THE HON'BLE SRI JUSTICE M.SATYANARAYANA MURTHY

A.S.No. 1756 OF 1999

CROSS-OBJECTIONS (SR). No. 82018 OF 1999

AND

CROSS-OBJECTIONS (SR). No. 9815 OF 2010

COMMON JUDGMENT:

The 1st defendant in O.S.No. 543 of 1987 on the file of the Court of I Additional Senior Civil Judge, Visakhapatnam (for short, 'the trial Court'), preferred A.S.No. 1756 of 1999 challenging the judgment and preliminary decree dated 27-05-1999 passed by the trial Court, whereby declared 1/4th right in item Nos. 1 and 2 of schedule property, 1/7th right in item No. 3 of schedule property, ordered for division accordingly and directed the 1st defendant to render true and correct account of income realized from item Nos. 1 to 3 of schedule property while dismissing rest of the claim. The plaintiff filed cross-objections (sr). No. 82018 of 1999 challenging dismissal of the claim in respect of item Nos. 4 to 6 of schedule property and the 6th defendant filed cross-objections (sr). No. 9815 of 2010 contending that, in view of change of law *i.e.* amendment to Section 6 of Hindu Succession Act, 1956 (for short, 'the Act of 1956'), item Nos. 1 and 2 of schedule property shall be divided into 7 equal shares and, therefore, she along with the plaintiff and defendant Nos. 1 to 3, 5 and 7 are entitled to claim 1/7th share each in item Nos. 1 and 2 of schedule property.

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

3. The plaintiff filed the suit; for partition of item Nos. 1, 2, 4 and 5 of schedule property into 4 equal shares allotting one such share each to him and defendant Nos. 1 to 3, partition of item No. 3 of schedule property into 7 equal shares allotting one such share to him and defendant Nos. 1 to 3 and 5

to 7 and to direct the 1st defendant to render account of income from joint family for the last three years; alleging that the plaintiff is son of the 1st defendant and brother of defendant Nos. 2, 3 and 5 to 7. Defendant Nos. 8 to 22 are tenants of schedule property. The 1st defendant is son of Patchipulusu Venkatarayulu and Bangaramma of Narkanapallivari family of Juthada Village. The said Venkatarayulu worked as a Telegraphic Master in P & T Department. While Venkatarayulu was in service, he died. At the time of death of Venkatarayulu, his wife Bangaramma was carrying pregnancy of the 1st defendant and, four months after death of Venkatarayulu, the 1st defendant was born. By the date of death of Venkatarayulu, he was working a t Calcutta and residing there itself along with his wife. After death of Venkatarayulu, Bangaramma performed marriage of her eldest daughter Laxminarasayamma with Garuda Sitharamayya. Thus, the 1st defendant is no other than brother-in-law of Sitharamayya. Bangaramma died within a short period after death of her husband. After demise of Bangaramma, there were disputes regarding guardianship of the 1st defendant as junior paternal uncle of the 1st defendant claimed both custody and guardianship. However, the same was opposed by Sitharamayya. The District Judge, Visakhapatnam, appointed father of Sitharamayya *i.e.* late G.V.G.Ramayya as guardian of the 1st defendant till Laxminarasayamma attains majority. Thereafter, Laxminarasayamma acted as guardian of the 1st defendant. G.V.G.Ramayya, his son Sitharamayya and Laxminarasayamma used to manage property of the 1st defendant. Sitharamayya and Laxminarasayamma performed marriage of their daughter Kamaratnam with the 1st defendant. Even after marriage, as the 1st defendant was not properly educated, all his affairs were being looked after by Sitharamayya and his wife Laxminarasayamma. The 4th defendant is wife of the 1st defendant and they were blessed with three daughters *i.e.* defendant Nos. 5 to 7 and three sons *i.e.* the plaintiff and defendant Nos. 2 and 3. They lived together as members of joint family in a portion of house *i.e.* item No. 2 of schedule property situated in Ganugulavari Street. Marriage of the 5th defendant was performed in the year 1969, the 6th defendant in 1976 and the 7th defendant in 1979. Since the date of marriages of defendant Nos. 5 to 7, they are living with their spouses separately. The plaintiff's marriage was performed in the year 1981 and he was blessed with two children. Marriage of the 2nd defendant, who is deaf and dumb, was performed in the year 1985 and he was blessed with two children. After marriage, the plaintiff started medical business in the name and style of Sri Laxmi Medicals which is his separate business.

It is the specific contention of the plaintiff that Patchipulusu Venkatarayulu, while working in P & T Department at Calcutta, used to draw salary of Rs.800/- per month by the date of his death. Patchipulusu Venkatarayulu belongs to Vysya community, led austere life, saved huge amount and purchased schedule property with the savings from his salary. As Patchipulusu Venkatarayulu was a Government servant, he obtained document in the name of his wife Bangaramma for item Nos. 2 and 3 of schedule property though Venkatarayulu himself was in possession and enjoyment of the property. The said transactions are benami in the name of Bangaramma but the real owner is Venkatarayulu, grandfather of the plaintiff. Subsequently, Venkatarayulu purchased land at Marripalem Village. Later, Patchipulusu Venkatarayulu died due to Gastroentitis while he was in service at Calcutta. Bangaramma received death benefits of her husband and purchased item No. 1 of schedule property in the name of the 1st defendant while he was 7 months old. Thereby, item No. 1 of schedule property was purchased with the death benefits of Venkatarayulu and, therefore, it forms part of joint family property since neither Bangaramma nor the 1st defendant did possess any amount to acquire item No. 1 of schedule property as on the date of purchase. As such, the entire schedule property is Hindu undivided coparcenary property of the plaintiff and the defendants.

It is specifically contended that mother of the 1st defendant Bangaramma hails from middleclass family and had no independent source of income to acquire any of the items of schedule property. Therefore, purchase of the property in the name of Bangaramma by Venkatarayulu is benami transaction and the real owner is Venkatarayulu, grandfather of the plaintiff. After death of Venkatarayulu in the year 1927, the 1st defendant, being the sole legal-heir, succeeded the property and, consequently, the plaintiff and defendant Nos. 1 to 3 became entitled to claim equal share in schedule property after its division into 4 shares. Hence, the plaintiff claimed 1/4th share in item Nos. 1, 2 and 4 of schedule property and 1/7th share in item No. 3 of schedule property.

4. The 1st defendant alone, contesting the suit, filed written statement denying material allegations *inter alia* contending that his father Patchipulusu Venkatarayulu was earning only Rs.200/- per month but not Rs.800/-, as alleged, at the time of his death in the year 1926. He also denied the alleged saving of huge amount, purchase of property in the name of his wife Bangaramma, Venkatarayulu himself was continuing in possession and enjoyment of the said property in his own right and that the transactions in the name of Bangaramma were not benami transactions.

It is specifically contended that Bangaramma hails from an affluent family and purchased item Nos. 2 and 3 with her Stridhana property under registered sale deed s dated 02-04-1921 and 20-04-1921 respectively. Item No. 2 is situated in Godevari Street, which is now known as Gangulavari Veedhi, and item No. 3 is situated in Butchirajupalem but not in Marripalem.

The 1st defendant admitted that item No. 1 was purchased by himself under registered sale deed dated 15-09-1926 during minority by his mother as guardian. Thus, item No. 1 is exclusive property of the 1st defendant. Item No. 4 belongs to his wife and she purchased the same under registered sale deed dated 12-10-1952. Item No. 5 is a shop room purchased by the 1st defendant in the name of his second son. Thus, item Nos. 1, 4 and 5 of schedule property is separate property of defendant Nos. 1, 4 and 2 respectively. During lifetime, Bangaramma, in sound disposing state of mind, executed registered will dated 09-10-1928 bequeathing item Nos. 2 and 3 of schedule property in favour of the 1st defendant. After death of Bangaramma, the 1st defendant became absolute owner of item Nos. 2 and 3 of schedule property as legatee under the will. Therefore, the plaintiff is not entitled to claim any share in any of the items of schedule property.

While the matter stood thus, item No. 3 of schedule property was divided in to 7 shares and allotted one such share to each of his sons and daughters while retaining 1/7th share for himself under family settlement deed dated 25-12-1971 and compensation for earlier acquisition was paid to him as an absolute owner. Item Nos. 1, 2 and 4 fetch income of Rs.3,000/-, Rs.600/- and Rs.1,000/- per month respectively but not Rs.6,000/-, Rs.2,000/- and Rs.2,000/- as alleged by the plaintiff. The 1st defendant also denied possessing 180 tulas of gold and 1,500 tulas of silver. The 1st defendant purchased item No. 5 in the name of his second son and invested an amount of Rs.50,000/- in business which was being run by the plaintiff in item No. 5. Even otherwise, the compensation paid by Government for the land acquired is his absolute money, none of the plaintiff and the defendants are entitled to claim share in any part of item No. 3, which was acquired in 1965, and the claim was the subject matter of O.P.No. 105 of 1965.

The 1st defendant alone enjoying item Nos. 1 and 2 of schedule property as absolute owner, item No. 4 of schedule property is being enjoyed by his wife and item No. 5 of schedule property is being enjoyed by his second son as their absolute property. Consequently, the plaintiff is not entitled to claim any share in schedule property and the property is not liable for partition. Finally, it is prayed to dismiss the suit in toto.

5. The other defendants remained *ex parte*.

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

Issues:

1. *Whether the properties were treated as joint family properties?*
2. *Whether the plaintiff is entitled to a share in the plaint schedule properties? If so at what rate?*
3. *Whether the family settlement dated 25-12-1971 pleaded by the defendant is true and binding on the plaintiff?*
4. *Whether the defendants 1 to 7 are liable to render accounts?*
5. *To what relief?*

7. During the course of trial, on behalf of the plaintiff, P.Ws.1 to 3 were examined and got marked Exs.A1 and A2. On behalf of the defendants, D.W.1 was examined and got marked Exs.B1 to B10.

8. Upon hearing argument of both counsel and considering oral and documentary evidence, the trial Court declared that the plaintiff is entitled to 1/4th share in item Nos. 1 and 2 of schedule property and 1/7th share in item No. 3 of schedule property and directed the 1st defendant to render true and correct account of income derived from item Nos. 1 to 3 of schedule property while holding that item No. 4 of schedule property is absolute property of the 4th defendant and item No. 5 of schedule property is exclusive property of the 2nd defendant.

9. Aggrieved by the decree and judgment of the trial Court, the 1st defendant preferred the present appeal raising the following contentions:

(a) The finding of the trial Court on issue No. 3 is incorrect as item No. 3 of schedule property was divided into 7 shares under settlement deed dated 25-12-1971 while keeping one share for himself. Thereby, question of partition of item No. 3 of schedule property again into 7 shares does not arise and, therefore, the finding is liable to be set aside;

(b) The trial Court did not consider acquisition of land by Government and payment of compensation to the 1st defendant long prior to filing of the suit. When compensation was already paid after acquisition of part of item No. 3 of schedule property long prior to filing of the suit, question of dividing the same does not arise. On this ground alone, the finding of the trial Court on issue No. 3 is liable to be set aside;

(c) The trial Court did not consider the evidence on record to prove joint family nucleus to acquire any of the items and ignored the will on misinterpretation of contents of the will. Thus, the trial Court committed an error in holding that the plaintiff is entitled to 1/4th share in item Nos. 1 and 2 of schedule property and 1/7th share in item No. 3 of schedule property;

(d) Item Nos. 1 to 3 of schedule property was purchased by Bangaramma, mother of the 1st defendant, with her Stridhana funds as she hails from an affluent family but the trial Court, without insisting the plaintiff to prove nature of the transactions pertaining to item Nos. 1 to 3 of schedule property as benami, erroneously concluded that those items were purchased with the savings of Venkatarayulu, grandfather of the plaintiff, and committed an error in passing preliminary decree for partition and rendition of accounts.

The 1st defendant, based on the above contentions, requested this court to reappraise entire evidence and allow the appeal setting aside the preliminary decree and judgment passed by the trial Court.

10. The plaintiff filed cross-objections challenging the finding of the trial Court regarding item Nos. 4 and 5 of schedule property on the ground that the 4th defendant had no independent source of income to acquire item No. 4 of schedule property so also the 1st defendant did not possess any other property except the joint family property. In the absence of proof of independent source of income, it shall be presumed that item Nos. 4 and 5 were acquired with the aid of joint family nucleus but the trial Court, on erroneous appreciation of evidence, concluded that item Nos. 4 and 5 of schedule property is separate property of defendant Nos. 4 and 2. The plaintiff finally prayed to set aside the finding recorded by the trial Court regarding item Nos. 4 and 5 and pass a preliminary decree for division of item Nos. 4 and 5 into 4 equal shares and allot one such share to him.

11. The 6th defendant, daughter of the 1st defendant, filed cross-objections contending that, in view of amendment to Section 6 of the Act of 1956, she became a coparcener and, therefore, item Nos. 1 and 2 are liable for partition into 7 equal shares but the trial Court, without considering this aspect, erroneously passed preliminary decree in favour of the plaintiff. The 6th defendant finally prayed to set aside the said finding while requesting to pass a decree for division of item Nos. 1 and 2 of schedule property into 7 equal shares and allot one such share to her along with the plaintiff and defendant Nos. 1 to 3, 5 and 7.

12. Considering rival contentions and perusing material available on

record, the points that arise for consideration are thus:

(1) *Whether item Nos. 1 to 3 of schedule property is the property acquired by late Venkatarayulu, grandfather of the plaintiff?*

(2) *Whether item Nos. 4 and 5 of schedule property is separate property of defendant Nos. 4 and 2 respectively, if not, whether the plaintiff is entitled to claim share in item Nos. 4 and 5 of schedule property?*

(3) *Whether the 6^{th} defendant is entitled to claim $1/7^{th}$ share in item Nos. 1 and 2 of schedule property based on Section 6 of the Act of 1956 as amended in 2005 by Central Act?*

(4) *Whether the plaintiff is entitled to claim $1/4^{th}$ share in item Nos. 1 and 2 and $1/7^{th}$ share in item No. 3 of schedule property, if not, whether the preliminary decree passed by the trial Court is in accordance with law?*

13. **In Re. Point Nos. 1 & 4:**

The basis for claim of the plaintiff is that Venkatarayulu, while working as telegraphic master at Calcutta, was earning Rs.800/- p.m.; as he belongs to Vysya community, led austere life; saved huge amount and invested in purchase of immovable property *i.e.* item Nos. 2 and 3 of schedule property in the name of his wife Bangaramma. Bangaramma, mother of the 1^{st} defendant and grandmother of the plaintiff, had no independent source of income to acquire item Nos. 2 and 3 of schedule property. Thus, item Nos. 2 and 3 of schedule property were acquired in the name of Bangaramma as a benami for the benefit of Venkatarayulu but Venkatarayulu was the real owner. Thereby, item Nos. 2 and 3 of schedule property formed part of Hindu undivided coparcenary. Similarly, the plaintiff contended that item No. 1 of schedule property was purchased by Bangaramma in the name of his father *i.e.* the 1^{st} defendant when he was 7 months old with the aid of death benefits of Venkatarayulu and that she had no independent source of income to acquire even item No. 1 of schedule property. As such, item No. 1 also forms part of Hindu undivided coparcenary propery and liable for partition.

14. Refuting the contentions, the 1st defendant contended that late Venkatarayulu was not earning Rs.800/- p.m. as salary and his mother Bangaramma purchased item Nos. 1 to 3 with her Stridhana funds. By virtue of will executed by Bangaramma marked as Ex.B8, the plaintiff is not entitled to claim any share in the property as the 1st defendant became absolute owner as legatee under the will.

15. To substantiate the contentions of the plaintiff, the plaintiff himself was examined as P.W.1 and reiterated that the property was purchased by his grandfather Venkatarayulu, while working in postal department, in the name of his wife Bangaramma; parents of Bangaramma were poor people; after death of Venkatarayulu, the 1st defendant was born within four months as she was carrying pregnancy by the date of death of her husband and, within one year thereafter, Bangaramma died. Thus, it is clear from the examination in chief of P.W.1 that parents of Bangaramma were poor and, therefore, question of their payment of any amount towards Stridhana does not arise. Undisputedly, Venkatarayulu used to work in postal department, earn some amount as salary and died in 1926 *i.e.* almost two or three decades prior to birth of the plaintiff.

16. Coming to the cross-examination of P.W.1, he admitted that he specifically does not know particulars of the property owned by Venkatarayulu at the time of his death and that he did not file any document to show that Venkatarayulu was earning Rs.800/- p.m. as on the date of his death. This sentence at best is useful to dispute the earnings of Venkatarayulu as on the date of his death. In fact, Venkatarayulu died in the year 1926 and the plaintiff was born almost 2 ½ decades subsequent to death of Venkatarayulu. As such, the plaintiff is not supposed to know the details of schedule property and source of income for acquisition of item Nos.

1 to 3 of schedule property by Bangaramma.

17. So far as source of income of Bangaramma to acquire item Nos. 1 to 3 of schedule property is concerned, P.W.1 denied the amount possessed by Bangaramma to acquire item Nos. 1 to 3 but, in cross-examination, admitted that Bangaramma hailed from Juthada Village while denying financial soundness of parents of Bangaramma. P.W.1 empathetically denied the suggestion put to him that Venkatarayulu used to draw salary of Rs.400/- as on the date of his death. P.W.1 admitted that he did not file any documentary proof about death benefits received by Bangaramma after death of Venkatarayulu. It is practically impossible for any person, who was born more than 2 ½ decades after death of Venkatarayulu, to produce any evidence about salary particulars and death benefits received by Bangaramma. Added to that Venkatarayulu died at Calcutta while serving in postal department which is far of place to Visakhapatnam. Therefore, insisting the plaintiff to produce any documentary evidence to substantiate his contention regarding salary of Venkatarayulu is nothing but to do an impossible thing for the reason that, in normal course of events, after sometime, documents in office will be destroyed as per departmental rules and those documents are not permanent documents. Hence, it is improbable to insist the plaintiff to produce documentary evidence to establish salary of Venkatarayulu and death benefits received by Bangaramma who died within one year after birth of the 1st defendant who was born 4 months after death of Venkatarayulu. Thus, Bangaramma died within a span of 1 ½ years after death of Venkatarayulu after receiving death benefits. In further cross-examination dated 02-04-1992, P.W.1 admitted that he did not produce any proof that Bangaramma got any amount after death of Venkatarayulu but he was told that there were disputes regarding guardianship of the 1st defendant who was minor by then but this piece of evidence is of no avail to believe the case of the plaintiff. In the entire cross-examination of P.W.1, except eliciting

that the plaintiff did not produce any documentary evidence in support of salary of Venkatarayulu drawing on the date of his death and death benefits received by Bangaramma after death of Venkatarayulu, nothing has been elicited either to prove that Venkatarayulu was not earning Rs.800/- p.m. and that Bangaramma did not receive any amount towards death benefits or to prove that Bangaramma possessed sufficient amount to acquire item Nos. 1 to 3 of schedule property or at least financial soundness of parents of Bangaramma to pay any amount to Bangaramma towards Stridhana. Therefore, the facts whatever elicited in the cross-examination are of no use to substantiate the contentions of the 1st defendant that Bangaramma possessed sufficient amount towards Stridhana to acquire item Nos. 1 to 3 of schedule property.

18. The plaintiff got examined one P.Mahalakshmamma who was aged 84 years as on the date of her examination on 30-07-1992. According to her evidence, she does not know how Venkatarayulu spent his salary but he earned a lot. Venkatarayulu purchased property *i.e.* schedule property during his lifetime, Bangaramma was housewife, she had no independent source of income and her parents were middleclass people not having capacity to purchase house for their daughter. P.W.2 was closely related to Venkatarayulu, who worked in postal department, and, by the date of his death, P.W.2 was aged 14 years. In cross-examination, P.W.2 admitted that her marriage was performed at her 12 years age and Venkatarayulu worked as telegraphic signaler at Dharmapur and Lahore. Thus, by the date of death of Venkatarayulu, marriage of P.W.2 was performed and attained the age of discretion. Therefore, due to close relationship, P.W.2 at least supposed to know financial status of Venkatarayulu and Bangaramma. Except P.W.2, no other person can speak about financial status of Bangaramma and Venkatarayulu and, thereby, her evidence is worthy of consideration as nothing has been elicited to discredit her trustworthiness and competency.

At the end of cross-examination, P.W.2 testified that Bangaramma was having substantial gold and silver ornaments but she had no independent income and that parents of Bangaramma did not possess any property.

19. The plaintiff also got examined one V.Sreerama Murty, Advocate, Visakhapatnam, to identify the voice of Garuda Seetaramayya who gave instructions to Lanka Venkateswarlu, advocate. P.W.3 identified the voice of Venkateswarlu and Seetaramayya. The cassette produced by the plaintiff before the trial Court at best may helpful to prove the conversation between Lanka Venkateswarlu and Garuda Seetaramayya while giving instructions to him to prepare pleadings. Ex.A1 is cassette. In fact, the trial Court discussed about evidentiary value of the cassette and, based on the law laid down by the Supreme Court in ***Mahavir Prasad Varma Vs. Surender Kaur*** [1], concluded that tape-recorded conversation can only be relied upon as corroborative evidence of conversation deposed by any of the parties to the conversation and in the absence of evidence of any such conversation, the tape-recorded conversation is indeed no proper evidence and cannot be relied upon. At best, it is only a corroborative piece of evidence but not a substantive piece of evidence. Therefore, much credence cannot be given to the recorded conversation between Venkateswarlu and Seetaramayya marked as Ex.A1.

20. In the written statement, the 1st defendant denied acquisition of property by Venkatarayulu in the name of his wife as benami since he was a Central Government employee by then and acquisition of item No. 1 of schedule property with the aid of death benefits of Venkatarayulu by Bangaramma while contending that Bangaramma acquired item Nos. 1 to 3 of schedule property with her Stridhana funds since her parents were rich. To substantiate his contentions, the 1st defendant himself was examined as D.W.1. D.W.1 testified that he came to know that his father Venkatarayulu

was drawing salary of Rs.200/- p.m. only. His mother purchased item No. 1 of schedule property under Ex.B2 registered sale deed dated 15-09-1926 from one Mahanthi. Item No. 2 was purchased by his mother under Ex.B3 registered sale deed dated 02-04-1921. Item No. 3 was purchased by his mother under Ex.B4 registered sale deed dated 20-04-1921. Thus, item Nos. 2 and 3 are separate properties of Bangaramma and item No. 1 is separate property of the 1st defendant in whose name the document stands. D.W.1 further testified that his mother executed will dated 09-10-1928 and registration extract of the same is produced and marked as Ex.B8. The 1st defendant, being legatee under the will, became absolute owner of the property. Therefore, he is the absolute owner of item Nos. 1 to 3 of schedule property by virtue of Ex.B8. In the examination in chief itself, D.W.1 did not disclose the source of income of his mother to acquire any of the items except making a bald allegation. In fact, it is difficult for the 1st defendant too to prove the source of income of his mother as she died at his one year age. Since he was one year old, it is difficult to know the details of Stridhana possessed by his mother. At best, possessing such Stridhana can be proved by examining any person who is sufficiently old but, for the reasons best known, the 1st defendant did not examine any person who was able to speak about family financial status and individual financial status of Bangaramma. In the cross-examination dated 04-08-1997, D.W.1 admitted that he does not know anything about his father as he died 4 months prior to his birth. A suggestion was put to D.W.1 that his father was drawing Rs.800/- p.m. but not Rs.200/- which was denied by him. D.W.1 admitted that he does not know anything about death benefits received by legal-heirs of his father and whether his mother received any death benefits of his father. D.W.1 admitted that available part of item No. 3, after its acquisition by Government, was divided into 7 equal shares and one such share was also allotted to the plaintiff. D.W.1 also admitted that he received Rs.65,000/- towards compensation for his half of 1/8th share. However, none were examined to speak about financial condition of parents of Bangaramma whether they were able to give any amount to Bangaramma towards Stridhana. When D.W.1 contending that item Nos. 1 to 3 were acquired with the aid of Stridhana property of Bangaramma, it is for him to establish the same by adducing cogent and satisfactory evidence but, except examining himself, no other witness was examined who was able to testify financial condition of his mother Bangaramma. Apart from that, D.W.1 was not competent witness to testify about financial condition of his mother as she died in the year 1928 *i.e.* one year after his birth. By the date of death of Bangaramma, D.W.1 did not attain the age of discretion much less to know financial condition of Bangaramma. Therefore, whatever stated by D.W.1 about financial condition of Bangaramma cannot be accepted.

21. Curiously, it is the contention of the 1st defendant that item No. 3 was divided into 7 shares and executed settlement deed among the 1st defendant and his children. Ex.B1 is memorandum of family settlement dated 25-12-1971 which is admittedly signed by the plaintiff to whom 1/7th share was allotted in part of item No. 3 of schedule property. In fact, sale deed for item No. 3 was obtained in the name of Bangaramma. For item No. 1, registered sale deed was obtained in the name of the 1st defendant at his 6 months age. Undoubtedly, D.W.1 had no income to acquire the property and no details were brought on record to establish that Bangaramma possessed sufficient amount to acquire item No. 1 of schedule property but it was acquired within 10 months from the date of death of her husband Venkatarayulu. Bangaramma, being wife of the deceased Venkatarayulu, is supposed to receive death benefits. In the absence of proof of source of income to purchase item No. 1 of schedule property, an inference can be drawn that Bangaramma received death benefits of Venkatarayulu, who died

while in service, and, with the aid of death benefits of Venkatarayulu, she purchased item No. 1 of schedule property. In addition to drawing an inference, division of remaining part of item No. 3 of schedule property, after acquiring part of item No. 3 by Government, is another strong circumstance to believe that item Nos. 1 to 3, though registered document for item No. 1 stood in the name of the 1st defendant, were treated as the property of entire family and, thereafter, divided item No. 3 into 7 shares under Ex.B1 and allotted one such share to the plaintiff. Treating part of item No. 3 of schedule property as joint family property and dividing the same into 7 shares is suffice to conclude that the property was purchased with the income of Venkatarayulu and with the death benefits of Venkatarayulu by Bangaramma in the name of the 1st defendant. If really the 1st defendant is the real owner, there is no obligation for partitioning part of item No. 3 of schedule property. Partition of part of item No. 3 of schedule property itself indicates that joint family is the real owner of item No. 3 of schedule property. On this ground alone, item Nos. 1 to 3 of schedule property can be accepted as joint family property.

22. Coming to item Nos. 2 and 3 of schedule property, Bangaramma did not possess any immovable property or Stridhana to acquire the same since the 1st defendant failed to establish her possessing any source of income or payment of any amount by her parents towards Stridhana. On the other hand, the evidence of P.W.2, who was closely related to the family of Bangaramma and Venkatarayulu, inspires confidence of the trial Court and, on the strength of her testimony, the trial Court disbelieved the contention that parents of Bangaramma were financially sound. In such case, the 1st defendant has to adduce evidence in support of his contention but no piece of evidence is brought on record to prove that parents of Bangaramma paid any amount towards Stridhana. On the other hand, Venkatarayulu was well placed during those days in Central Government as telegraphic signaler. In

the absence of proof of any independent source of income to acquire item Nos. 2 and 3 of schedule property and when the plaintiff proved that Venkatarayulu had sufficient source of income to acquire item Nos. 2 and 3 of schedule property, the Court has no other option except to believe that the property was acquired by Venkatarayulu in the name of Bangaramma who is his wife.

23. Learned counsel for the plaintiff mainly contended that item Nos. 2 and 3 were acquired by Venkatarayulu in the name of his wife as benamidar whereas the contention of learned counsel for the 1st defendant is that when the property stood in the name of Bangaramma, she is the registered owner and, unless it is proved that Bangaramma had no independent source of income and her husband Venkatarayulu had sufficient means to acquire the property, the transaction cannot be said to be a benami transaction. Learned counsel for the 1st defendant, in support of his contention, placed reliance on ***Kovvuri China Venkata Reddy Vs. Kovvuri Ganohi and others***[2], wherein a Division Bench of this Court held that

> *"Where a husband alleges that a purchase in the name of his wife is benami for him, the onus lies on the husband to prove that benami nature of the purchase. The first step in such proof is to establish that the consideration for the purchase was provided by him. Proof of that is not however conclusive in his favour that the transaction is benami. The next step is to establish the alleged motive for the purchase in the name of the wife. Failure to prove the motive alleged may go a long way in enabling the Court to presume that the transaction was intended for the benefit of the wife. In arriving at that presumed intention, the Court will have to consider whether there are admitted or proved facts in the case which show that the real intention in effecting the transaction was to benefit the wife. As between husband and wife, the custody of the document of title, possession of the property, payment of taxes and cists by the husband are not by themselves important. If the intention to benefit the wife can be gathered from the proved facts and the inferences to be drawn from them, the Court would hold against the benami nature of the transaction."*

In ***Binapani Paul Vs. Pratima Ghosh and others***[3], the Apex Court

relied on ***Jaydayal Poddar (deceased) Vs. Mst. Bibi Hazra and others***[4],
wherein the Apex Court spelt out the following six circumstances which can be taken as a guide to determine the nature of the transaction:

(1) the source from which the purchase money came;

(2) the nature and possession of the property, after the purchase;

(3) motive, if any, for giving the transaction a benami colour;

(4) the position of the parties and the relationship, if any, between the claimant and the alleged benamidar;

(5) the custody of the title deeds after the sale; and

(6) the conduct of the parties concerned in dealing with the property after the sale.

In ***Nand Kishore Mehra Vs. Sushila Mehra***[5]***,*** the Apex Court held that

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

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

name of wife or unmarried daughter is not intended to confer any benefit on the person in whose name document was obtained'. Therefore, the plaintiff is entitled to raise plea of benami even according to the provisions of the Benami Transactions (Prohibition) Act, 1988 ('the Act of 1988' for brevity). In fact, the provisions of the Act of 1988 have no application to the present facts of the case for the reason that the transactions were entered long prior to commencement of the Act of 1988. A perusal of the plaint, the plaintiff raised a specific plea that Bangaramma had no independent source of income to acquire any of the items of schedule property and Venkatarayulu, while working as telegraphic signaler, was earning Rs.800/- p.m. during 1926. In support of his evidence, P.W.1 got examined P.W.2 who is sufficiently old. P.W.2 testified about salary of Venkatarayulu as on the date of his death besides testifying that Bangaramma had no independent source of income, parents of Bangaramma were middleclass people, nothing was given to her towards Stridhana, the motive to acquire in the name of his wife is that he, being a Central Government employee under the control of British, cannot acquire any property during those days and, therefore, dispelled the statutory presumption under Section 3 (2) of the Act of 1988. When the plaintiff discharged his initial onus of proof, it will shift to the defendants to prove contra. Certain tests are laid down to determine whether a transaction is benami transaction or not and unless those tests are satisfied, the transactions pertaining to item Nos. 2 and 3 of schedule property cannot be treated as benami transactions.

In ***Valliammal (d) by L.Rs. Vs. Subramaniam and others***[6]***,*** the Supreme Court ruled that

> *"There is a presumption in law that the person who purchases the property is the owner of the same. This presumption can be displaced by successfully pleading and proving that the document was taken benami in the name of another person for some reason, and the person whose name*

appears in the document is not the real owner, but only a benami. Heavy burden lies on the person who pleads that the recorded owner is a benami-holder."

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

In ***Ramaiah Vs. Singaraiah***[7], this Court held that

"Each factor by itself may be decisive, but the cumulative effect or the totality of all the relevant and material factors should be the safe guide for determining the benami nature or otherwise of a transaction."

In ***Lachu Reddy Vs. Venkamma***[8], this Court held that

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

In ***Ramarao Vs. Srikrishna Murthi***[9], this Court laid down four tests to determine the nature of a transaction, they are as follows:

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

2. Custody of the sale deed and connected vouchers.

3. Passing of consideration; and

4. Possession of the property."

In view of the law laid down by the Apex Court and this Court, to determine the nature of a transaction as benami transaction, the transaction has to pass through the above tests to accept the contention of the plaintiff that the transaction pertaining to item Nos. 1 to 3 of schedule property is benami transaction. In the present case, there is specific plea that the transaction pertaining to item Nos. 2 and 3 of schedule property is benami transaction and item No. 1 of schedule property is purchased with the aid of death benefits of Venkatarayulu. The plaintiff adduced satisfactory evidence to prove that Venkatarayulu possessed sufficient source of income, explained under what circumstances Venkatarayulu purchased schedule property in the name of Bangaramma during British ruling and that an Indian employee shall not possess any immovable property but it was not rebutted at least by any suggestion in cross-examination. However, in view of possessing sufficient source of income and in the absence of proof that Bangaramma had no means to acquire item Nos. 2 and 3 of schedule property, it can safely be concluded that item Nos. 2 and 3 were purchased by Venkatarayulu in the name of his wife Bangaramma not intending to confer any benefit on her but for the reason that since he was a Central Government employee, he was required to comply with certain formalities to acquire property as per departmental procedure.

24. The 1st defendant, though raised several contentions, failed to establish source of income of Bangaramma to acquire item Nos. 2 and 3 of schedule property. On the other hand, item No. 3 of schedule property, though registered document was obtained in the name of Bangaramma, was partitioned treating it as joint family property for all practical purposes. In those circumstances, the trial Court rightly concluded that item Nos. 2 and 3 of schedule property was acquired by Venkatarayulu in the name of his wife not intending to confer any benefit on her. In such case, the finding of the trial Court cannot be found fault warranting interference of this Court. Hence, I find no ground to come to a different conclusion than the conclusion arrived by the trial Court to disbelieve that the transaction pertaining to item Nos. 2 and 3 of schedule property is benami transaction.

25. In view of my foregoing discussion, the plaintiff established that Bangaramma, registered owner of item Nos. 2 and 3 of schedule property, did not possess any independent source of income, Venkatarayulu possessed sufficient source of income to acquire item Nos. 2 and 3 of

schedule property in the name of Bangaramma, the motive to obtain documents in the name of Bangaramma and the transaction is benami transaction but the real owner is Venkatarayulu and item No. 1 was purchased with the death benefits of Venkatarayulu. Thereby, item Nos. 1 to 3 belong to Hindu undivided coparcenary. Accordingly, the point is answered in favour of the plaintiff and against the defendants.

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

The plaintiff filed cross-objections challenging the adverse finding recorded against him holding that item Nos. 4 and 5 of schedule property is separate property of defendant Nos. 4 and 2 respectively. The specific contention of the plaintiff is that item Nos. 4 and 5 were acquired with the aid of joint family nucleus *i.e.* with the aid of income from item Nos. 1 to 3 of schedule property but the trial Court disbelieved this contention on the ground that D.W.1 established that item Nos. 4 and 5 belong to defendant Nos. 4 and 2 respectively. In the cross-objections filed by the plaintiff, the plaintiff challenged the only finding with regard to item No. 4 but paid Court fee for item Nos. 4 and 5 of schedule property. According to Order 41, Rule 2 of the Code of Civil Procedure (for short, 'C.P.C.'), unless a ground is raised in memorandum of grounds, Court cannot go beyond memorandum of grounds and decide issue involved in appeal. Order 41, Rule 2 of C.P.C. further says that the appellant shall not, except by leave of the Court, urge or be heard in support of any ground of objection not set forth in the memorandum of appeal; but the Appellate Court, in deciding the appeal, shall not be confined to the grounds of objection set forth in the memorandum of appeal or taken by leave of the Court under this rule provided that the Court shall not rest its decision on any other ground unless the party who may be affected thereby has had a sufficient opportunity of contesting the case on that ground. Thus, it means the Court while deciding an appeal need not limit its decision to the grounds urged in memorandum of appeal but, whenever the Court wants to decide an appeal beyond the grounds urged in memorandum of appeal, sufficient opportunity shall be given to the contesting respondent. In any view of the matter, the plaintiff challenged the finding of the trial Court with regard to item No. 4 only.

27. The main contention of the plaintiff is that item No. 4 of schedule property was acquired with the aid of joint family nucleus. Item No. 4 was allegedly purchased by the 1st defendant in the name of his wife *i.e.* the 4th defendant. When the plaintiff contended that item No. 4 was acquired with the aid of joint family nucleus, it is for him to establish that joint family possessed sufficient nucleus to acquire it. Then, onus of proof will automatically shift to the 4th defendant to prove that it is her separate property having sufficient source of income to acquire the same. To substantiate the contention of the plaintiff, the plaintiff himself was examined as P.W.1 but his evidence is totally silent with regard to source of income that item Nos. 1 to 3 would fetch sufficient income to acquire item No. 4 of schedule property. Except the alleged fetching of monthly rent of Rs.6,000/- from item No. 1, no material is produced to substantiate the said contention and did not disclose anything whether item No.1 was fetching Rs.6,000/- as on the date of purchase of property by the 4th defendant or the 1st defendant in the name of the 4th defendant. P.W.1 further admitted that item No. 4 was being enjoyed by the 4th defendant and she alone realizing the rent. Therefore, this admission strengthens the case of defendant Nos. 1 and 4 that item No. 4 was being enjoyed by the 4th defendant alone but not by the other defendants. In addition to the evidentiary admissions, the surrounding circumstances of the case have to be looked into to decide whether item Nos. 1 to 3 yielded any income to acquire item No. 4. Item Nos. 1 and 2 are two residential houses and item No. 3 is agricultural land in an extent of Ac. 2.40 cents but the plaintiff did not produce any iota of evidence to substantiate his

contention that item Nos. 1 to 3 yielded sufficient income to acquire item No. 4 of schedule property in the name of the 4th defendant by the 1st defendant. Though P.W.1 got examined P.W.2, her evidence is silent as to joint family nucleus to acquire item No. 4 of schedule property.

28. The 1st defendant was examined as D.W.1 and asserted that item No. 5 was purchased by him under Ex.B5 sale deed dated 12-10-1952 but did not state anything about item No. 4 of schedule property. However, in cross-examination dated 04-08-1997, learned counsel for the plaintiff could elicit that the 4th defendant is daughter of Laxminarasayamma who is elder sister of the 1st defendant. Thus, the 1st defendant married his sister's daughter after obtaining permission from the District Judge, Visakhapatnam, in the year 1947. D.W.1, in para No. 3 at page No. 5, admitted that item No. 5 of schedule property was registered in the name of the 4th defendant but the 4th defendant is not an employee, not carrying on any business and she had no independent source of income to acquire item No. 5 covered by Ex.B5. It appears that there is a mistake in recording evidence since Ex.B5 pertains to item No. 4 and it was the consistent case of the parties from the beginning that item No. 4 was registered in the name of the 4th defendant having purchased the same by the 1st defendant in her name. D.W.1 further disclosed that he carried on business independently and, with the income derived therefrom, he purchased item No. 5 in the name of the 4th defendant. Ex.B5 is only an endorsement on the reverse of Ex.B4 registered sale deed obtained by the 4th defendant for item No. 4. As per Ex.B4, the 1st defendant agreed to pay part of sale consideration covered by Ex.B4. Even as per the conversation between the advocate and Seetaramayya, item No. 4 was purchased in the name of his daughter *i.e.* the 4th defendant but not by the 1st defendant. The evidence adduced by the plaintiff goes against his own

case. Ex.B5 is endorsement on sale deed dated 12-10-1952. By that time, D.W.1 was carrying on business independently. Therefore, the evidence on record is sufficient to conclude that item No. 4 was purchased by the 1st defendant in the name of the 4th defendant, the same is being enjoyed by her and the rent therefrom is also being enjoyed by her independently in view of clear admission made by P.W.1 in his evidence. Though item No. 4 was acquired by the 1st defendant in the name of the 4th defendant, it would not form part of the property of Hindu undivided coparcenary for the reason that it was purchased with the independent income of the 1st defendant in the name of the 4th defendant to confer benefit on her. Though the 1st defendant did not examine any of the witnesses to prove income, it is an undisputed fact that D.W.1 carried on business and earned income. However, it is not even the case of the plaintiff that it was joint family business. In such case, item No. 4 cannot be said to be joint family property. Hence, I find no illegality in the finding recorded by the trial Court.

29. Though the plaintiff claimed right in item No. 5 and an adverse finding was also recorded by the trial Court, obviously, for different reasons, he did not raise any specific objection in the cross-objections questioning the finding of the trial Court with regard to item No. 5. In the absence of any objection against the finding recorded by the trial Court for item No. 5 of schedule property and in view of bar under Order 41 Rule 2 of C.P.C., I am not inclined to interfere with the finding recorded by the trial Court with regard to item No. 5 of schedule property. Hence, I find no illegality in the finding recorded by the trial Court while holding that item Nos. 4 and 5 belong to defendant Nos. 4 and 2 respectively. The same is, therefore, hereby confirmed holding this point against the plaintiff and in favour of the defendants.

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

Though the 6th defendant did not claim any right before the trial Court claiming 1/7th share in item Nos. 1 and 2 and no adverse finding was recorded against her, she filed cross-objections contending that, in view of central amendment to Section 6 of the Act of 1956, she is entitled to claim 1/7th share in item Nos. 1 and 2 of schedule property, being daughter, and prayed to grant 1/7th share in item Nos. 1 and 2 of schedule property. No doubt, the plaintiff and defendant Nos. 2 and 3 are sons of the 1st defendant and grandsons of Venkatarayulu. Defendant Nos. 5 to 7 are daughters of the 1st defendant. By the date of filing suit in 1999, defendant Nos. 5 to 7 were aged 48, 49 and 47 respectively, they are all married and they did not claim benefit of Section 29-A A.P. amendment to the Act of 1956 but suddenly raised a contention that, in view of central amendment to Section 6 of the Act of 1956, they are entitled to claim equal share in schedule property along with the plaintiff. However, this contention was objected by learned counsel for the plaintiff on the ground that in the absence of any claim and adverse finding against the 6th defendant by the trial Court, the cross-objections are not maintainable. *Per contra*, learned counsel for the 6th defendant contended that change of law can be taken note of by the Court and taking into consideration of central amendment to Section 6 of the Act of 1956, the Court can mould the relief and grand equal share to the 6th defendant.

31. Order 41 Rule 22 of C.P.C. permits any respondent, though he may not have appealed from any part of the decree, may not only support the decree (but may also state that the finding against him in the Court below in respect of any issue ought to have been in his favour; and may also take any cross-objection) to the decree which he could have taken by way of appeal, provided he has filed such objection in the Appellate Court within one month from the date of service on him or his pleader of notice of the day fixed for

hearing the appeal, or within such further time as the Appellate Court may see fit to allow. From this, it is clear that cross-objections can be filed only when an issue is held against respondent in appeal or an adverse finding is recorded against respondent in appeal by trial Court. In the present case, the 6th defendant did not file written statement raising any contention, no issue was framed regarding her entitlement to share on par with the plaintiff and no adverse finding is recorded against her in the entire judgment.

32. In ***Banarsi and others Vs. Ram Phal***[10], the Apex Court, while considering Sections 96 and 100 of C.P.C. and Order XLI Rules 22 (1) and 33 of C.P.C., held as follows:

> *"The CPC Amendment of 1976 has not materially or substantially altered the law except for a marginal difference. Even under the amended Order 41 Rule 22 Sub-rule (1) a party in whose favour the decree stands in its entirety is neither entitled nor obliged to prefer any cross objection. However, the insertion made in the text of Sub-rule (1) makes it permissible to file a cross objection against a finding. The difference which has resulted we will shortly stated. A respondent may defined himself without filing any cross objection to the extent to which decree is in his favour, however, if he proposes to attack any part of the decree he must take cross objection. The amendment inserted by 1976 amendment is clarificatory and also enabling and this may be made precise by analysing the provision. There may be three situations:*
>
> *(i) The impugned decree is partly in favour of the appellant and partly in favour of the respondent;*
>
> *(ii) The decree is entirely in favour of the respondent though an issue has been decided against the respondent;*
>
> *(iii) The decree is entirely in favour of the respondent and all the issues have also been answered in favour of the respondent but there is a finding in the judgment which goes against the respondent.*
>
> *In the type of case (i) it was necessary for the respondent to file an appeal or take cross objection against that part of the decree which is against him if he seeks to get rid of the same though that part of the decree which is in his favour he is entitled to support without*

taking any cross objection. The law remains so post amendment too. In the type of cases (ii) and (iii) pre-amendment CPC did not entitle nor permit the respondent to take any cross objection as he was not the person aggrieved by the decree. Under the amended CPC, read in the light of the explanation, though it is still not necessary for the respondent to take any cross objection laying challenge to any finding adverse to him as the decree is entirely in his favour and he may support the decree without cross objection; the amendment made in the text of Sub-rule (1), read with the explanation newly inserted, gives him a right to take cross objection to a finding recorded against him either while answering an issue or while dealing with an issue. The advantage of preferring such cross objection is spelled out by Sub-rule (4). In spite of the original appeal having been withdrawn or dismissed for default the cross objection taken to any finding by the respondent shall still be available to be adjudicated upon on merits which remedy was not available to the respondent under the unamended CPC. In pre-amendment era, the withdrawal or dismissal for default of the original appeal disabled the respondent to question the correctness or otherwise of any finding recorded against the respondent."

The Apex Court again discussed about the Scope of Order XLI Rules 4 and 22 of C.P.C. and finally concluded as follows:

"The power is subject to at least three limitations: firstly, the power cannot be exercised to the prejudice or disadvantage of a person not a party before the Court: secondly, a claim given up or lost cannot be revived; and thirdly, such part of the decree which essentially ought to have been appealed against or objected to by a party and which that party has permitted to achieve a finality cannot be reversed to the advantage of such party. A case where there are two reliefs prayed for and one is refused while the other one is granted and the former is not inseparably connected with or necessarily depending on the other, in an appeal against the latter, the former relief cannot be granted in favour of the respondent by the appellate court exercising power under Rule 33 of Order 41."

In view of the law declared by the Apex Court, the 6th defendant is not entitled to file cross-objections under Order 41 Rule 22 of C.P.C. since no adverse finding was recorded against her.

33. Item Nos. 2 and 3 of schedule property was acquired by Venkatarayulu in the name of his wife Bangaramma, who was benamidar, and, after her death, those two items would devolve upon the legal-heirs of late Venkatarayulu. Similarly, item No. 1 was purchased with the death benefits of late Venkatarayulu by Bangaramma in the name of the 1st defendant at his 6 months age. Item No. 3 was divided among the plaintiff and defendant Nos. 1 to 3 and 5 to 7 into 7 equal shares. When item Nos. 2 and 3 of schedule property devolved upon the 1st defendant, male descendents i.e. the plaintiff and defendant Nos. 2 and 3, being grandsons of Venkatarayulu and the 1st defendant, being son of late Venkatarayulu, are entitled to partition the same since female descendents were not coparceners as on the date of opening of succession. As such, they are not entitled to claim any share in item Nos. 1 and 2 of schedule property of the deceased Venkatarayulu as coparceners with the aid of central amendment to Section 6 of the Act of 1956.

34. In ***Sheela Devi and others Vs. Lal Chand and another*** ***[11]***, the Apex Court held that the law existing on the date of opening succession alone is applicable. In ***Prakash and others Vs. Phulavati and others*** ***[12]***, the Apex Court held as follows:

> *"The proviso to Section 6(1) and Sub-section (5) of Section 6 clearly intend to exclude the transactions referred to therein which may have taken place prior to 20th December, 2004 on which date the Bill was introduced. Explanation cannot permit reopening of partitions which were valid when effected. Object of giving finality to transactions prior to 20th December, 2004 is not to make the main provision retrospective in any manner. The object is that by fake transactions available property at the introduction of the Bill is not taken away and remains available as and when right conferred by the statute becomes available and is to be enforced. Main provision of the Amendment in Section 6(1) and (3) is not in any manner intended to be affected but strengthened in this way. Settled principles governing such transactions relied upon by the Appellants are not intended to be done away*

with for period prior to 20th December, 2004. In no case statutory notional partition even after 20th December, 2004 could be covered by the Explanation or the proviso in question. The rights under the amendment are applicable to living daughters of living coparceners as on 9th September, 2005 irrespective of when such daughters are born. Disposition or alienation including partitions which may have taken place before 20th December, 2004 as per law applicable prior to the said date will remain unaffected. Any transaction of partition effected thereafter will be governed by the Explanation."

In view of the law declared by the Apex Court in the above two judgments, the law that is applicable on the date of opening succession alone governs the rights of succession of Hindus.

35. The 6th defendant and the other daughters of the 1st defendant *i.e.* defendant Nos. 5 and 7 were already married by the date of filing the suit and they were majors. Even otherwise, by the date of filing the suit in the year 1987, at best, they are entitled to claim the benefit of law that was prevailing on the date of filing the suit *i.e.* Section 29-A of the Act of 1956 (A.P. amendment) but not the law that came into force on account of central amendment to Section 6 of the Act of 1956 in view of the law declared by the Apex Court in the judgments referred *supra*. Even to claim the benefit under Section 29-A of the Act of 1956, they must be minors or unmarried by the date of the Act came into force but the daughters of the 1st defendant including the 6th defendant-cross objector were not minors or unmarried. Therefore, they are not entitled to claim any right as coparceners even as per A.P. amendment to the Act of 1956. Viewed from any angle, defendant Nos. 5 to 7 are not entitled to claim any right in view of A.P. amendment to the Act of 1956 or central amendment to the Act of 1956. Therefore, the 6th defendant is not entitled to claim share in item Nos. 1 and 2 as coparcener on par with male descendents of late Venkatarayulu. Apart from that, in the absence of any claim before the trial Court by filing written statement and

issue framed by the trial Court, the 6th defendant is not entitled to file cross-objections to claim independent right. Accordingly, the point is answered against the 6th defendant and in favour of the plaintiff.

36. As per my finding on point No. 1, the plaintiff is a coparcener and the 1st defendant succeeded the estate of late Venkatarayulu. The plaintiff and defendant Nos. 1 to 3, being coparceners, are entitled to claim equal share in the estate of the deceased Venkatarayulu. Similarly, item No. 3 of schedule property was already divided *vide* Ex.B1. Therefore, no decree need be passed for division of item No. 3 while declaring that the plaintiff is entitled to 1/4th share in item Nos. 1 and 2 of schedule property by passing a preliminary decree. Thereby, the trial Court rightly passed preliminary decree in favour of the plaintiff declaring that he is entitled to 1/4th share in item Nos. 1 and 2 and 1/7th share in item No. 3 of schedule property while declining decree for division of item Nos. 4 and 5 of schedule property. Therefore, the finding of the trial Court does not call for interference of this Court even after reappraisal of entire evidence on record. Hence, the finding of the trial Court is hereby confirmed holding this point in favour of the plaintiff and against the defendants.

37. The 1st defendant claimed right in schedule property as legatee under Ex.B8 will allegedly executed by Bangaramma. The trial Court disbelieved the will assigning its own reasons. However, this Court, while deciding point Nos. 2 and 3, held that the real owner is Venkatarayulu but not Bangaramma. Therefore, Bangaramma had no testamentary capacity to execute the will bequeathing schedule property to the 1st defendant. Hence, genuineness or otherwise of Ex.B8 will need not be examined. Thereby, the 1st defendant is not entitled to claim any right in schedule property based on Ex.B8 will.

38. Sri Dr. Balabolu Ramesh, S/o late Vasudeva Rao, who purchased part of schedule property, is impleaded during pendency of the appeal. The only contention of the 23rd respondent is that he is a *bona fide* purchaser for valuable consideration and entitled to claim equities. No doubt, if the 23rd respondent is a *bona fide* purchaser for valuable consideration without notice of pendency of litigation, he is entitled to claim equities but here the 23rd respondent did not plead and prove that he is a *bona fide* purchaser for valuable consideration without noticing the pendency of litigation. Since the 23rd respondent is impleaded during pendency of the appeal, he has no opportunity to raise any plea by filing written statement and adduce any evidence in support of his plea. In those circumstances, he can contest the final decree petition raising possible pleas to protect his right in the property. Hence, liberty is given to both parties to contest the claim of the 23rd respondent regarding equities in final decree petition and the trial Court is at liberty to record a finding whether or not the 23rd respondent is a *bona fide* purchaser for valuable consideration without notice of pending suit and permit to claim equities subject to finality.

39. In view of my finding on point Nos. 1 to 4, I find no error in the finding recorded by the trial Court warranting interference of this Court. Hence, the finding of the trial Court is hereby confirmed as the appeal is devoid of merits.

40. In the result, the appeal and both the cross-objections are dismissed confirming the judgment and preliminary decree dated 27-05-1999 passed in O.S.No. 543 of 1987 on the file of the Court of I Additional Senior Civil Judge, Visakhapatnam. Pending miscellaneous petitions, if any, in this appeal, shall stand dismissed in consequence. No order as to costs.

M.SATYANARAYANA MURTHY, J.

Date: 05th February, 2016.

JSK

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[1] AIR 1982 SC 1043

[2] 1976 (2) APLJ 237

[3] (2007) 6 SCC 100

[4] AIR 1974 SC 171

[5] (1995) 4 SCC 572

[6] (2004) 7 SCC 233

[7] 1973 (2) APLJ 10 (SN)

[8] 1956 An.W.R.943

[9] AIR 1962 AP 226

[10] 2003 (9) SCC 606

[11] (2006) 8 SCC 581

[12] MANU/SC/1241/2015