden of proof as to the said business being joint family business. It shall be treated as separate business of plaintiffs 1 and 2."

53. In view of the principles laid down by the Apex Court and this Court, persuaded by the Division Bench Judgment of Madras High Court, the burden is upon the plaintiff to prove that it is the joint family business by producing satisfactory evidence. In the present case, the alleged mutton business is not the joint family business for the reason that the Appaswamy, father of the plaintiff never carried on mutton business and that too the license was obtained by Subba Rao to individually

carry on the business and 10th defendant also obtained license in his individual name and the plaintiff miserably failed to establish that the mutton business is the joint family business and in such case, the businesses carried on by Subba Rao and 10th defendant are presumed to be their separate and individual businesses.

54. On behalf of the defendants, 1st defendant was examined as DW.1; she categorically denied about the nature of acquisition *i.e.,* with the aid of joint family nucleus while asserting that her husband Subba Rao started mutton business in the year 1950 almost 20 years prior to death of Appaswamy and with the income earned on the business and other businesses he acquired B schedule property. She further asserted that her father Kandaswamy was a rich man who presented gold Jewellery to her and by sale of gold Jewellery, she acquired B-1 schedule property produced Exs.B-1 to B-20 to establish that B schedule property and B-1 schedule property was acquired by them. The property covered by Exs.B-1 to B-6 relates to B schedule property acquired during 1962 to 1970 before death of Appaswamy. Similarly, Exs.B-9 to B-20 relates to B-1 schedule property purchased on different dates commencing from 1960 to 1972. In all the documents consideration was passed by the purchasers *i.e.,* Subba Rao under Exs.B-1 to B-8 and from DW.1 under Exs.B-10 to B-20. Even before the purchase of B schedule property, late Subba Rao was carrying on mutton business since 1950 and father of DW.1, Kandaswamy, was also carrying on mutton business. The license was obtained by Subba Rao to carry on mutton business from the Municipality marked as Exs.B-21 to B-29. She further asserted that her father-in-law Appaswamy never carried on mutton business and therefore the business is not family business. In the cross-examination of DW.1 nothing was elicited to disprove the contentions of the defendants, more particularly to establish that B and B-1 schedule property was acquired with the aid of joint family nucleus. Therefore, the un-rebutted testimony coupled with voluminous documentary evidence marked as Exs.B-1 to B-29 established that mutton business was not the joint family business and that property was purchased by Subba Rao and 1st defendant with the aid of income from mutton business and several businesses carried on by Subba Rao and by sale of gold Jewellery of DW.1.

55. 26th defendant was examined as DW.2. While asserting that C schedule

property is the separate property of her husband, denied acquisition of C schedule property with the aid of joint family nucleus for the reason that A schedule property is a dry land and Appaswamy used to raise fodder crops not even sufficient to meet his family necessities during his life time and it was left fallow for some years prior to filing of the suit. Therefore, no income was derived from A schedule property. Similarly, the alleged residential property was not fetching any income since the houses were in occupation of various family members. Even otherwise, the income derived from the tiled houses is not sufficient to acquire B, B-1 and C schedule property. She produced Exs.B-30 to B-33 to prove that C schedule property was acquired by her husband with self exertions, she also further contended that her husband carried on mutton business obtaining license from municipality which is marked as Exs.B-34 to B-39 evidencing payment of license fees to the Municipality to carry on mutton business. Her evidence was not rebutted by eliciting anything in the lengthy cross-examination by the learned counsel for the plaintiff and supporting defendants. Even otherwise, the initial burden is on the plaintiff who asserted that the property registered in the names of late Subba Rao, 1st defendant and 10th defendant was acquired with the aid of joint family nucleus. No doubt, Subba Rao and Seshagiri Rao were members of the joint family but when they were living separately, the property acquired by them cannot be treated as joint family property or acquired with the aid of joint family nucleus and the presumption that the property belonging to the members of Hindu Undivided Coparcenary property is the joint family property does not arise. In similar set of circumstances, this Court in ***Pulimi Bapa Reddy Vs. Pulimi Dasaradharama Reddy***, held as follows in paragraphs 33 and 34:

> "It is settled principle of Hindu Law that there is always a presumption in favour of the family being joint, till the otherwise is proved. So far as the properties are concerned, such a presumption is not available. However, where, a coparcener, asserting the joint ness of the property, proves to the satisfaction of the Court, that there existed sufficient nucleus for the joint family to acquire properties, the burden shifts to the one, who pleads that any item of properties, is his self-acquisition."

56. In another decision of this Court in ***Ravada Yerranna (died) per L.Rs. Vs. Ravada Thammunaidu (died) per L.Rs., and others***, it was held as follows in paragraphs 22 and 25:

> "Where a property was acquired in the name of the Manager of the family whether it can be self-acquired property is to be decided basing on the proof of source of income or joint family nucleus."

57. The consistent view expressed by the Apex Court and this Court time and again in catena of decisions is that presumption of joint ness in the status can be drawn but possessing the property jointly by the joint family does not arise unless it is proved by the person who asserted that the property belongs to the joint family or acquired with the aid of joint family nucleus. Here, the plaintiff miserably failed to establish that the joint family possessed sufficient nucleus to acquire various items of property shown in B, B-1 and C schedule property. Even as per Ex.A-1, A schedule property would not fetch much income to acquire the alleged schedule property. B-1 schedule property was registered in the name of 1st defendant, wife of Subba Rao, who is not a coparcener and not a member of joint family but the contention was that the property was purchased by 1st defendant with the aid of joint family nucleus by Venkata Subba Rao on her name but there was no pleading that B-1 schedule property was purchased in the name of 1st defendant or as a benami for the joint family. Even in the absence of any pleading, the presumption that she is the owner of B-1 schedule property shall be drawn. In similar circumstances, this Court in ***E. Vinod and another Vs. R. Sathamma and others***, held as follows:

> "Even if the averment made by the plaintiffs in the plaint to the effect that the property was purchased in favour of Defendant No.3 out of the funds of paternal grand-father of the plaintiffs is established, in my considered view, it is rudimentary that, when once it is established that the property stood in the name of a lady, in any capacity whatsoever, through any source or means, may be from the paternal side or maternal side of the plaintiffs, in normal course and subject to certain exceptions, the property should be understood and construed as belonging to that lady only. Obviously, the property was purchased in the year 1960 i.e., subsequent to the coming into force of the Hindu Succession Act. Therefore, at any stretch of imagination, the property held by Defendant No.3, who is no other than the mother of the plaintiffs, cannot be subjected to partition by the plaintiffs as 'coparceners', which claim of the plaintiffs is something unknown to the canon of law, unless proved contra and as pointed out already subject to some exceptions and no such exceptional circumstances are present in this case. On this short ground alone, the suit of the plaintiffs has to be dismissed."

58. In those circumstances, the trial Court has no option except to conclude that B, B-1 and C schedule property was not acquired with the aid of joint family nucleus as the plaintiff miserably failed to establish sufficient nucleus and that too a general presumption is that when the property was registered in the name of an individual, it is presumed that it is separate property in view of the decision of the Apex Court in ***Valliammal (died) by L.Rs. Vs. Subramaniam and others***, wherein it was held as follows:

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

59. By applying the principle laid down by the Apex Court and other decisions referred supra, it is difficult for me to interfere with the finding of the trial Court since the finding of the trial Court is supported by legal reasoning with reference to evidence. Therefore, in this Appeal, I find no ground to set-aside or reverse the finding recorded by the trial Court enabling the plaintiff to claim partition of B, B-1 to C schedule property. Hence, finding of the trial Court that B, B-1 and C schedule property is the separate property of late Subba Rao, 1st defendant and 10th defendant and after their death, their legal heirs succeeded their respective estates and during pendency of the suit defendants 1 and 10 died and their legal heirs became owners of B, B-1 and C schedule property and the plaintiff has no right to claim any share in them.

60. The plaintiff also claimed share in D schedule property, which were found in possession of 10th defendant, during inspection of Commissioner while conducting inventory. As seen from the Commissioner’s report, some of the items in D schedule were found in possession of 10th defendant. However, 10th defendant claimed that those items exclusively belong to him while the plaintiff asserting that the items found during inventory by the Commissioner in the house of 10th defendant belongs to the joint family. It is for the plaintiff to establish that the D schedule property is the joint family property like immovable property. D schedule is the movables and the

question of proving title to movable normally does not arise except in rare circumstances by producing receipts evidencing their purchase but no such documents are produced. According to Section 110 of the Indian Evidence Act, 1872 when a question is whether any person is the owner of anything of which he is shown to be in possession, the burden of proving that he is not the owner is on the person who affirms that he is not the owner. Therefore, the initial burden of proof is on the plaintiff to establish that 10th defendant is not the owner but unfortunately the plaintiff did not produce any piece of evidence to substantiate his contention that 10th defendant is not the owner except *ipse-dixit* of PWs.1 to 3 who are interested in the claim. However, as per my finding on Point No.1, the Appeal was dismissed against respondents 4, 11, 14, 16 to 22 and 26, who are claiming interest in the property being the legal heirs of Subba Rao and 10th defendant and in their absence the claim over D schedule property cannot be effectively decided.

61. On over all consideration of entire material available on record, it is evident that 10th defendant was found in possession of movables during inventory by the Commissioner, appointed by the trial Court, but it is disproved by the plaintiff that 10th defendant is not the owner and he is presumed to be the owner of the property. Here, the plaintiff did not discharge the initial burden of proof which rests on him and failed to establish that the 10th defendant is not the owner of the property. On the other hand, the claim against respondents 11 and 26 *etc.,* legal heirs of 10th defendant was dismissed in this Appeal on this ground also the claim of the defendants-respondents is liable to be rejected.

62. In view of my foregoing discussion, I find that the plaintiff-appellant is not entitled to claim any share in D schedule property. Accordingly, both these points are answered against the plaintiff-appellant and in favour of Subba Rao, defendants 1, 10 and their legal heirs.

63. **<u>POINT No.4:</u>** The plaintiff also claimed share in E schedule property which belongs to the mother of plaintiff, Subba Rao and 10th defendant. The trial Court rejected the claim on the ground of the legal heirs of deceased Venkata Subbamma were not impleaded but I am not going to examine the issue about the effect of failure to implead the legal heirs of Venkata Subbamma for the reason that the

Appeal was dismissed against respondents 4, 11, 14, 16 to 22 and 26 who are interested in the claim, in whose absence the claim of the plaintiff cannot be decided in this Appeal. Hence, it is wholly un-necessary to examine this issue in view of my finding on 1st point. Therefore, I find that it is not a fit case to interfere with the finding of the trial Court with regard to claim of the plaintiff in E schedule property. Accordingly, the claim of the plaintiff is rejected holding this point in favour of the defendants-respondents and against the plaintiff-appellant.

64. In view of my foregoing discussion, I find no illegality or legal infirmity warranting interference of this Court with the decree and judgment of the trial Court.

In the result, the Appeal Suit is dismissed confirming the decree and judgment dated 22.12.1994, passed in Original Suit No.125 of 1976 by the learned Principal Subordinate Judge, Ongole, Prakasam District.

In consequence, the miscellaneous petitions, if any, pending in this Appeal, shall stand dismissed. No order as to costs.

M. SATYANARAYANA MURTHY, J

Date: 27-03-2015.

Dsh

HON'BLE SRI JUSTICE M. SATYANARAYANA MURTHY

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27.03.2015

APPEAL SUIT No.1642 OF 1996

Date.27-03-2015

DSH