THE HON'BLE SRI JUSTICE M.SATYANARAYANA MURTHY

SECOND APPEAL NO.1167 OF 1998

JUDGMENT:

The plaintiffs in O.S.No.83 of 1985 on the file of the Subordinate Judge, Tadepalligudem, having lost the claim before the Appellate Court in A.S.No.135 of 1992 on the file of the District Court, West Godavari, Eluru, preferred the present second appeal, challenging dismissal of the suit filed by the plaintiffs before the Appellate Court, thereby reversed the judgment of the Trial Court.

For convenience of reference, the parties to the appeal will hereinafter be referred to as plaintiffs and defendants, as arrayed in O.S.No.83 of 1985.

The plaintiffs 1 to 3 filed suit for declaration of title and for recovery of possession of the suit schedule property.

While the plaintiffs and defendants 1 & 2 are living jointly, the 1st defendant started acting detrimental to the interest of the joint family members, while dealing with the property for Avyavaharika purpose. At the intervention of elders and relatives, the 1st defendant executed a registered relinquishment deed dated 24.05.1974 and relinquished the undivided rights in the joint family property in favour of the plaintiffs by receiving consideration of Rs.1,000/-. Since then, the plaintiffs were in exclusive possession and enjoyment of the suit schedule property as absolute owners. Thus, the plaintiffs became absolute owners of entire joint family property, including the suit schedule property.

As the defendants 1 & 2, who are the parents of the plaintiffs did not look after them during their childhood, they were brought up by their maternal grandfather Punnam Subba Rao at Hyderabad. But the plaintiffs occasionally used to visit their parents at Pothavaram. While so, defendants 1 & 2 colluded with the 3rd defendant and brought into existence a false document in respect of the plaint schedule property. Taking advantage of the absence of the plaintiffs, 3rd defendant trespassed into the plaint schedule property. When the plaintiffs questioned the first defendant, he informed that 'A' schedule building was let out to the 3rd defendant 6 years ago and during his lifetime, when the first plaintiff questioned the 3rd defendant in the month of November, 1984, he did not respond properly, but indicated that he is going to purchase the property. It is averred that defendants 1 & 2 cannot enter into any transaction in respect of the schedule property as any transaction without the sanction the District Court is void and does not bind the plaintiffs.

Defendants 1 & 2 agreed to sell the property by creating an agreement of sale. Though the plaintiffs got issued a legal notice dated 13.11.1984, the 3rd defendant claimed recovery of possession of 'A' schedule, and did not give reply to the legal notice and not even complied the legitimate demands of the plaintiffs. The 3rd defendant did not even pay rent to the plaintiffs at any time and therefore, the possession is unlawful and thereby entitled to mesne profits payable by the person in lawful or wrongful possession i.e. 3rd defendant. Hence, the suit was filed.

Initially defendants 1 & 2 remained *exparte.* But, after the death of 1st plaintiff, the 2nd defendant filed her written statement separately contending that plaintiffs 2 & 3 were residing at Hyderabad with her father and 1st defendant is acting against the interest of the plaintiffs and the defendant. It is stated in the written statement that the alleged agreement said to have been executed by the 1st defendant in favour of the 3rd defendant is a rank forgery and it is not binding on the 2nd defendant and contended that she never executed any agreement in any capacity and requested to allot her share in the property to be delivered to her.

The 3rd defendant resisted the claim of the plaintiffs raising several contentions while denying the contention of the plaintiffs that the suit schedule property is a joint family property and the 1st defendant is the sole absolute owner of the suit property. It is stated that the 1st defendant never dealt with the property for Avyavaharika purpose and the plaintiffs were never in possession and enjoyment of the suit property.

It is specifically contended that defendants 1 & 2 while representing that they are absolute owners of the suit property, executed an agreement of sale dated 09.03.1979 for Rs.13,500/- and on 18.06.1979, the 1st defendant received an amount of

Rs.12,500/-. Thus, defendants 1 & 2 agreed to sell the property to 3rd defendant for valuable consideration. The 3rd defendant got issued legal notice dated 01.10.1984 demanding defendants 1 & 2 to execute registered sale deed. But, as defendants 1 & 2 refused to receive notice, the same was returned with an endorsement of refusal.

It is contended that as the alleged notice issued to 3rd defendant by the plaintiffs is false, and as there was no necessity to give reply, 3rd respondent did not give reply to the notice.

It is alleged that the relinquishment deed dated 24.05.1974 is a collusive one executed to avoid payment of debts, though they are binding on the family and therefore, the same is not enforceable under law and such document would not create any right in the immovable property. It is also contended that the document was never acted upon and no consideration was passed thereunder. The alleged relinquishment deed is not actually relinquishment deed, but, it is a settlement deed.

It is asserted that the plaintiffs are residing along with defendants 1 & 2, but not along with their grandfather. That apart, the suit property is a self acquired property by defendants 1 & 2 and they have got every right to seek for specific performance of agreement of sale and also entitled to claim protection under Section 53-A of Transfer of Property Act, as the 3rd defendant is ready and willing to perform his obligation under the agreement of sale, it is prayed that the plaintiffs are not entitled to any of the reliefs claimed in the suit.

Based on the above pleadings, the Trial Court framed the following issues and additional issues:

1. *Whether the 1st defendant acted detrimental to the interests of the plaintiffs and squandered the properties for Avyavaharika purpose?*
2. *Whether the 1st defendant has relinquished his undivided share in the joint family properties in favour of the plaintiffs upon taking consideration of Rs.1000/- pursuant to compromise and executed a relinquishment deed dated 25.4.74?*
3. *Whether the third defendant has acquired any right title or interest in the plaint schedule property?*
4. *Whether the defendants are liable to be evicted and put the plaintiffs in possession of the plaint schedule property?*
5. *Whether the third defendant is a bonafide purchaser for consideration without notice to the plaintiff's right?*
6. *To what relief?*

Additional issue framed on 1.8.90

1. *Whether the agreement is true?*
2. *Whether the 3rd defendant is entitled to have a share or order delivery of possession of her share?"*

During Trial, on behalf of the plaintiffs P.Ws 1 to 4 were examined and Exs.A-1 to A-5 were marked. On behalf of the defendants D.Ws.1 to 5 were examined and Exs.B-1 to B-15 were marked.

The Trial Court upon hearing argument of both the plaintiffs and the defendants, recorded a finding that the agreement of sale executed in favour of the 3rd defendant cannot be said to have been executed for Avyavaharika purpose, but executed for the purpose of relinquishing the shave in the suit property. It was also observed that the 1st defendant acted detrimental to the interest of the plaintiffs pertaining to suit property. The Trial Court also held that the 1st defendant has no right to deal with the property, in view of relinquishment of undivided share in the joint family property in favour of the plaintiffs dated 24.05.1974 and concluded that the sale agreement Ex.B-1 executed by defendants 1 & 2 in favour of 3rd defendant is not proved and 3rd defendant is not bonafide purchaser of the suit property, thereby, 3rd defendant has not acquired any right or title to the property. The Trial Court concluded that the relief of specific performance is barred and the defendants are liable to be evicted from the suit property and granted decree in favour of the plaintiffs.

Aggrieved by the judgment and decree of the Trial Court, the 3rd defendant having lost his claim before the Trial Court preferred an appeal before the District Judge, West Godavari at Eluru in A.S.No.135 of 1992 and the same was allowed by decree and judgment dated 30.04.1998, setting aside the judgment and decree of the Trial Court and dismissed the suit filed by the plaintiffs. The First Appellate Court thus, reversed the findings recorded by the Trial Court, holding that the agreement of sale marked as Ex.B-1 is enforceable under law and that the relinquishment deed is sham and nominal, as the plaintiffs failed to prove the intention of 1st defendant to execute Ex.A-1 relinquishment deed. The evidence of D.W-1 appears to be trustworthy in view of the admission made by him in cross-examination and that apart, Ex.A-1 was executed only to avoid payment of debts mentioned therein, to save the property from the hands of the creditors and thereby Ex.A-1 is not binding and it is sham and nominal, considering several circumstances pointed out by the Appellate Court in paragraph 15 of the judgment. Assailing the decree and judgment passed by the Appellate Court in A.S.No.135 of 1992, the present appeal is filed raising several contentions and formulated substantial question of law. But this Court while admitting the appeal on 29.09.1999 formulated the following substantial questions of law.

1. ***Whether the finding of the lower appellate court that the registered relinquishment Ex.A-1 dated 24.05.1974 is a nominal document is perverse?***
2. ***Whether the finding of the lower appellate court that the plaint schedule property is not a joint hindu property is perverse.?***

During hearing learned counsel for the petitioner Sri S. Srinivas Reddy would contend that when 1st defendant received Rs.1,000/- towards value of his share and executed a relinquishment deed, relinquishing his undivided share in the joint family property, he is no more an owner of any part of the property or undivided share. Learned counsel contends that the Trial Court rightly discussed entire evidence in proper perspective and arrived at proper conclusion by assigning reasons to its findings, that Ex.A-1 is binding on the defendants 1 & 2 thereby defendants 1 & 2 are not competent to execute Ex.B-1 agreement of sale in favour of 3rd defendant. It is further contended that the First Appellate

Court, being the final Court of fact, did not consider the evidence in proper perspective and committed an error.

It is also further contended that defendants 1 & 2 are incompetent to execute the agreement of sale marked as Ex.B-1 and it is not binding on the plaintiffs and the sale of agreement with 3rd defendant is against the purport of Section 8 of Hindu Minority and Guardianship Act, 1955, as no prior permission was obtained for sale of minor's property, as required under the provisions of the Act. Therefore, such agreement of sale is not valid and not binding on the plaintiffs, since the 3rd defendant is in possession of the property without any lawful entitlement, and such possession shall be deemed to be unlawful and thereby liable to pay damages to the plaintiffs while delivering vacant possession of the property. But the First Appellate Court on erroneous appreciation of evidence, came to a totally wrong conclusion and therefore, prayed to set-aside the decree and judgment of the First Appellate Court while restoring the decree and judgment passed by the Trial Court and placed reliance on an unreported judgment of this Court in A.S.No.1178 of 1997 dated 10.10.2014.

However, learned counsel places reliance on the judgment in **Yadarao Dajiba Shrawane (dead) by L.Rs v. Nanilal Harakch and Shah (dead) and others**[1] to contend that when the First Appellate Court mis-interpreted the documentary evidence, or when the First Appellate Court on wrong consideration of in-admissible evidence,

[1] AIR 2002 SUPREME COURT 2849

ignoring material evidence, the High Court in second appeal is entitled to interfere with the judgment while exercising jurisdiction under Section 100 of C.P.C that the admissions of the parties or their witnesses is relevant piece of evidence, due weight should be given to said admissions and the Court is not supposed to ignore the admissions made by the parties and therefore, the Court while exercising jurisdiction under Section 100 of C.P.C can interfere as the judgment of the First Appellate Court is perverse on the face of the record.

Learned counsel also placed reliance on another judgment reported in **Neelakantan and others v. Mallika Begum**[2] to contend that when the First Appellate Court wrongly placed burden of proof on plaintiffs to establish a particular property in question, that would give rise to substantial question of law and while exercising jurisdiction under Section 100 of C.P.C can interfere with said finding, as such finding is perverse.

On the strength of the above judgments, learned counsel for the plaintiffs/appellants prayed to allow the second appeal and set-aside the decree and judgment of the Appellate Court restoring the judgment and decree passed by the Trial Court and pass a decree in favour of the plaintiffs with other consequential reliefs.

Per contra, Smt. Neeraja Reddy, learned counsel appearing on behalf of Sri B. Sudhakar Reddy for the respondents would contend that when the First Appellate Court recorded a fact

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[2] AIR 2002 SUPREME COURT 827

finding, this Court while exercising jurisdiction under Section 100 of C.P.C cannot normally interfere with the findings recorded by the First Appellate Court on the ground that the findings are perverse, unless it is demonstrated by the appellants that the First Appellate Court did not consider a particular piece of evidence in proper perspective or consider inadmissible evidence. In the absence of such *prima facie* proof, this Court cannot interfere with the findings recorded by the Trial Court based on the alleged perversity in the findings recorded by the First Appellate Court and placed reliance on the judgment of the Apex Court in **Kondiba Dagadu Kadam v Savitribai Sopan Gujar and others**[3] and also placed reliance on the judgment of this Court in **Dakarapu Lakshmana Swamy v. Maddula Narasimha Rao and others**[4] to contend that, when the plaintiffs failed to prove payment of consideration under Ex.A-1, the alleged relinquishment deed executed by the 1st defendant in favour of the plaintiffs is intended to avoid payment of debts mentioned in Ex.A-1, as the same can be said to be sham and nominal with an intention to avoid debts due to various creditors and the same is unenforceable under law. That apart, though the 3rd defendant is in possession of the property, based on an agreement of sale, evidencing delivery of possession, he is entitled to claim protection under Section 53-A of Transfer of Property Act. Finally, it is contended by the learned counsel for 3rd defendant that by the date of execution of relinquishment deed Ex.A-1, the plaintiffs were just less than 10 years old without any

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[3] (1999) 3 Supreme Court Cases 722
[4] 2014 (5) ALD 577

independent source of income even to pay Rs.1,000/- covered by Ex.A-1. In the absence of proof of independent source of income, Rs.1,000/- to pay to 1st defendant under settlement deed marked as Ex.A-1, the relinquishment deed which is nothing but sham and nominal is aimed to avoid debts due to various creditors. In the absence of consideration of Ex.A-1, the finding of the First Appellate Court cannot be interfered. The First Appellate Court also concluded that the plaintiffs failed to establish that the property covered by Ex.A-1 was acquired by the joint family, since 1st defendant is a businessman having his own independent source of income besides deriving income from agricultural land which was allotted to him in the partition between him and his brother and obtained registered sale deed in his name, in the absence of proof that the property was acquired with the aid of ancestral nucleus, the plaintiffs are disentitled to claim relief of declaration and the same would not form part of the ancestral property which allegedly devolved upon the plaintiffs and 1st defendant, being members of Hindu undivided coparcenary. Learned counsel further contends that the finding of the First Appellate Court does not call for interference, since the finding is free from any legal infirmity and based on appreciation of evidence and finally prayed to dismiss the appeal, confirming the decree and judgment passed by the First Appellate Court.

In view of the rival contentions and the substantial question of law formulated by this Court on 29.09.1999, I would like to confine my decision to the substantial questions of law formulated by this Court and decide those questions.

IN RE POINT No.1:

This Court, at the time of admitting the second appeal decided the grounds of appeal and the judgment of the Trial Court and First Appellate Court, formulated a question regarding perversity in the finding recorded by the Appellate Court with regard to Ex.A-1 dated 24.05.1974. It is the case of the plaintiffs that the suit schedule property was originally joint Hindu undivided coparcenary property/joint family property where the plaintiffs and 1st defendant are joint family members or coparceners. Since 1st defendant succeeded Ac.13-72 cents from his ancestors vide Ex.A-5 dated 31.08.1965, subsequent to the partition covered by Ex.A-5 the first defendant allegedly purchased the suit schedule property under the registered sale deed marked as Ex.B-15 with the ancestral nucleus. No doubt, as per original of Ex.A-5 dated 31.08.1965 Ac.13-72 cents was allotted to the share of 1st defendant in the partition between himself and his brothers Gunnaeshwar and others. But, with the income derived from the said property, the plaintiffs and the defendants 1 & 2 used to maintain themselves, but, the suit property was purchased under the original of Ex.B-15 and registered in the name of 1st defendant alone. There is sufficient evidence to come to a conclusion that the schedule property which is in dispute under the original of Ex.B-15 is joint family or Hindu undivided coparcenary. When the

3[rd] defendant contended that the property purchased by him under Ex.B-1 is the separate property of 1[st] defendant, it is for him to prove that 1[st] defendant has got an independent source of income to acquire the property covered by Ex.B-1. But, no evidence is brought on record to prove that the property covered by Ex.B-1 was acquired with income derived from any independent source of income by the first defendant. When the plaintiffs are able to establish that 1[st] defendant was allotted Ac.13-72 cents vide original of Ex.A-5 and deriving income thereon, it is sufficient to conclude that with the ancestral nucleus, property covered by Ex.B-1 was acquired, but this fact was not considered.

The members of the Hindu undivided coparcenary are continuing and possessing coparcenary property and they are deemed to be continuing as members of the coparcenary. Unless one is able to establish that they got independent sources of income to acquire any others property, they are entitled to claim joint right over any property purchased by one of the coparceners. Though, the initial onus of proof is on the plaintiffs, it is asserted that particular property was purchased with the aid of income from coparcenary property and they are required to establish that the joint family/Hindu undivided coparcenary not only possessed coparcenary property, but also required to prove that there is sufficient nucleus to acquire the property in dispute as held by the Apex Court.

In **Srinivasa Krishnarao Kango Vs. Narayan Devji Kango and others[5]**, the Full Bench of the Apex Court held as follows:

> "Proof of the existence of a joint family does not lead to the presumption that property held by any member of the family is joint, and the burden rests upon anyone asserting that any item of property was joint to establish the fact. But where it is established that the family possessed some joint property which from its nature and relative value may have formed the nucleus from which the property in question may have been acquired, the burden shifts to the party alleging self acquisition."

In **Appasaheb Peerappa Chandgade Vs. Devendra Peerappa Chandgade[6]** , the Apex Court relying on its earlier judgments, held as follows:

> "When the defendants in the suit failed to establish from their evidence that they had sufficient means and out of which such property could be purchased. The purchase of the property by the defendants is not believable. Thus, it means the burden is upon the defendant to prove that defendant has got sufficient means to acquire the property."

If this principle is applied to the present facts of the case, the burden is upon the defendants to establish that various items of the schedule property were purchased with self exertions otherwise a presumption shall be drawn that the schedule property is the Hindu undivided coparcenary property. However, in **Mallipudi Narasimhamurthy Vs. Mallipudi Nagabhushanam[7]**, this Court held as follows:

> "Hence, the burden of proof to show that the property, which was acquired by a member of a joint Hindu family in his name belongs to the

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[5] AIR 1954 (SC) 379 (1)
[6] AIR 2007 C 218
[7] AIR 1956 AP 256

> joint family, is upon the person who sets up that plea. But if there are admissions made by the member, then the onus is shifted on to prove that what he admitted is not true."

Similarly, in **D. S. Lakshmaiah and another Vs. L. Balasubramanyam and another**[8], the Apex Court held as follows:

> "There is no presumption of a property being joint family property only on account of existence of a joint Hindu family. The one who asserts has to prove that the property is a joint family property. If, however, the person so asserting proves that there was nucleus with which the joint family property could be acquired, there would be presumption of the property being joint and the onus would shift on the person who claims it to be self-acquired property to prove that he purchased the property with his own funds and not out of joint family nucleus that was available."

In **Baikuntha Nath Paramanik (dead) by LRs and heirs Vs. Sashi Bhusan Pramanik (Dead) by his LRs and others**[9], the Apex Court held as follows:

> "When a joint family is found to be in possession of nucleus sufficient to make the impugned acquisitions then a presumption arises that the acquisitions standing in the names of the persons who were in the management of the family properties are family acquisitions."

In **Surendra Kumar Vs. Phoolchand (dead) through LRs and another**[10], the Apex Court in Para 6 of the judgment held as follows:

> "It is no doubt true that there is no presumption that a family because it is joint possessed joint property and therefore the

[8] 2003 (10) SCC 310
[9] AIR 1972 SC 2531
[10] 1996 (2) SCC 491

> person alleging the property to be joint has to establish that the family was possessed of some property with the income of which the property could have been acquired. But such a presumption is a presumption of fact which can be rebutted. But where it is established or admitted that the family which possessed joint property which from its nature and relative value may have formed sufficient nucleus from which the property in question may have been acquired, the presumption arises that it was the joint property and the burden shifts to the party alleging self-acquisition to establish affirmatively that the property was acquired without the aid of the joint family. Both the courts below have scrutinized the evidence bearing in mind the aforesaid legal position and have rightly come to the conclusion that the property in question is the joint family property. The appreciation of evidence has been rightly made bearing in mind the correct legal position. The appellant thus has utterly failed to establish that the consideration money for the property was paid out of his personal funds. Consequently, there is no justification for Supreme Court's interference with the said concurrent findings of the two courts below."

In view of the law declared by the Apex Court, it is for the plaintiffs herein to prove that the Hindu coparcenary possessed sufficient nucleus to acquire the 'A' schedule property herein i.e. residential house as the document was obtained in the name of 1st defendant. Here, admittedly, 1st defendant was allotted Ac.13-72 cents under Ex.A-5 dated 31.08.1965 in the partition among his brothers and the vacant site was purchased subsequent to partition of coparcenary property by 1st defendant and his brothers and later constructed a house on the vacant site. Admittedly, the title to the property rests with 1st defendant and in the cross-examination P.W.1 admitted that as per his knowledge, his father purchased Ac.5-00 cents and again P.W.1 was recalled and filed registration extract of partition deed as Ex.A-5 and it is contended that his father was allotted Ac.13-72 cents towards his share and out of the same, he sold Ac.3-00 of land, but the sale of Ac.3-00 of land was to would acquire 'A' schedule property, house site is not based on any pleadings and it is a subsequent development made by the plaintiffs, conveniently to establish that the property was purchased with ancestral nucleus. In any view of the matter, when the plaintiffs are able to establish that the Hindu undivided coparcenary possesses sufficient nucleus, it is for 1st defendant to establish that he has got sufficient independent income from any other source other than the coparcenary property, but conveniently he avoided to enter into witness box to explain whether he purchased the suit schedule property and constructed a building with or without the aid of ancestral nucleus or income derived therefrom. Admittedly, the plaintiffs were minors when the said site was purchased and construction was raised. Thus, 1st defendant was alone maintaining the house and plaintiffs were not earning anything to contribute any amount to purchase the property or even to raise construction in the vacant site. The First Appellate Court concluded that, in the absence of any evidence to prove that the plaintiffs have got independent source of income to contribute anything to purchase or to raise a structure, the property cannot be said to be acquired with a joint family or ancestral nucleus. But, this finding is contrary to the law declared by the Apex Court in the judgment referred supra. Therefore, the findings of the First Appellate Court that the property was self acquired property by 1st defendant, in the absence of establishing any independent source of income to acquire the property by 1st defendant himself is contrary to the law, as declared by various Courts referred supra. Hence, the finding of the Appellate Court is hereby set-aside holding that the property was acquired with the joint family nucleus. Accordingly, the point is answered.

In Re substantial question No.2:-

The 2nd substantial question of law formulated by this Court is regarding the genuineness and validity of relinquishment deed Ex.A-1 dated 24.05.1974. Since the First Appellate Court on reappraisal of the entire evidence on record, concluded that Ex.A-1 was sham and nominal, since the First Appellate Court considered all the facts and circumstances of the case including oral and documentary evidence, concluded that Ex.A-1 is a sham and nominal document and explained the circumstances under which Ex.A-1 was brought into existence.

Even assuming for a moment, it is a substantial question of law, as it goes to the root of the case, this Court is required to advert to the evidence on record to decide the genuineness of Ex.A-1 dated 24.05.1974. It is the specific contention of the plaintiffs from the beginning that as 1st defendant contracted Avyavaharika debts, the village elders and relatives advised him to execute relinquishment deed. Thus, the basis for claim is that 1st defendant contracting Avyavaharika debts. The Trial Court concluded that 1st defendant did not incur Avyavaharika debts and the First Appellate Court also confirmed the said finding holding that 1st defendant never incurred any Avyavahariaka debts. The contention of the plaintiffs from the beginning is that, they are living with their grandfather at Hyderabad, as 1st defendant did not look after the welfare of the plaintiffs when they were minor. The First Appellate Court disbelieved this contention, since it is artificial and unbelievable.

D.W.1 in his evidence, specifically testified that defendants 1 & 2 are living together. Believing the same, the First Appellate Court gave much credence to the testimony of D.W.1. Further, P.W.1 in his cross-examination admitted that his father and mother are living together. When 2nd defendant was examined as D.W.5, she testified that she is presently residing at Hyderabad and she is not in talking terms with her husband, shifted her residence about five years back to Hyderabad. The testimony of D.Ws.1 & 5 clearly establish that they did not speak truth and they testified falsely only to defeat the rights of 3rd defendant in the suit schedule property.

The first plaintiff Vaddi Jagadeesh Kumar was born on 28.01.1964 and appeared for S.S.C examination during the academic year 1980. Whereas, Ex.A-1 was executed on 24.05.1974 and by that time, he was aged 10 years having no independent source of income, being a student, prosecuting his studies. But, as seen from Ex.A-1, 1st defendant received Rs.1,000/- from plaintiffs towards consideration to relinquish his undivided share in favour of the plaintiffs. The evidence on record does not disclose anything as to how plaintiffs paid Rs.1,000/- as consideration relinquishing the undivided share of 1st defendant in the Hindu undivided coparcenary property. The recitals of Ex.A-1 clearly disclosed that 1st defendant relinquished his share in Ac.16-20 cents of land and in 'A' schedule property i.e. house site construction thereon. The market value of the property was not shown anywhere in the entire document, but received only Rs.1,000/- towards consideration for relinquishing the right in the Hindu undivided coparcenary property. The source of income of the plaintiffs was not disclosed in the entire document and it is not their case at any stage either in the pleadings or in the evidence that the consideration was paid by any other person. In the absence of proof of possessing independent source of income by the plaintiffs, payment of consideration of Rs.1,000/- under Ex.A-1 is unbelievable. From the beginning, the third defendant is contending that Ex.A-1 is sham and nominal and never acted upon. In view of this plea, the initial onus of proof is on the plaintiffs to prove passing of consideration under Ex.A-1. But, they miserably failed to establish passing of consideration mentioned in original of Ex.A-1.

In **Nagendra Gopal v. Rajat Vidhyardhi**[11] (para 32 clause 3), it was held that in appreciating the documents of unilateral dispositions and testamentary dispositions (wills), the true intention of the testator (executant) has to be gathered, not by attaching importance to isolated expressions but by reading the

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[11] (2009) 3 SCC 287

document as a whole. The intention of the testator must be ascertained not only from the words used but also from surrounding circumstances. The Court will put itself in the armchair of the executant/testator. In construing instruments Court must have regard not only to the presumed intention of the parties but also to the meaning of the words which they have used (vide **V.S. Talwar v. Premchandra**[12])

In **Hind Plastics v. Collector of Customs**[13] the Apex Court held that every instrument has to be so interpreted as to accord with the intention of its maker having regard to the language used. Though one cannot ignore actual words used and go after the supposed intention of maker, since that would amount to entering the arena of speculation, but all the same said principle is unexceptionable.

Thus, from the reading of the principles laid down by this Court and the Apex Court, it is the duty of the Trial Court to look into the real intention of the real executant.

In paragraph 16 of the judgment in **Dakarapu Lakshmana Swamy's** case, this Court discussed about passing of consideration under relinquishment deed marked as Ex.A-1. In the facts of the above judgment, it was noted that the contents of Ex. A-1 relinquishment deed read that by receiving Rs. 500/- as consideration, the undivided interest of 2nd defendant-Gangaraju

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[12] AIR 1984 SC 664
[13] (1994) 5 SCC 167

was relinquished by him in their favour in the joint family properties in favour of his sons, but concluded that it is practically an unilateral document and said reasons assigned no way inspire confidence to believe as no ordinary prudent man with these reasons relinquishes his right for alleged cause of division results fragmentation, that too, when he is the father-manager already managing and cultivating the lands to further managing and cultivating even on behalf of his minor sons by keeping jointly. There is no mention for any disputes or he was wasting the properties or how plaintiffs got Rs. 500/- to pay. It was not mentioned whether his wife paid the amount or his father-in-law paid the amount and what is the necessity for him to receive Rs. 500/- even to relinquish, if relinquishes for said cause for disbelieving the document. Finally, disbelieved the document i.e. relinquishment deed.

By applying the principles laid down in the above judgment, to the present facts of the case, which are identical, except variation of consideration passed under Ex.A-1, the reasons mentioned in Ex.A-1 for relinquishing is incurring debts to several creditors. But, there is no evidence as to discharge of the debts due to various creditors mentioned in Ex.A-1 and if recitals of entire document Ex.A-1 is considered, the intention of the executant is clear that to avoid payment of debt due to various creditors mentioned in Ex.A-1, it was executed. When document was executed with such an intention and failed to prove passing of consideration of Rs.1,000/- as mentioned in Ex.A-1, the same can be said to be sham and nominal. That apart, registration of the house property in the name of 1st defendant even for the year 1981 and issue of demand notice by the Executive Officer, Gram Panchayat demanding payment of property tax for the house bearing D.No.1-41 (A) for the year 1981 for the half year ending by 31st March, 1981, 1982, 1983 would go to show that 1st defendant is continuing as owner of the property even after execution of Ex.A-1 and the name of the respondents was not mutated in the Gram Panchayat records and the property tax registration of Gram Panchayat vide Exs.B-1, B-2, B-3. Similarly, payment of property tax would clearly show that 1st defendant alone paid property tax based on attending and surrounding circumstances referred above, it can safely be held that Ex.A-a is a sham and nominal document for the following reasons:

a) The plaintiffs failed to prove possessing any independent source of income to pay Rs.1,000/- to 1st defendant as consideration under Ex.A-1.
b) Failure to prove the debts due to various creditors mentioned in Ex.A-1 and intention of 1st defendant in execution of the document Ex.A-1.
c) Continuation of the property in the name of 1st defendant in the property tax demand registers of Gram Panchayat, Pothavaram, even after execution of Ex.A-1, payment of property tax to the Panchayat.
d) Failure to enter into the witness box by 1st defendant to explain any of the circumstances referred above conclusively

prove that Ex.A-1 was executed nominally to avoid payment of debts.

The cumulative effect of evidence on record established that Ex.A-1 was executed nominally by 1st defendant to avoid payment of debts due to various creditors which is nonest in the eye of law.

The main reason for claiming relief of declaration of title is that defendants 1 & 2 executed Ex.B-1 nominally and it is evident from Ex.B-1 that Ex.B-1 was executed by 1st defendant, the registered owner of the property and his wife representing as guardian of the minor children, executed agreement of sale in favour of 3rd defendant. The execution of the sale agreement Ex.B-1 is proved as per the findings recorded by the Trial Court and First Appellate Court. When execution of Ex.B-1 is proved by 3rd defendant, it is for the two plaintiffs or defendants 1 & 2 to disprove the same, but conveniently 1st defendant avoided to enter into the witness box while 2nd defendant was examined as D.W.5. But she could not disprove execution of Ex.A-1 by D.W.5. Therefore, 1st defendant being the registered owner and 2nd defendant being the guardian of minors executed Ex.B-1 in favour of 3rd defendant. Agreeing with the finding of the First Appellate Court and the observations which are already discussed in earlier paragraphs, Ex.A-1 is sham and nominal document executed with an intention to avoid payment of several debts to the creditors and never acted upon, thereby 1st defendant and his minor sons being the coparceners are entitled to sell the property. But here, 2nd defendant is a guardian of the minors in execution of Ex.B-1 along with Karta of the joint family 1st defendant herein. According to settled law, Karta of the joint family is competent to deal with the joint family property for the joint family benefit. But the contention of the plaintiffs is that when the property is sold under agreement of sale without any purpose, such agreement is not enforceable under law.

One of the major contentions is that when the property is sold under the agreement of sale without any purpose, such agreement is not enforceable under law, placed reliance on a judgment of this Court in ***Yadlapati Subba Rao Vs. Yedlapati Narasimha Rao and others***[14], wherein it was held as follows:

> "The expression 'benefit to the estate' cannot be confined only to transactions of a defensive nature, such as the preservation of the estate form extinction, the defence against hostile litigation and the protection from injury or deterioration by flood or fire. The expression 'benefit to the estate' comprehends also a transaction by the manager which is neither risky, nor speculative, but is calculated to confer a positive advantage on the family. *Where a kartha of a Hindu joint family sells the ancestral property and applies the proceeds of the sale for the purchase of better land, it cannot be said that the family has not been benefited*. In such a situation, the sale would certainly be binding upon the other members of the family, adult or minor. It must, however, be further established, first, that the proceeds of the sale were actually applied to the purchase of other land, and secondly, that the Kartha was selling the property for the purchase of other lands."

[14] 1963 (1) ALT 329

From the principle laid down by this Court in ***Yadlapati Subba Rao***[14], it is clear that when the property was sold for acquiring some other property for the benefit of joint family, a duty is cast upon the plaintiff to see whether the sale proceeds were utilized by the kartha of joint family for purchasing the property somewhere or not etc.,. Even if the principle laid down by this Court in ***Yadlapati Subba Rao***[14] is applied to the present facts of the case, sale of schedule property, for acquiring immovable property elsewhere, by defendants 1 and 2 can be said to be for the benefit of joint family. On this ground alone, the suit is liable to be decreed, subject to proving the other requirements contemplated in the above judgment.

The learned counsel for the appellant - 3rd defendant drawn the attention of this Court to a judgment of the Madras High Court in ***Medikenduri and others Vs. Kata Venkayya and another***[15], wherein it was ruled as follows:

> "In order to validate a sale of ancestral land by the father, the benefit need not be purely of a defensive or protective character. To hold so should be to miss the significance of the expression 'benefit to the estate'. If the transaction is not a speculative or risky one but is beneficial or advantageous from the financial point of view and is calculated to confer a benefit o the estate the sale must be held to be a valid one binding on the members of the estate. Whether a particular transaction is beneficial to the estate or not varies according to the circumstances of that case. The sale of ancestral land by the manager of joint family in order to purchase lands elsewhere therefore constitutes a benefit to the estate so as to be binding on the joint Hindu family."

[15] AIR 1953 Madras 210

The principle laid down by Madras High Court in Para 7 of the judgment is in support of the plaintiff's case and on the other hand, the Madras High Court relied on the judgment of Privy Council in ***Hanooman Persad Panday Vs. Mussamat Babooee Munraj Koonwaree***[16], wherein the Privy Council held that the actual pressure on the estate, danger to be averted, or the benefit to be conferred upon it in the particular instance is a thing to be regarded. In ***Dasari Jayachandra Prasad and others Vs. Dasari Venkata Subbaiah and others***[17], a Division Bench of this Court while dealing with the similar case is of the view that the burden on the alienee is heavier and it is not enough if he made *bonafide* enquiries about the sale of the properties in order to migrate to another village and purchase lands which are more productive, but that the sale proceeds have also been applied for purchasing properties in the other village.

In ***Sengoda Goundan Vs. Muthuvellappa Goundan minor by next friend and maternal grand father Palani Goundan and others***[18], a Division Bench of Madras High Court held that where unproductive family property is sold at an advantageous price because of a town planning scheme but the sale proceeds are not utilized for the purchase of other income-fetching property for the family, the alienation cannot be said to be for the benefit of the family.

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[16] 6 M.I.A. 392 at 423
[17] AIR 1973 AP 214
[18] AIR 1955 Madras 531

But, the Division Bench of this Court took a contrary view while dealing with the powers of Joint Family Manager in ***B. Ranga Rao (died) and others Vs. G. Venkata Krishna Rao and others***[19], held as follows:

> "The Manager of a joint Hindu family governed by Mitakshara Law is called its 'Karta'. The manager has got power over the income and expenditure of the joint family. He may alienate the joint family property for legal necessity or for the benefit of the estate. He has got power to contact debts for maintenance of the members of the joint Hindu family, for marriage expenses of coparceners and for defending the head or any other member of the family in suits or other proceedings. The karta of a joint Hindu family cannot dispose of the joint family property or any portion thereof, except for legal necessity or for the benefit of the estate and the sale of the joint family property for legal necessity as is binding on the plaintiffs and other members of the family both the adult and minors. The burden of proof lies on the plaintiff to show that the property was sold for legal necessity and are no obligation to enquire into application of sale amount in detail by the Kartha as alienee has no control over him."
>
> It is further held therein as follows:
>
> "The alienee has to take reasonable care to find out whether the sale, in fact, was for the benefit of the family on the date of transaction, which includes to find out that the sale was for the purchase of other property or better investment; that the sale consideration was actually utilised for the purpose of purchasing in other lands for the benefit of the family."

From a reading of principles laid down in all the judgments cited *supra*, it is clear that if the sale of the property by kartha of the joint family is for the legal necessity or for the benefit of the family, it is binding on the other members, including major and minor members of joint family. Here, it is the case of the plaintiff that defendants 1 and 2 sold the property under the agreement of sale, marked as Ex.A-11, for purchasing the property elsewhere, for the simple reason that the 2nd defendant is working as an

[19] 1995 (2) ALT 307 (DB)

employee in Hyderabad, whereas the schedule property is situated in a small village in West Godavari district. During those days, if the property in a small village is sold and purchased the property at Hyderabad or in some other city, it would be more beneficial to the joint family. It is not the case of the 1st appellant – plaintiff, at any stage, that the defendants 1 and 2 sold the property for illegal purpose or for discharge of immoral debts. In the absence of such plea by the plaintiffs, it is difficult to hold that the sale of the schedule property, for purchase of property somewhere, is for the benefit of joint family and not tainted with any illegality.

The consistent law laid down by the High Courts in various judgments cited *supra* is that, firstly, it is the duty of the alienee to prove that he made *bona-fide* enquiries that the proposed sale is for benefit of the joint family and that the transaction, in fact, was for justified legal necessity or for the benefit of the estate and; secondly, the purchaser made a reasonable and *bona-fide* enquiry to the existence and satisfied himself that the Manager was acted for the benefit of estate, in view of the principle laid down by a Division Bench of this Court in ***Rangarao's*** case (referred supra). But, in view of the principle laid down by a Division Bench of this Court in ***Yadlapati Subba Rao***'s case (referred supra), a duty is cast upon the purchaser to prove that the proceeds of the sale were actually utilized to purchase other land and, secondly, kartha was selling the property for purchase of some other property. But, the principle laid down by this Court in ***Yadlapati Subba Rao***'s case (referred supra) is almost over ruled by a Division Bench of this

Court in ***Rangarao****'s case* (referred supra) and held as follows in Para 29:

> "When the sale is only for legal necessity, the burden on the alienee is to show that the sale itself was justified by legal necessity and he is under no obligation to enquire into application of sale amount in detail by the Kartha as alienee has no control over him."

In view of the Division Bench judgment of this Court in ***Rangarao****'s case*, the judgment of this Court in ***Yadlapati Subba Rao****'s case* is no more a good law and it is impliedly over ruled. In a Division Bench judgment of this Court in ***Rangarao****'s case*, this Court relied on several judgments of other High Courts, including ***Medikenduri****'s case*, ***Yadlapati Subba Rao****'s case* and other judgments. Therefore, the duty is cast upon on the alienee to make *bona-fide* enquiries regarding the application of sale proceeds for purchase of property is no more subsisting in view of the Division Bench judgment of this Court in ***Rangarao****'s case*, since the alienee has no control over the property.

If those principles are applied to the present facts of the case, no duty is cast upon 3rd defendant to inquire into the application of profits for benefit of the joint family or not and that apart, he has paid part of the consideration and still same amount is due to defendants 1 & 2 as part of consideration.

One of the contentions raised before this Court during hearing is that, 2nd defendant is incompetent to act as guardian of minors and agreement entered into with 3rd defendant for sale of the property is not binding on the defendants. But, this contention cannot be accepted in view of the principles laid down in **Ms. Githa Hariharan and another Vs. Reserve Bank of India and another**[20]**,** wherein the Apex Court considering the language used under Section 6(a) of the Hindu Minority and Guardianship Act, held as follows:

> "Section 6(a) uses the words, 'the father and after him, the mother.' This phrase on a cursory reading, does given an impression that the mother can be considered to be natural guardian of the minor only after the lifetime of the father. If the section is so understood the section has to be struck down as unconstitutional as it undoubtedly violates gender equality, one of the basic principles of our Constitution. It is well settled that if on one construction a given statue will become unconstitutional, whereas on another construction, which may be open, the statue remains within the constitutional limits, the Court will prefer the latter on the ground that the Legislature is presumed to have acted in accordance with the Constitution and Courts generally lean in favour of the constitutionality of the statutory provisions. The word 'after' need not necessarily mean 'after the life time'. In the context in which it appears in Section 6(a), it means 'in the absence of', the word 'absence' therein referring to the father's absence from the care of the minor's property or person for any reasons whatever. If the father is wholly indifferent to the matters of the minor even if he is living with the mother or if by virtue of mutual understanding between the father and the mother, the latter is put exclusively in charge of the minor, or if the father is physically unable to take care of the minor either because of his staying away from the place where the mother and the minor are living or because of his physical or mental incapacity, in all such like situations, the father can be considered to be absent and the mother being a recognized natural guardian, can act validly on behalf of the minor as the guardian. Such an interpretation will be the natural outcome of harmonious construction of Sections 4 and 6 of Hindu Minority and Guardianship Act, without causing any violence to the language of Section 6(a) of Hindu Minority and Guardianship Act."

In view of the principle laid down by the Apex Court in ***Githa Hariharan***'s case, mother is also competent to act as guardian for minor child during his minority.

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[20] AIR 1999 SC 1149

The other contention is that when defendants 1 & 2 intended to sell the property of minors without prior permission under Section 8 of Hindu Guardianship Act is needed to be obtained. But, this contention holds no substance for the reason that the finding that Ex.A-1 is sham and nominal, the entire property remained as Hindu Undivided Coparcenary property and 1st defendant being the kartha of the joint family is entitled to deal with the property for the benefit of the Hindu undivided coparcenary and no permission is required for sole of undivided interest of a minor Hindu undivided coparcenary. Even if the property is sold, the purchaser is entitled to claim equities for allotment for the properties sold to him to the share of one of the coparceners from whom he purchased. On that ground Ex.B-1 cannot be annulled. Hence, I find no substance in the contention of the learned counsel for the plaintiffs/appellants.

The main and major contention of 3rd defendant is that the jurisdiction of this Court is limited to a substantial question of law under Section 100 of C.P.C, whereas, the contention of the respondents is that when a finding of fact recorded by both the Trial Court and Appellate Court is without discussing documentary evidence, such finding cannot be set-aside while exercising jurisdiction under Section 100 of C.P.C. Learned counsel for the appellant places reliance on the judgment reported in **Yadarao Dajiba Shrawane**'s case wherein the Apex Court held that the position is well settled that when the judgment of the final Court of fact is based on misinterpretation of documentary evidence or on consideration of inadmissible evidence or ignoring material evidence the High Court in second appeal is entitled to interfere with the judgment. The position is also well settled that admission of parties or their witnesses are relevant pieces of evidence and should be given due weightage by Courts. A finding of fact ignoring such admissions or concessions is vitiated in law and can be interfered with by the High Court in second appeal. Since the parties have been in litigating terms for several decades the records are voluminous. The High Court as it appears from judgment has discussed the documentary evidence threadbare in the light of law relating to their admissibility and relevancy.

A Similar view is expressed in **Neelakantan v. Mallika Begum**[21] wherein, the Supreme Court held that the High Court committed no error in holding that the Courts below had wrongly placed the burden of proof upon the defendant landlady to establish the fact that the property in question did not fall in the area declared as slum area. On the other hand, the burden lay on the plaintiffs to establish their case and fix the identity of the property in suit in reference to Door number which may have been declared as slum area under Section 3 of the Act. Plaintiffs will not be entitled for the relief of injunction as the basis of the provision under Section 29 of the Act.

On the contrary, learned counsel for the 3rd defendant placed reliance on the judgment of the Apex court in **Kondiba Dagadu**

[21] AIR 2002 SC 827

Kadam's case wherein the Supreme Court in paragraph 5 held that it is not within the domain of the High Court to investigate the grounds on which findings were arrived at, by the last court of fact, being the first appellate court. It is true that the lower appellate court should not ordinarily reject witnesses accepted by the trial court in respect of credibility but even where it has rejected the witnesses accepted by the trial court, the same is no ground for interference in second appeal when it is found that the appellate court had given satisfactory reasons for doing so. In a case where from a given set of circumstances two inferences are possible, one drawn by the lower appellate court is binding on the High Court in second appeal. Adopting any other approach is not permissible. The High Court cannot substitute its opinion for the opinion of the first appellate court unless it is found that the conclusions drawn by the lower appellate court were erroneous being contrary to the mandatory provisions of law applicable or its settled position on the basis of pronouncements made by the apex Court, or was based upon in inadmissible evidence or arrived at without evidence.

At any rate, it is not the case of the plaintiffs that the First Appellate Court misinterpreted any documents. However, it is clear from the findings recorded by the First Appellate Court and they are based on facts on record.

In **Dnyanoba Bhaurao Shemade v. Maroti Bhaurao Marnor**[22], Apex Court held that whether a finding of fact reached by Courts below is against the weight of evidence or not is a question which will remain in the realm of appreciation of evidence and does not project any question of law, much less, any substantial question of law, which can enable the High Court in second appeal to upset such a finding of fact.

In view of the law declared by the Apex Court in the judgments referred supra, appreciation of evidence is in the realm of the First Appellate Court that Ex.A-1 is sham and nominal document is purely a fact finding and not a substantial question of law. In any view of the matter, in view of my discussion I find that the genuineness of Ex.A-1 dated 24.05.1974 is purely a question of fact based on the evidence on record. However, after reappraisal of entire evidence by exercising power under Section 103 of C.P.C., I hold that Ex.A-1 is sham and nominal and the findings recorded by the First Appellate Court are based on appreciation of evidence.

As per my findings on substantial questions of law Nos.1 and 2 though the suit scheduled property was acquired with the ancestral nucleus, the alleged relinquishment of right in the joint family property by defendant No.1 is sham and nominal and thereby the defendant No.1 is entitled to claim his share in the property; apart from that the wife of the defendant No.1 also joined as executant on behalf of the children and executed agreement of

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[22] AIR 1999 SC 867

sale representing the minor children. Therefore, the said agreement is binding on the plaintiffs and it can be enforced against them.

The plaintiffs filed suit for declaration of title to the suit schedule property and recovery of possession. As long as the agreement is in force and enforceable under law, the plaintiff are not entitled to recover the possession as the purchaser/3rd defendant was inducted into possession of the property in pursuance of the agreement of sale and he is entitled to protect his possession claiming benefit under Section 53-A of Transfer of Property Act subject to proof of requirement under Section 53-A of Transfer of Property Act. Here the purchaser/3rd defendant established all the requirements to claim benefits under Section 53-A of Transfer of Property Act, which is equitable doctrine of part-performance. Therefore, the plaintiffs are not entitled to recover the possession declaring them as exclusive owners of the property as their father/defendant No.1 is also joint owner of the property during his lifetime.

Therefore, the first appellate Court rightly declined to declare that the plaintiffs are exclusive owners of the property since their father also having share and sold the property to the purchaser/3rd defendant. Hence, I find no illegality in the judgment of the First Appellate Court, consequently the second appeal is liable to be dismissed as it is devoid of merits.

In the result, the second appeal is dismissed.

Consequently, miscellaneous applications pending if any, shall also stand dismissed. No costs.

JUSTICE M. SATYANARAYANA MURTHY

Date:17.11.2016

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