

HON'BLE SRI JUSTICE A.RAJASHEKER REDDY

CMA Nos. 857 and 858 OF 2014

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COMMON JUDGMENT:

As the parties, schedule of properties and issues involved in both the appeals are one and the same, they are being disposed of by way of this Common Judgment.

2. Both these appeals are filed by the appellant aggrieved by the Common Judgment and decree dated 31.07.2014 in A.S.Nos.55 and 62 of 2010 passed by the I Additional District Judge, Nellore wherein the lower appellate Court allowed the above appeals by setting aside the judgment and decree dated 11.02.2010 passed in O.S.No.31 of 1998 by the file of the Principal Senior Civil Judge, Nellore.

3. Brief facts which are necessary for disposal of these appeals are as follows: The parties hereinafter will be referred to as arrayed in the suit O.S.No.31 of 1998.

The plaintiff filed suit O.S.No.31 of 1998 on the file of Principal Senior Civil Judge, Nellore for partition of his half share in the plaint schedule properties consisting of items Nos.1 to 4 by metes and bounds and put him in possession of the same against the defendants stating that the 1st defendant is the own brother of the father of the plaintiff. The father of the plaintiff died when he was three months' old. The mother of the plaintiff by name Subbamma brought him up and was looking after the family affairs. The 1st defendant, being the next elder of the family, has been maintaining the affairs of the plaintiff's mother, as she being a lady. The mother of the plaintiff was living with the family of the 1st defendant as her husband died. While so, the mother of the plaintiff along with 1st defendant purchased item Nos.1 to 4 of the plaint schedule property by virtue of the registered sale deeds dated 10.03.1958, 29.07.1963, 27.01.1968 and 30.10.1971

and ever since the purchase, the mother of the plaintiff i.e., Subbamma and 1st defendant had been in possession and enjoyment in their own right jointly. After the plaintiff has grown up, he used to cultivate the said lands along with the 1st defendant. Hence, the mother of the plaintiff and 1st defendant are having equal shares. In the year 1989, Subbamma died intestate leaving behind her the plaintiff as her sole legal heir and her estate was devolved upon him including the half share in the plaint schedule property. After the death of Subbamma, the plaintiff and 1st defendant have been jointly cultivating the suit lands. Since the plaintiff is in need of money to perform the marriage of his younger daughter, he intended to sell a portion of the schedule mentioned property within his half share. The 1st defendant refused to do so, as such, the plaintiff demanded the 1st defendant to partition the schedule mentioned properties into two equal shares and to put him in possession of his half share. The 1st defendant did not cooperate for partition. Hence, the suit.

4. In response to the plaint averments, the 1st defendant filed written statement denying the very relationship between himself and the father of the plaintiff. It is also pleaded that the items Nos.1 to 4 of plaint schedule properties are purchased by the 1st defendant alone with his hand earnings, he paid sale consideration and he is the absolute owner of the suit schedule lands, ever since his purchase and he is in possession and enjoyment of the lands. It is stated that after the death of the plaintiff's father, his mother had no shelter of her own, thereby the 1st defendant provided shelter in his family and maintaining them. During their stay, the 1st defendant developed illicit contact with the mother of the plaintiff. It is also stated that he obtained sale deeds in his name and also in the name of mother of plaintiff Subbamma, but her name was nominally shown in the sale

deed. It is stated that as on the date of purchase of schedule properties, the mother of the plaintiff had no capacity to contribute for payment of sale consideration. That after the plaintiff had grown up, the mother of the plaintiff was residing separately and that she had no right or share over the suit schedule properties. It is stated that the 1st defendant sold away the item Nos. 1 to 3 of the plaint schedule properties to one Yerrapareddy Ramaiah @ Ramanaiah and he is in possession and enjoyment of said items and that the mother of the plaintiff also signs the document at the request of Ramanaiah. Hence, the 1st defendant is in possession of item No.4 of the plaint schedule property as absolute owner. It is stated that the revenue authorities also issued Pattadar Passbook in the name of the 1st defendant and that the mother of the plaintiff never claimed any share or right in the properties. The plaintiff was never in possession and joint enjoyment of suit schedule properties and that he never issued any notice demanding partition and sought for dismissal of the suit.

5. During the pendency of the suit, the 1st defendant died. Hence, the defendants 2 to 5 were added as his legal heirs as per orders in I.A.No.496 of 2003 dated 26.08.2003. Subsequently, the defendants 2 to 5 have filed their written statements separately and all of them pleaded that the 1st defendant is their Senior Paternal uncle and he had landed properties, his wife Mangamma predeceased him and that the 1st defendant died on 07.04.2003 intestate and had no issues. It is stated that during the life time of 1st defendant, he was in possession and enjoyment of item No.4 of the plaint schedule property and some other properties, as he was personally cultivating with the help of other defendants. The 1st defendant during his life time, while he was in sound and disposing state of mind, executed a registered will on 26.03.2003 bequeathing item No.4 and other properties in favour of the defendants 2 to 5 and that after his death the will came into operation.

The item No.4 of the plaint schedule property was allotted to them and they became owners of the said property.

6. Initially, after examining P.Ws.1 and 2 on behalf of the plaintiff and marking Exs.A1 to A4 and after examining D.Ws.1 to 4 and marking Exs.B1 on behalf of defendants 1 to 5, after trial, the suit was dismissed on 11.04.2005. Against the said judgment and decree, the plaintiff preferred appeal in AS No.59 of 2005 before the District court, Nellore, which was allowed on 20.09.2007 by setting aside the judgment and decree of the trial Court and the matter was remanded to the trial Court by the 1st appellant Court by observing as follows:

“..... the matter is remanded to the lower court for determination of the question as to whether the plea of the defendants is not permissible in view of the Benami Transactions (Prohibition) Act and to determine as to whether the defendants have discharged the burden of proof that the document is sham or nominal, and to further determine in case the mother of the plaintiff is having right in the property, whether the will affects her right or not; the plaintiff also, if interested for a just adjudication of the rights in items No.1 to 3, should take steps for adding Ramanaiah in whose favour the property under Items No.1 to 3 is said to have been sold by the 1st defendant and Subbamma and, if no steps are taken, the determination of the suit shall be confined only to Item No.4 of the property. Both the parties shall be given opportunity to adduce further evidence. Both parties to appear before the lower court on 01.10.2007.”

Subsequently, the matter was taken up by the trial Court. The plaintiff impleaded the 6th defendant vide orders dated 28.02.2008 in I.A.No.1335 of 2007. The 6th defendant also filed written statement and additional written statement. After filing of the rejoinder by the plaintiff, the trial Court also framed additional issue on 18.02.2009. In addition to the evidence already on record, P.W.3 was examined and marked Exs.A5 to A7 on behalf of the plaintiff and on behalf of the defendants, in addition to the evidence of D.Ws.1 to 4, they examined D.Ws.5 and 6 and got marked Exs.B2 to B4. Basing on the pleadings of both parties, after considering the both oral and documentary adduced on

either side, the trial Court decreed the suit as follows:

“23. In view of the finding given on issues No.1 to 4 and the additional issue dated 18.02.2009, the plaintiff, his sister Kuppa Ramanamma and the legal heirs of his other sister Athipati Krishnamma, are each entitled for $\frac{1}{3}^{\text{rd}}$ share in $\frac{1}{2}$ share of the plaint schedule /p/r/o/p/erty. In view of the circumstances prevailing in this case, each party do bear their own costs and a preliminary decree can be passed accordingly. This issue is answered accordingly.

24. In the result, the suit is decreed, but without costs, directing division of plaint schedule property into 2 (two) equal shares, and out of 1 (one) such share, to allot $\frac{1}{3}^{\text{rd}}$ share each to the plaintiff, to his elder sister Kuppa Ramanamma and to the legal heirs of his another sister Athipati Krishnamma. Preliminary decree is accordingly passed.”

7. Against the said judgment and decree, the 6th defendant filed A.S.No.55 of 2010 and the defendants 2 to 5 filed A.S.No.62 of 2010.

The 1st Additional District Judge, Nellore, by Common Judgment dated 31.07.2014 allowed both the appeals by setting aside the judgment and decree in O.S.No.31 of 1998 on the file of the Principal Senior Civil Judge, Nellore dated 11.02.2010 and suit was remanded to trial Court, which shall given an opportunity to the plaintiff to implead all the necessary parties forthwith and adduce further evidence if any in this regard. The trial Court was also directed to dispose of the suit as expeditiously as possible. Against the said common judgment, the present appeals are filed by the plaintiff.

8. Heard Sri M.Ravindra, learned counsel for the appellant and Sri R.Rajasheker, learned counsel for the respondent in CMA No.857 of 2014 and Sri B.Vijaysen Reddy, learned counsel for the respondents in CMA No.858 of 2014.

9. Learned counsel for the appellant submits that the trial Court rightly decreed the suit of the appellant holding that the appellant is entitled to allotment of 50% of the suit schedule property after dividing the suit schedule property into two equal shares and out of one such share, the appellant, his elder sister Kuppa Ramanamma and to the

legal heirs of his another sister Athipati Krishnamma were entitled to 1/3rd share each out of that 50% of the suit schedule property. He would further contend that the trial Court consciously held that the two sisters of the appellant can apply for division of their respective shares at least at the time of passing of final decree safeguarding the interest of other co-parceners, as such, there is no need for remanding the matter back to the trial Court. He also contended that the appeals before the lower appellate Court have been filed against the judgment of the trial Court only on the ground that sisters of the appellant have not been impleaded. He further contended that the trial Court consciously taken care regarding the shares of the sisters of the appellant and there was no need for remanding the matter back to the trial Court. He further contended that even as per Section 99 of CPC, the judgment and decree need not be set aside for misjoinder of parties or of causes of action. Even the merit of the case is not going to be affected. He further submits that the sisters of the appellant can be impleaded at the time of passing of final decree proceedings. He further submits that under Order I Rule 10 CPC, the Court may at any stage of the proceedings, on its own or on application made by a party, direct a third party to be impleaded in the suit or proceeding for complete and effective adjudication of the issue involved in the suit and that there is no impediment for impleading the parties in the final decree proceedings and that there is no valid reason for remanding the matter to the trial Court. In support of his contention, he relied on the judgments reported in **Bayyarapu Narayana Raidu and another v. Pagadala Varalaxmi**^[1], **Sannapu Reddy Venkata Reddy v. Jillela Bhupal Reddy and another**^[2], **Seth Anand Kumar v. Abnash Kaur**^[3], **T.Chandrasekhar and another v. Sunchu Rajamallu and others**^[4], **Nima Kaur v. Surjith Singh and others**^[5] and **Madadi Narasimha Reddy v. Madadi Ramachandra Reddy and**

two others^[6].

9. On the other hand, learned counsel for the respondents submits that no final decree be passed unless all the co-parceners are added. He further submits that admittedly, the appellant has not made her two sisters as parties in the suit, who are necessary parties and that in a suit for partition, all the co-parceners and legal heirs of the deceased have to be made parties, failing which, the suit is liable to be dismissed. He submits that the lower appellate Court instead of dismissing the suit, remanded back the matter to the trial Court giving an opportunity to the appellant to implead his sisters as parties to the suit. As such, the judgment and decree of the trial court cannot be validated. He further submits that the trial Court allotted the shares to the sisters of the appellant, though they are not parties to the suit, which is erroneous, as such, the lower appellate Court rightly set aside the judgment and decree of the trial Court and remanded the matter back to the trial Court. In support of his contention, he relied on the judgments reported in **Kanakarathanammal v. V.S.Loganatha Mudaliar and another**^[7], **Ali Amad (deceased represented by L.Rs) v. Sindhi Ebrahim Kasam and others**^[8], **Kusampudi Subba Raju v. Panumatsa Sayi Raju and others**^[9] and **K.Bhaskar Rao v. K.A.Rama Rao**^[10].

10. In this case, it is to be seen that these appeals have been filed against Common Judgment of the lower appellate Court wherein, the judgment and decree in the suit i.e., O.S.No.31 of 1998 passed by the trial Court was set aside and remanded the matter back to the trial Court only on the ground that the sisters of the appellant were not made as parties and also observed that they are proper and necessary parties to partition suit. The lower appellate Court also directed the trial Court to afford an opportunity to the appellant to implead his sisters as parties. The lower appellate court has not decided the issue on merits though the appeal grounds show that the decree and

judgment of the trial Court is also challenged on merits. The lower appellate Court framed the Points for consideration as follows:

- “1. Whether mother of the plaintiff and first defendant jointly purchased the plaint schedule properties?
2. Whether the suit is bad for non-joinder of sisters of plaintiff?
3. Whether first defendant sold item Nos.1 to 3 to six defendant?
4. Whether the plaintiff is entitled to share in the plaint schedule properties and if so, to what share?
5. Whether the judgment of the trial Court is erroneous and liable to be set aside?”

The lower appellate Court though framed five points for consideration, but no finding is rendered in respect of the other points, except with regard to point No.2, i.e., Whether the suit is bad for non joinder of sisters of the plaintiff?”

11. The lower appellate Court found that the appellant himself categorically admitted in his evidence that he has two sisters namely Kuppa Ramanamma and Athipati Krishnamma and both of them are married. It is also stated that Athipati Krishnamma died prior to the filing of the suit and Kuppa Ramanamma is residing at Yellapalem Village. The appellant did not choose to file death certificate of Athipati Krishnamma and also did not adduced evidence to show that Athipati Krishnamma has no legal heirs and that he has not taken steps to implead the legal heirs of Athipati Krishnamma. Though it is stated by P.W.1 in his evidence that Ramanamma was adopted by his grand father and she relinquished her right in the plaint schedule property through relinquishment deed dated 19.10.1980, the petition filed by the appellant to receive the said deed was dismissed only on the ground that the same was unregistered and inadmissible, as such, the appellant failed to prove that Ramanamma had relinquished her rights. The appellant also did not state about the existence of his two sisters in the pleadings. Even when the 6th respondent in the suit took a specific plea that the appellant failed to add his sisters as necessary

parties to the suit, the appellant failed to prove the same in spite of filing rejoinder. The lower appellate Court also relied on the judgments cited by the learned counsel for the respondents in **Kanakarathanammal v. V.S.Loganatha Mudaliar and another (supra)** and **Kusampudi Subba Raju v. Panumatsa Sayi Raju and others (supra)** and held that if necessary parties are not added to the suit, the same is liable to be dismissed. The trial Court observed that since the suit is of the year 1998 and already once the matter was remanded and that the sisters of the appellant are also entitled for equal share, if one such share of suit schedule property is allotted to the appellant and his two sisters, the appellant and his sisters are entitled to get 1/3rd share out of that half share and that they can also apply for division of their respective shares at least at the time of passing of final decree. The lower appellate Court found that unless sisters of the appellant are made parties to the suit, no share out of the suit schedule property allotted to them. The lower appellate Court also by relying on the judgments of this Court and also the judgments of Hon'ble Apex Court observed that if necessary parties are not added to the suit, it is a fatal and that the suit is liable to be dismissed. The lower appellate Court also observed that the appellant has no exclusive right in the share of his mother and suppressed the existence of his sisters and claimed half share. The said two sisters of the appellant are co-heirs in respect of the properties left intestate by their mother. The appellant alone is not entitled to relief in the suit. The appellant has knowingly suppressed the fact of existence of his sisters, even after specific issue was raised by the respondents, the appellant did not choose to implead them and he took a plea that they are not entitled to any share in the suit schedule property and that he failed to prove the same. By holding so, the lower appellate Court remanded the matter to the trial Court for impleading the sisters of the appellant and for giving them fresh opportunity.

a) The Hon'ble Supreme Court in **Kanakarathanammal v.**

V.S.Loganatha Mudaliar and another (supra) observed as follows:

“15..... Once it is held that the appellant's two brothers are co-heirs with her in respect of the properties left intestate by their mother, the present suit filed by the appellant partakes of the character of a suit for partition and in such a suit clearly the appellant alone would not be entitled to claim any relief against the respondents. The estate can be represented only when all the three heirs are before the Court.”

b) In **Ali Amad (deceased represented by L.Rs) v. Sindhi Ebrahim Kasam and others (supra)**, the Hon'ble Gujarat High Court held as follows:

“5.... This is the clear exposition of law and even on the first principles also, it is necessary that all persons who are entitled to a share in the property by inheritance must be made parties to the suit for partition.”

c) In **Kusampudi Subba Raju v. Panumatsa Sayi Raju and others (supra)**, this Court held as follows:

“19. It is true that there is some negligence on the part of the plaintiff in not impleading the necessary parties and on that ground the plaintiff is liable to be non-suited and accordingly the suit was dismissed. But, however, in the light of the peculiar facts and circumstances and especially in the light of the view expressed by this Court in relation to the bar under Order 23 Rule 1 of the Code and the applicability thereof to a different cause of action and the subsequent events, this Court is of the considered opinion that it would be just and proper to remand the matter and give an opportunity to the plaintiff to implead all the necessary parties forthwith and also adduce further evidence if any in this regard. It is needless to say that the necessary parties so impleaded also would be given an opportunity and the other parties who are already on record also to be given opportunity to adduce further evidence if any in this regard in view of the order of remand being made by this Court.”

d) In **K.Bhaskar Rao v. K.A.Rama Rao**, a learned Single Judge of this Court observed as follows:

“22. While the stand of the plaintiff before the trial Court was that it was not necessary, as the sisters were already married and given sufficient share at the time of marriage, in this appeal the appellant has filed an application CMP No.2141 of 2005 to implead the sisters as parties. In view of the stand of the plaintiff that no share need to go to them and in spite of pointing out that their presence is necessary in the suit, the plaintiff has chosen not to implead them. The defect of non-joinder of necessary parties being fatal, the same

cannot be cured by impleading them in appeal. The trial Court, therefore, rightly held that the suit is liable to be dismissed on the ground of non-joinder of necessary parties. I see no reason to take a different view.”

In view of above citations relied on by the learned counsel for the respondents, it is well settled law that in a suit for partition, all the heirs are entitled for share in the property including daughters, irrespective of their marital status and any suit without impleading all the legal heirs, is liable to be dismissed. Admittedly, the appellant has two sisters and one of them died. The trial Court had already allotted shares to his two sisters, who are not at all parties to the suit. It is the case of the appellant that his sisters can be added as necessary parties even in final decree proceedings. In view of above legal position, I am of the opinion that the sisters of the appellant, being legal heirs along with appellant, are proper and necessary parties for adjudication of the suit before the trial Court.

12. a) In **T.Chandrasekhar and another v. Sunchu Rajamallu and others (supra)**, a learned Single Judge of this Court held as follows:

“20. In *I.Aga Reddy v. S.Dharneet Singh* learned single Judge of this Court while dealing with the identical case, held as under:

The contention of the respondents that third parties cannot be impleaded in a suit, after a preliminary decree is passed, cannot be countenanced. The reason is that in any suit, in which a final decree is contemplated, it is deemed to be pending till such final decree is passed. Therefore, the petitioners deserve to be impleaded in the suit as defendants and as respondents in the final decree proceedings.

The application filed under Order I Rule 10 CPC need not depend upon the existence of absolute rights. It would be sufficient, if the parties have some interest in the property, which is the subject matter of the suit.

21. Under Order I Rule 10 CPC the Court may at any stage of the proceedings, on its own or on application made by a party, direct a third party to be impleaded in the suit or proceeding for complete and effective adjudication of the issue involved in the suit. Thus, there is no impediment for impleading the parties in the final decree proceedings. The Court has wide discretion in the matter of adding the parties to the proceedings under Order I Rule 10 CPC, if the Court is of the opinion

that the proposed party has a right in the subject matter and there is a possibility of his right being affected if he is not added as a party.”

b) In **Nima Kaur v. Surjith Singh and others** (supra), a learned Single Judge of this Court held as follows:

“7. [In Phoolchand and Anr. v. Gopal Lal](#), AIR 1967 SC 1470, it was held that any partition suit by which the shares allotted in the preliminary decree already passed can be amended and if there is dispute between surviving parties in that behalf and that dispute is decided, the decision amounts to a decree and that there is no prohibition in the Code of Civil Procedure against passing a second preliminary decree in such circumstances. It was also clarified in the said judgment that this can be done so long as the final decree has not been passed and also that such course of action is permissible only in partition suits. It would be appropriate to extract a relevant portion of the said judgment, which is as under:

"(7) We are of opinion that there is nothing in the Code of Civil Procedure which prohibits the passing of more than one preliminary decree if circumstances justify the same and that it may be necessary to do so particularly in partition suits when after the preliminary decree some parties die and shares of other parties are thereby augmented. We have already said that it is not disputed that in partition suits the Court can do so even after the preliminary decree is passed. It would in our opinion be convenient to the Court and advantageous to the parties, specially in partition suits, to have disputed rights finally settled and specification of shares in the preliminary decree varied before a final decree is prepared. If this is done, there is a clear determination of the rights of parties to the suit on the question in dispute and we see no difficulty in holding that in such cases there is decree deciding these disputed rights; if so, there is no reason why a second preliminary decree correcting the shares in a partition suit cannot be passed by the Court. So far therefore as partition suits are concerned we have no doubt that if an event transpires after the preliminary decree which necessitates a change in shares, the Court can and should do so; and if there is a dispute in that behalf, the order of the Court deciding that dispute and making variation in shares specified in the preliminary decree already passed is a decree in itself which would be liable to appeal. We should however like to point out that we are saying must be confined to partition suits".

8. The Madras High Court in [Nanja Naicken v. Rangammal](#), 3. , had to consider, with respect to the omission in the preliminary decree to declare one of the defendant's share who had been impleaded as a party after the date of the preliminary decree, the question whether the preliminary decree can be rectified either by amendment of the preliminary decree or by the grant of a second preliminary decree. The Court after referring to and relying upon Phoolchand's case (supra 2 cited), held that more than one preliminary decree can be granted in a partition suit and that it is the duty of Court to adjudicate upon the claims of all the parties to avoid anomalies and complications. Relevant portion of the judgment, reads as under:

"...It must not be forgotten that a partition suit must be deemed to be pending till a final decree is actually granted. It is the duty of the Court in a partition suit to adjudicate upon the claims of all the parties who claim a share in the subject matter of the suit. Otherwise it would lead to endless anomalies and complications. It has repeatedly held by this Court that in a partition action more than one preliminary decree can be granted".

9. It is thus amply clear that as long as the partition suit is pending and until a final decree is actually passed, application for impleading a party is maintainable. That a duty is cast on the Court in a partition suit to adjudicate upon the claims of all the parties who claim a share in the subject matter of the suit and that there is nothing in the Code of Civil Procedure which prohibits the passing of more than one preliminary decree if circumstances justify the same. It is not only convenient to the Court and advantageous to the parties, specially in partition suits to have disputed rights finally settled before a final decree is prepared."

c) In **Bayyarapu Narayana Raidu and another v. Pagadala Varalaxmi**

(**supra**), a learned Single Judge of this Court observed as follows:

"25. In **Saraswathi Devi Vs. J.Satyanarayana Raju**^[9], this Court held: "..... The power under Order XLI Rule 23 of the Code of Civil Procedure is of wide amplitude and of a discretionary nature, but the discretion should not be exercised arbitrarily but with circumspection guided by sound and reasonable judicial principles capable of being corrected by the Court of appeal. It should not be a substitute for laxity but be stemmed from the need to render substantial justice. The order of remand should indicate sufficient and cogent reasons for remitting the matter for retrial. It is to be remembered that when re-trial is ordered, it amounts to allowing the party to fill in the lacuna crept at the trial with eyes wide open to the basis of the pleadings and issues raised and the trial concluded. So the parties have to bear the consequences thereof. The order of remand should not, generally speaking, be ordered when the defect in the proceedings has been made due to the negligence or default on the part of the defaulting party who will have the advantage of the remand. The mere fact that the evidence on record is not sufficient to enable a Court to come to a definite conclusion on an issue or point is not a ground to remit the matter. It is also to remember that the mere fact that the parties did not have an opportunity of producing all the evidence they needed before the trial Court, is not also a relevant circumstance unless the parties are taken by surprise. There is a danger that the order of remand of the court would cause lurking apprehension, may be unfounded, in the mind of the court below that there is something wrong in the judgment and it needed correction. However carefully the order may be worded, the danger of such an impression cannot easily be erased from the mind of the court below. The appellate court must therefore be circumspect in that regard. The appellate Court should consider whether the party succeeding in the trial Court would be met with undue hardship of further litigation and expense and also whether injustice would be done by the order of remand. Keeping those circumstances in view, though the

power of remand is of wide discretionary one, it should be exercised sparingly and with circumspection ultimately the ends of justice.”

d) In **Sannapu Reddy Venkata Reddy v. Jillela Bhupal Reddy and**

another (supra), this Court held as follows:

4..... It is clear from the above that the power of remand to be exercised by the lower appellate Court must be in conformity with any of the said provisions and a remand is not to be ordered if the case does not fall under any of the aforesaid provisions. It is not in dispute that all the exhibited documents, which are on record, before the trial Court are also before the lower appellate court and the lower appellate Court has the same power, on questions of law and fact, as that of a trial Court. Hence, the lower appellate Court itself can appreciate the oral and documentary evidence and come to its own conclusions.”

e) In **Seth Anand Kumar v. Abnash Kaur (supra)**, the Hon’ble upreme Court held as follows:

“6. From the above observations it is clear that the only ground on which the retrial of the case has been ordered is that in the absence of a properly arranged and printed record the court found it difficult to decide the case. We do not think that on this ground a remand could have been ordered. It is a serious matter to order the retrial of a case which means considerable waste of considerable public time. Retrial can be ordered only in exceptional circumstances. We quite realise that hearing of a heavy appeal without proper assistance in the shape of properly prepared records is quite a difficult matter but such difficulties will have to be overcome by the appellate court by taking necessary steps under its rules. Absence of such facilities do not justify an order of remand.

It may be that the manner in which the evidence has been recorded has led to considerable difficulty in hearing the appeal. This certainly is regrettable. But that was done under the orders of a court and it is too late in the day to undo that order. We are quite sure that the learned Judges of the appellate court with their and do experience will be able to overcome those difficulties and do justice according to law without driving the parties to a fresh trial.”

In the judgments cited by the learned counsel for the appellant, it is clearly held that third parties can be impleaded in the final decree proceedings if they have interest in the suit property, as such, there is no bar in impleading the parties even at the stage of final decree proceedings. All the decisions relied on by the learned counsel for the appellant are after preliminary decree is passed. It is well settled law that remand cannot be a matter of course. In the present case, the

lower appellate Court by relying on the judgments of this Court as well as Apex court, came to the conclusion that the sisters of the appellant are necessary parties, since appellant has filed suit for partition, as such, gave an opportunity to the appellant to implead his sisters. No doubt, the trial Court held that the suit is of the year 1998 and it clearly held that the 6th defendant, who is subsequent purchaser, might have purchased item Nos.1 to 3 of the suit schedule property from the 1st defendant, but he failed to prove the same, as he failed to produce any agreement of sale, which is alleged to have been signed by the mother of the appellant. The trial Court also found that the 1st defendant can execute Will only in respect of 50% of the share in respect of the suit schedule property since as per Exs.A1 to A4, he is entitled to only half share of the suit schedule property, as the same is purchased in the name of the mother of the appellant and 1st defendant.

Though the findings of the trial Court on the above issues were challenged before the lower appellate Court, the appellate Court, though framed several points for determination, but only dealt with point No.2 i.e., with regard to non-joinder of sisters of plaintiff. Since the appellate Court has not dealt with the findings on the other issue, but only remanded the matter only on the ground that sisters of the appellant were not impleaded as parties to the suit. The appellant's sisters can be impleaded at the time of final decree proceedings, as per the decisions relied on by the learned counsel for the appellant referred to above, as such, remand by the lower appellate Court to the trial Court is not required and that the remand on that ground is erroneous. The lower appellate Court has not answered the other points framed by it except the point of mis-joinder or non-joinder of sisters of appellant. Since the present appeals are filed only on the ground of remand by the lower appellate Court, this Court cannot go into the other aspects of the matter. Since, lower appellate Court has

not answered the other points, except the point No.2 i.e., with regard to non-joinder of necessary parties, this Court is of the considered opinion that it would be just and proper to remand the matter to the lower appellate Court to decide the issue on merits i.e., on point Nos.1, 3 to 5 framed by it in Common Judgment dated 31.07.2014 in A.S.Nos.55 and 62 of 2010 on merits.

Accordingly, both the Civil Miscellaneous Appeals are disposed of. No costs. As a sequel thereto, miscellaneous petitions, if any, pending, shall stand closed.

A.RAJASHEKER REDDY, J

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HON'BLE SRI JUSTICE A.RAJASHEKER REDDY

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- [\[1\]](#) 2014 (4) ALT 808
- [\[2\]](#) 2014 (4) ALT 339
- [\[3\]](#) 1969 (2) UJ 115 SC
- [\[4\]](#) 2015 (1) ALT 454
- [\[5\]](#) 1997 (5) ALT 183
- [\[6\]](#) 1975 AWR 227
- [\[7\]](#) AIR 1965 Supreme Court 271
- [\[8\]](#) AIR 1983 Gujarat 156
- [\[9\]](#) 2005 (6) ALD 88
- [\[10\]](#) 2010 (5) ALD 339