

* **HONOURABLE SRI JUSTICE T.SUNIL CHOWDARY**

+ SECOND APPEAL Nos.603 of 2009

% Date: 05.1.2018

Yeluru Ramakrishna, S/o.Venkateshwarlu
... Appellant/
Appellant/Plaintiff

and

\$ Yeluru Venkateshwarlu, S/o.Tirumalaiah
And others

... Respondents/
Respondents/Defendants

! Counsel for the appellant : Sri M.R.K.Chakravarthy
Representing Sri M.V.Durga Prasad

^ Counsel for the respondents : Sri M.Rajamalla Reddy

< **GIST:**

> **HEAD NOTE:**

? **CASES REFERRED:**

- 1) AIR 1988 AP 77 (FB)
- 2) 2014) 8 SCC 294
- 3) 2015) 1 SCC 417
- 4) (1997) 2 SCC 387
- 5) (2003) 12 SCC 35
- 6) AIR 1955 SC 363
- 7) IR 2003 SC 3109
- 8) 2014 (3) ALD 119
- 9) 000 (6) ALT 295
- 10) 2001 (4) ALD 26 (SC)
- 11) AIR 1974 SC 471
- 12) 2010 (5) ALD 339
- 13) AIR 1994 AP 87
- 14) (2010) 13 SCC 216

THE HON'BLE JUSTICE SRI T. SUNIL CHOWDARY

SECOND APPEAL No.603 of 2009

JUDGMENT:

1 The plaintiff, who lost the battle for partition in both the Courts, preferred this second appeal under Section 100 CPC, questioning the legality and validity of the judgment and decree dated 08.04.2004 passed in A.S.No.45 of 2002 on the file of the Court of the III Additional District Judge (FTC-II), at Khammam, upholding the judgment and decree dated 05.07.2000 passed in O.S.No.129 of 1991 on the file of the Court of the Senior Civil Judge, Khammam.

2 For the sake of convenience, the parties to this second appeal will, hereinafter, be referred to as they were arrayed in the suit. The first defendant, who is no more, is not arrayed as respondent and defendant Nos.2 to 7 are arrayed as respondent Nos.1 to 6 respectively.

3 The facts leading to the filing of the present second appeal, in nutshell, are as follows:

4 Yeluru Sessaiah and Yeluru Appaiah who are brothers by full blood, owned agricultural land in Gundrathimaduvu village of Khammam Taluq and district and the said land was submerged under Wyra reservoir. The first defendant and one Ramaiah are the sons of Yeluru Sessaiah. Second defendant is elder son and third defendant is the younger son of the first defendant. The

plaintiff is the son of second defendant. The plaintiff and defendant Nos.1 to 3 are members of Hindu Mithakshara co-parcenery joint family. At the time of marriage of the first defendant with one Ramulamma, his father-in-law Katta Lakshmi Narsaiah presented Rs.116/- and one cow and one calf to the first defendant. Appaiah the paternal uncle of the first defendant also presented Rs.116/- and one cow and one calf to the first defendant at the time of marriage. The first defendant also got compensation in respect of the land submerged in Wyra reservoir. Ramulamma-the first wife of the first defendant died after she gave birth to the second defendant. The first defendant married one Hanumayamma (defendant No.4), who is the own sister of Ramulamma through whom the first defendant begot one son i.e., defendant No.3 and three daughters (defendant Nos.5 to 7). First defendant is the Kartha of the joint family and he used to manage the entire joint family properties. Second defendant under the guidance of the first defendant performed the marriages of his sisters and brother. First defendant, with the amounts gifted to him at the time of marriage and the amount received towards compensation for the land acquired for Wyra reservoir, has purchased Item No.1 of the suit schedule property admeasuring Ac.9.34 guntas (Wet land of Ac.3.00 and dry land of Ac.6.34 guntas) from its pattedar Nawab Ahmad Jung Bahadur on 01.11.1955. First defendant was the tenant of the said

Nawab prior to the purchase of the Item No.1 of the suit schedule property. Item Nos.2 to 5 of the suit schedule property were purchased by the first defendant with the income derived from Item No.1 of the suit schedule property. Second defendant, being a Government employee, worked at different places. First defendant had become a pawn at the hands of his wife Hanumayamma (defendant No.4). The acts of defendant Nos.1 to 3, at the instance of Hanumayamma, are causing detriment to the interest of the plaintiff. The plaintiff had placed the matter before elders in the month of July 1991, but the defendants have paid deaf ear to the advice of the elders. Hence the plaintiff, having no other alternative, filed the suit for partition of the suit schedule properties into six equal shares and allot one such share to him and also for future mesne profits.

5 First defendant filed written statement admitting the inter-se relationship between the parties, inter alia contending that he had not inherited any property from his ancestors so as to constitute any nucleus for the unfounded joint family of the plaintiff and defendants. Yeluru Appaiah was not having any agricultural land. If at all any gifts were given to the first defendant, they do not constitute the joint family property. First defendant and his brother-Ramaiah had cultivated an extent of Ac.20.00 of land, which belongs to Nawab of that area. First defendant and his brother-Ramaiah were declared as protected

tenants and ownership certificates were given to that effect under Section 38-E of The A.P. (Telangana Area) Tenancy & Agricultural Lands Act, 1950 (for short, 'the Act'). Out of Acs.20.00, Acs.10.00 of land got by this defendant and the remaining Acs.10.00 of land was allotted to Ramaiah. Therefore, item No.1 of the suit schedule is the self-acquired property of this defendant. This defendant purchased other items of property with his own money. He gave Acs.3.00 of land to his daughters (defendant Nos.5 to 7) towards pasupu-kunkuma. This defendant bequeathed an extent of Ac.6.30 guntas of dry land in Item No.1 in favour of his second son Yeluru Narasimha Rao i.e., third defendant through a Will. Item No.2 of the suit schedule property was sold by his wife-Hanumayamma (defendant No.4) in favour of wife of Pothu Satyanarayana. First defendant sold an extent of Ac.1.00 in Item No.3 of the suit schedule property to one Pola Rama Sundari, W/o.Mohana Rao in the year 1983. First defendant also sold an extent of Ac.1.00 in favour of Sanka Jagan Mohan Rao, Ac.0.45 guntas in favour of Nerella Satyanarayana, Ac.0.22 guntas in favour of Patipalli Nagaraja Kumari and thus he sold Acs.2.67 guntas in Item No.3 in favour of the aforesaid persons. An extent of Ac.0.20 guntas was acquired for formation of Nagarjuna Sagar Canal. He sold Ac.3.00 in favour of one Saraswathi-wife of third defendant. He gave Acs.2.00 to seventh defendant towards her pasupu

kunkuma. So, the first defendant is not having any extent in item No.3 of the suit schedule property. He constructed a tiled house in item No.4 and hence it is his exclusive property. Second defendant purchased house bearing D.No.12-47 in Madhira and house plots at Khammam. Second defendant also owned an extent of Ac.2.00 of land in Warangal, which was converted into house sites. The plaintiff, in collusion with the second defendant, filed the present suit. Any property acquired with the income derived from item No.1 would become the self acquired property of this defendant and so the plaintiff is not entitled for any share in the suit schedule properties. Hence the suit is liable to be dismissed. During the pendency of the suit, first defendant died and his wife and three daughters were brought on record as defendant Nos.4 to 7.

6 Second defendant did not choose to file written statement and remained *ex parte*. Third defendant filed separate written statement with almost similar contents with that of the first defendant.

7 Basing on the above pleadings, the following issues and additional were settled by the trial court:

ISSUES

1. Whether the plaintiff and defendants 1 to 3 constituted members of a joint Hindu family?
2. Whether all the suit properties are joint family properties as alleged by the plaintiff?
3. Whether the suit properties are the self-acquired properties of the 1st defendant?

4. Whether the plaintiff is entitled to the relief of partition?
5. Whether the valuation of the suit relief is correct?
6. To what relief?

ADDITIONAL ISSUES DT:05.08.1992

1. Whether Item No.1 of the plaint schedule was already disposed of by the 1st defendant?
2. Whether Item No.2 of the plaint schedule belonged to Hanumayamma, the wife of 1st defendant as pleaded by the 3rd defendant?

ADDITIONAL ISSUES DT:03.11.1998

1. Whether the defendant No.1 had inherited any property from his ancestors to constitute nucleus for the joint family of the plaintiff and defendants in acquiring the suit schedule properties including Part of Item No.1 suit schedule property?
2. Whether the defendant No.1 and his brother Eluri Ramaiah were declared as protected tenants of Item No.1 of the suit schedule property and whether it is the self acquisition of defendant No.1?
3. Whether giving of three acres of wet land of Item No.1 of the suit schedule property by defendant No.1 in favour of his three daughters (one acre each) towards pasupu kunkuma and bequeathing of Acs. 6-30 gts dry land out of Item No.1 of the suit schedule property by the defendant No.1 in favour of defendant No.3 is true and genuine?
4. Whether Item No.2 of the suit schedule property is the property of Eluri Hanumayamma and whether it was sold by her in favour of wife of Potu Satyanarayana as contended?
5. Whether the alienations with regard to Item No.3 of the suit schedule property as contended are true and correct and genuine?
6. Whether D.1 executed a registered Will to Item No.3 in a sound and disposing state of mind bequeathing properties to D.3, D.4 and Yeluru Sri Phani?

8 To substantiate the case, before the trial Court, the plaintiff got examined himself as P.W.1 and got marked Ex.A.1. To non-suit the plaintiff, on behalf of the contesting defendants D.Ws.1 to 5 were examined and Exs.B.1 to B.7 and Ex.X.1 were marked.

9 After having a thoughtful consideration to the oral, documentary evidence and other material available on record, the trial Court arrived at a conclusion that Item No.1 of the suit schedule property is the self acquired property of the first defendant; therefore, he is entitled to bequeath the properties under Ex.B.1 Will and Ex.B.3 Gift deed, and consequently dismissed the suit.

10 Feeling aggrieved by the judgment and decree dated 05.07.2000 passed by the trial Court in O.S.No.129 of 1991, the plaintiff preferred A.S.No.45 of 2002 on the file of the Court of the III Additional District Judge (FTC-II), at Khammam. The first appellate Court, after reappraising the oral and documentary evidence available on record and without being influenced by the findings recorded by the trial Court, arrived at a conclusion that the suit schedule properties are self acquired properties of the first defendant; thus the plaintiff is not entitled to partition of the suit schedule properties and accordingly dismissed the appeal. The first appellate court also believed Ex.B.1-Will and Ex.B.3 Gift deed. Hence the present second appeal by the unsuccessful plaintiff.

11 Heard Sri M.R.K.Chakravarthy, learned Advocate representing Sri M.V.Durga Prasad, learned counsel for the appellant-plaintiff, Sri M.Rajamalla Reddy, learned counsel

for the respondents-defendants and perused the material available on record.

12 The substantial questions of law urged by the learned counsel for the appellant are briefly as follows:

(i) Whether the property got by a protected tenant, by virtue of ownership certificate issued under Section 38 E of The A.P. (Telangana Area) Tenancy & Agricultural Lands Act, 1950 would become self acquired property or a joint family property?

(ii) Whether the Courts below have misconstrued Section 68 of the Indian Evidence Act and Section 63 of the Indian Succession Act while upholding Ex.B.1 Will?

(iii) Whether the Courts below committed any error while placing reliance on Ex.B.3 gift deed without examining one of the attestors?

13 The following admitted facts emerge from the pleadings and evidence. First defendant married one Ramulamma. Unfortunately, Ramulamma died after she gave birth to the second defendant. First defendant married Hanumayamma (defendant No.4), who is none other than own sister of Ramulamma. Out of their lawful wedlock, first defendant and Hanumayamma (defendant No.4) were blessed with one son i.e., third defendant and three daughters (defendant Nos.5 to 7). First defendant died during the pendency of the suit and his wife- Hanumayamma and three daughters were brought on record as defendant Nos.4 to 7. The plaintiff is the grandson of the first defendant and son of second defendant. Second defendant was a Government employee.

14 The predominant contention of the learned counsel for the plaintiff is that the Courts below proceeded on a

wrong premise and arrived at a conclusion that Item No.1 of the suit schedule property is the self acquired property of the first defendant, which finding is contrary to the provisions of Hindu Succession Act and fundamental principles of law. He further contended that the finding, which is contrary to the fundamental principles of law, can be set aside by this Court, while exercising jurisdiction under Section 100 CPC and this is one such case.

15 Refuting the submissions made by the learned counsel for the plaintiff, the learned counsel for the defendants submitted that the plaintiff failed to prove that Item No.1 of the suit schedule property was purchased by the first defendant with joint family income and that aspect was considered by the courts below in right perspective and hence there is no question of law much less substantial question of law to interfere with concurrent findings of fact recorded by the courts below.

16 Establishment of joint family nucleus is *sine qua non* to treat the property in the hands of kartha of the joint family as joint family property. Suffice it to say, any property purchased by kartha of the joint family from and out of the income derived from the joint family property will automatically become the joint family property regardless of in whose name the property stands. To put it in a different way, mere purchase of the property in the name of one of the joint family members will not confer any vested right in

him, if the same was purchased with the income of the joint family property. The burden of proof lies on the person, who asserts a particular fact and desires the court to adjudicate the same in his favour, in view of Section 101 of Indian Evidence Act. In the instant case, the burden of proof lies on the plaintiff to establish that the first defendant purchased Item No.1 of the suit schedule property with the joint family nucleus and thereafter purchased Item Nos.2 to 5 of the suit schedule property with the income derived from Item No.1 of the suit schedule property. Once the plaintiff, prima facie, establishes the stand taken by him, then only the onus of proof shifts on to the defendants to substantiate the stand taken by them. It is a settled principle of law that unlike onus of proof, burden of proof is static.

17 Yeluru Seshiah and Appiah, father and the paternal uncle of the first defendant, owned agricultural land admeasuring Ac.10.00 in Gundrathimaduvu village of Khammam Taluq as per Ex.A.1 for the fasli 1951-52. It is an admitted fact that the said land was acquired by the Government for the purpose of Wyra reservoir. There is no specific pleading in the plaint whether the said land was acquired by the Government during the lifetime of the father of the first defendant or not. Except a bald averment in the plaint, no convincing evidence was produced before the trial Court in which year the above said land was

acquired by the Government and to whom the compensation was paid viz., either to the first defendant or to his father. Except the self-serving testimony of P.W.1, there is no other evidence, much less cogent and convincing evidence to establish that the first defendant received the compensation from the Government. By the time of alleged payment of compensation by the Government to the first defendant, the father of the plaintiff was also not born. In such circumstances, how the plaintiff got the above information is not properly explained. Second defendant is the competent person, when compared to the plaintiff, to speak about all these things. For the reasons best known to him, second defendant did not choose to file written statement or enter into the witness box either to substantiate or negate the stand of the plaintiff. In view of the same, the testimony of P.W.1 cannot be taken into consideration.

18 The plaintiff has taken a specific plea in the plaint that at the time of the marriage, the kith and kin of the first defendant presented gifts in the shape of cash and live stock and whatever the gifts received by the first defendant at the time of his marriage became the joint family property and that any property purchased by the first defendant with the said amount would automatically become the joint family property.

19 Strictly speaking, the plaintiff is not the competent person to speak about the gifts alleged to have been received by the first defendant at the time of his marriage. There is no mention in the plaint through whom the plaintiff came to know about the said information. There is no provision under the Hindu Succession Act indicating that the gifts given to the bridegroom at the time of marriage will attain the character of joint family property. Whatever the gifts presented at the time of marriage will become personal or self acquired property of the bridegroom. Therefore, the contention of the learned counsel for the plaintiff that the courts below committed error by not treating the gifts presented to the first defendant at the time of his marriage as joint family property is unsustainable either on facts or in law. Absolutely there is no material on record to establish that the first defendant inherited property either in the shape of land or compensation under the Land Acquisition Act. In the absence of the joint family nucleus whatever the property purchased by the first defendant will be treated as his self-acquired property.

20 The learned counsel for the plaintiff submitted that in view of fluid situation, the Court can presume that the first defendant might have received the compensation and purchased Item No.1 of the suit schedule property. As observed earlier, the burden of proof always lies on the

plaintiff to establish the specific stand taken by him. Granting of relief in favour of plaintiff, basing on presumptions and assumptions, without any basis, is not recognized by law. Even if the Court records a finding basing on presumptions and assumptions, such finding is not legally sustainable. The Court can draw an inference or make a presumption basing on facts pleaded and proved. In the absence of pleading and proof thereof, the court on its own motion cannot draw an inference or make a presumption. Therefore, I am very much afraid to accept the submission made by the learned counsel for the plaintiff.

21 The next contention of the learned counsel for the plaintiff is that the first defendant got Item No.1 of the suit schedule property as a protected tenant; therefore, the same will automatically become joint family property and thereby the plaintiff is entitled to a share in it. He further submitted that Item Nos.2 to 5 of the suit schedule property were acquired by the first defendant from and out of the income derived from the Item No.1 of the suit schedule property. Hence the suit schedule property is the joint family property of the plaintiff and the defendant Nos.1 to 3 and hence the plaintiff is entitled to a share therein.

22 To substantiate the submissions, the learned counsel for the plaintiff has drawn the attention of this Court to the

ratio laid down in **Sada vs. The Tahsildar, Uttoor, Adilabad District**¹ wherein a Full Bench of the Hon'ble apex Court while dealing with various provisions of the Tenancy Act, made the following observations at Para Nos.29 and 36 as follows:

29. It is clear from Section 38-E that it is for these 'Protected tenants' who are finally declared to be 'protected tenants' and included in the Register prepared for that purpose and for whom protected tenancy certificates have been issued, that ownership rights are envisaged in S.38-E(1), subject of course, to the limitation with regard to extent of holdings as specified in S.38(7) and to the proviso to S.38-E(1). Once persons who held land on the dates or for the periods mentioned in Ss.34, 37 and 37-A and the requirement of physical possession on the dates required in those sections is satisfied, such persons have become 'protected tenants'. Once a person becomes a protected tenant, he earns a qualification to become an owner by force of statute, subject of course to the qualification regarding extent in S.38(7) and to the proviso to S.38-E(1). There is no requirement in the Act that he should also be in possession on the date specified in the notification issued in S.38-E(1). The words 'all lands held by protected tenants' is more a description of the lands with regard to which the right as protected tenant has been declared and there are no words requiring physical possession on the date specified in the notification.

36. For all the aforesaid reasons we hold on point No.1 that for the vesting of the ownership of land 'held' by a protected tenant under S. 38E(1), it is not necessary that the protected tenant should have been in physical possession on the date of notification. It is sufficient if he continued to hold the status of a 'protected tenant' as on the notified date even if not in physical possession and he satisfied the requirements of S.32(7) of the Act. This is also subject to the proviso to Section 38-E(1).

23 As per the principle enunciated in the case cited supra, the protected tenant has right to obtain Occupancy Rights Certificate in respect of the land physically held by him.

¹ AIR 1988 AP 77 (FB)

24 In **Gaiv Dinshaw Irani vs. Tehmtan Irani**² the Hon'ble apex Court held at para Nos.37 to 39 as follows:

37. In *H.C. Pandey v. G.C. Paul*, (1989) 3 SCC 77, this Court held that:

“4. It is now well settled that **on the death of the original tenant, subject to any provision to the contrary either negating or limiting the succession, the tenancy rights devolve on the heirs of the deceased tenant.** The incidence of the tenancy are the same as those enjoyed by the original tenant.”

38. Furthermore in *Parvinder Singh v. Renu Gautam*, (2004) 4 SCC 794, it has been held by this Court that;

“6. Tenancy is a heritable right unless a legal bar operating against heritability is shown to exist.”

39. The aforementioned cases indicate that in general tenancies are to be regulated by the governing legislation, which favour that tenancy be transferred only to family members of the deceased original tenant. However, in light of the majority decision of the Constitution Bench in *Gian Devi Anand v. Jeevan Kumar*, (1985) 2 SCC 683, the position which emerges is that **in absence of any specific provisions, general laws of succession to apply**, this position is further cemented by the decision of this Court in *State of West Bengal v. Kailash Chandra Kapur* (1997) 2 SCC 387, which has allowed the disposal of tenancy rights of Government owned land in favour of a stranger by means of a Will in the absence of any specific clause or provisions.

25 As per the principle in the case cited above, in the absence of specific provisions in the Act in respect of transfer of tenancy right by testamentary disposition, the general laws of succession are applicable.

26 In **N. Padmamma vs. S.Ramakrishna Reddy**³ the Hon'ble apex Court held at para Nos.15 and 16 as follows:

15. It is evident from the above that the right of partition was held to have been lost by operation of law. Till such time the grant was made no such right could be recognized observed this Court. This Court specifically

² (2014) 8 SCC 294

³ (2015) 1 SCC 417

held that it was not concerned with the consequences that would ensue after grant is made. The suit in the present case was filed after the grant of occupancy rights. **The question here is whether the grant of such rights is for the benefit of one of the members of the joint family or for all the heirs left behind by Ramachandra Reddy. Our answer to that question is in favour of the Appellants. In our opinion, the grant of such occupancy rights in favour of Respondent No. 1 was for the benefit of all the legal heirs left behind by Ramachandra Reddy.** Reliance upon Lokraj v. Kishan Lal, (1995) 3 SCC 291, therefore, is of no assistance to the respondents. We are also of the view that the decision in Lokraj's case (supra), does not correctly apply the earlier decision of this Court in Bhubaneshwar Prasad Narain Singh v. Sidheswar Mukherjee, (1971) 1 SCC 556. With utmost respect to the Hon'ble Judges who delivered the decision in Lokraj's case, the law was not correctly laid down, if the same was meant to say that even in the absence of a plea of ouster, a co-heir could merely on the basis of grant of the occupancy rights in his name exclude the other co-heirs from partition of the property so granted.

16. In the result, we allow this appeal and set aside the judgment and order passed by the Courts below to the extent the same hold that inam lands granted in favour of Respondent No. 1 upon abolition of the inam under the Andhra Pradesh (Telangana Area) Abolition of Inams Act, 1955 are not partible among the heirs left behind by Shri Ramachandra Reddy. The suit filed by the Appellants shall resultantly stand decreed even qua the inam land in the same ratio as has been determined by the High Court by the impugned judgment in regard to other items of properties. No costs.

27 As per the principle enunciated in the case cited supra, even though inam grant was given in the name of one person for the benefit of the entire family, the same can be treated as a joint family property.

28 The learned counsel for the defendants has drawn the attention of this Court to the ratio laid down in **State of West Bengal vs. Kailash Chandra Kapur**⁴ wherein the Hon'ble apex Court held at Para No.12 as follows:

12. In view of the above settled legal position, the question is: whether the bequest made by Mullick in 'favour of the respondent is valid in law and whether the Governor is bound to recognise him? It is seen that Clauses (7), (8) and (12) are independent and each deals

⁴ (1997) 2 SCC 387

with separate situation. Clause (7) prohibits sub-lease of the demised land or the building erected thereon without prior consent in writing of the Government. Similarly, Clause (8) deals with transfer of the demised premises or the building erected thereon without prior permission in writing of the Government. Thereunder, the restricted covenants have been incorporated by granting or refusing to grant permission with right of pre-emption. Similarly, Clause (12) deals with the case of lessee dying after executing a Will. **Thereunder, there is no such restrictive covenant contained for bequeath in favour of a stranger. The word 'person' has not been expressly specified whether it relates to the heirs of the lessee. On the other hand, it postulates that if the bequest is in favour of more than one person, then such persons to whom the leasehold right has been bequeathed or the heirs of the deceased lessee, as the case may be, shall hold the said property jointly without having any right to have a partition of the same and one among them should alone be answerable to and the Government would recognise only one such person.** In the light of the language used therein, it is difficult to accept the contention of Shri V.R. Reddy; that the word 'person' should be construed with reference to the heirs or bequest should be considered to be a transfer. Transfer connotes, normally, between two living persons during life; will takes effect after demise of the testator and transfer in that perspective becomes incongruous. Though, as indicated earlier, the assignment may be prohibited and Government intended to be so, a bequest in favour of a stranger by way of testamentary disposition does not appear to be intended, in view of the permissive language used in Clause (12) of the covenants. We find no express prohibition as at present under the terms of the lease. Unless the Government amends the rules or imposes appropriate restrictive covenants prohibiting the bequest in favour of the strangers or by enacting appropriate law. There would be no statutory power to impose such restriction prohibiting such bequest in favour of the strangers. It is seen that the object of assignment of the Government land in favour of the lessee is to provide him right to residence. If any such transfer is made contrary to the policy, obviously, it would be defeating the public purpose. But it would be open to the Government to regulate by appropriate covenants in the lease deed or appropriate statutory orders as per law or to make a law in this behalf. But so long as that is not done and in the light of the permissive language used in Clause (12) of the lease deed, it cannot be said that the bequest in favour of strangers inducting a stranger into the demised premises or the building erected thereon is not governed by the provisions of the regulation or that prior permission should be required in that behalf. However, the stranger legatee should be bound by all the covenants or any new covenants or statutory base so as to bind all the existing lessees.

29 The Act was enacted in order to regulate the relationship of landlord and tenant of the agricultural land

and the alienations of such land. It is apposite to refer to certain provisions of the Act in order to appreciate the rival contentions. Section 2 (1) (r): 'Protected' means, a person who is deemed to be a protected tenant under the provisions of this Act. Section 2 (1) (u) 'Tenancy' means the relationship of land holder and tenant. Section 2 (1) (v) 'Tenant' means an 'asami shikami' who holds land on lease and includes a person who is deemed to be a tenant under the provisions of the Act.

30 Chapter IV of the Act deals with the rights of the protected tenant. Section 34 of the Act deals with 'deemed protected tenant'. Section 35 of the Act enables the Tahsildar to decide who is the deemed protected tenant. Section 36 of the Act deals with the recovery of possession by the protected tenant. Section 37A of the Act postulates that the person who is in possession of the agricultural land as tenant at the commencement of the Hyderabad Tenancy and Agricultural Lands (Amendment) Act, 1955 (for short, 'Hyderabad Act') automatically deemed to be protected tenant. Section 38 of the Act confers right on the protected tenant to purchase the land under his cultivation. Sections 38-A to 38-E of the Act deal with the conducting of enquiry and issuance of ownership certificates in favour of the protected tenants, subject to fulfilment of certain limitations. The composite State of Andhra Pradesh issued notification on 01.01.1973 under Section 38-E of the Act

and from the said date, a protected tenant shall be deemed to be the full owner of such land. Section 38-E confers ownership right on the protected tenant.

31 Let me consider the facts of the case on hand in the light of the ratio laid down in the cases cited supra as well as the provisions of the Act.

32 It is an admitted fact that the first defendant and his brother cultivated an extent of Acs.20.00 as tenants which belonged to Nawab Ahmad Jung Bahadur as on the date of commencement of the Hyderabad Act. Therefore, the first defendant has become protected tenant to an extent of Acs.10.00. As per the provisions of the Act, a protected tenant is legally entitled to purchase the land under his cultivation from his landlord and get ownership certificate under Section 38-E of the Act in respect of the land held by him as protected tenant. In the instant case, first defendant purchased the land from Nawab Ahmad Jung Bahadur and consequently, the Tahsildar, after due enquiry, issued ownership certificate in favour of the first defendant to an extent of Ac.10.00. Rule 5 of The Andhra Pradesh (Telangana Area) Protected Tenants (Transfer of Ownership of Lands) Rules, 1973 deals with issuance of certificate, which reads as under:

5. **Issue of Certificate:** (1) After the declaration of the final list under sub-rule (3) of Rule 4, the Tribunal shall issue a certificate under sub-section (2) of Section 38-E in Form II to every protected tenant included in the final list, declaring him to be the owner of the land specified against him in the final list and shall cause the

necessary entries to be made in the relevant or other revenue accounts of the village.

(2) Simultaneously with the issue of certificate under sub-rule (1), a notice in Form II together with a copy of the said certificate shall be issued to every landholder whose land stands transferred to the protected tenant under Section 38-E.

33 The first defendant became the absolute owner to an extent of Ac.10.00 which is the Item No.1 of the suit schedule property. As observed earlier, there is no iota of evidence to establish that the first defendant purchased the Item No.1 of the suit schedule property with the compensation received under Land Acquisition Act. In the absence of such vital and indispensable link, it is not possible for the court to arrive at a conclusion that the first defendant purchased Item No.1 of the suit schedule property with the joint family nucleus. In the absence of such proof, Item No.1 of the suit schedule property cannot be treated as joint family property.

34 The learned counsel for the plaintiff has placed much reliance on **N. Padmamma** case (3 supra). That case was decided under the provisions of Inam Abolition Act. In the said case, grant was given in favour of one of the family members after the demise of the original inamdar. Inam land cannot be equated with that of the tenancy land. Both lands are governed by different enactments. Moreover, in the instant case, ownership certificate was issued in favour of the first defendant during his lifetime that too after conducting due enquiry. It is not the case of the plaintiff

that issuance of ownership certificate under Section 38E of the Act, in the name of the protected tenant, is not only for the benefit of himself but also for the benefit of his joint family members. Hence the ratio laid down in that case is not applicable to the facts of the case on hand.

35 The learned counsel for the plaintiff strenuously submitted that even assuming but not conceding that it is a self acquired property of the first defendant, he has no right to alienate the property by way of Will or gift. To substantiate the same, he has drawn the attention of this Court to Section 48-A of the Act, which imposes restrictions on permanent alienation or transfer of land acquired by first defendant as a protected tenant. As per the above provision, a protected tenant is not entitled to alienate the property within eight years from the date of issuance of certificate. Section 48-A of the Act enables the Tahasildar to cancel the certificate if the protected tenant alienate the property in gross violation of the provisions of the Act. The first defendant executed Ex.B.3 Gift deed on 27.07.1989 and also executed Ex.B.1 Will on 06.01.1992 i.e. after lapse of eight years from the date of issuance of ownership certificate in his favour. Therefore, the plaintiff is not entitled to challenge the validity of Ex.B.1 and B.3 taking aid of Section 48-A of the Act.

36 The learned counsel for the plaintiff further contended that the tenancy rights are heritable in view of

Section 40 of the Act, therefore, the plaintiff along with defendant Nos.2 and 3 has right over the Item No.1 of the suit schedule property. To appreciate this contention, it is not out of place to extract hereunder Section 40 of the Act.

40. Rights of protected tenant heritable:- (1) All rights of a protected tenant shall be heritable.

(2) If a protected tenant dies, his heir or heirs shall be entitled to hold the tenancy on the same terms and conditions on which such protected tenant was holding the land at the time of his death (and such heirs may, notwithstanding anything contained in this Act, subdivide inter se according to their shares the land comprised in the tenancy to which they have succeeded.)

(3) If a protected tenant dies without leaving any heirs, all his rights shall be extinguished.

(4) The interest of a protected tenant in the land held by him as a protected tenant shall form sixty per cent.

37 A perusal of the above section, at a glance, clearly demonstrates that the legal heirs of the protected tenant inherit the tenancy rights after his death only. This section clearly indicates that during the lifetime of protected tenant, his family members cannot claim right in the tenancy rights. The plaintiff filed the suit during the lifetime of the first defendant. Therefore, the plaintiff is not entitled to take shelter under Section 40 of the Act on the premise that the first defendant died during the pendency of the suit. If the submission of the learned counsel for the plaintiff is accepted, the first defendant would be a protected tenant as on the date of filing of the suit as well as till his last breath. A person cultivating the land as a tenant, as on the date of commencement of Hyderabad Act, would become a protected tenant. The Act enables the

protected tenant to become the absolute owner of the tenancy lands by paying sale consideration to the landlord, as fixed by the Government. Once the ownership certificate is issued under Section 38-E of the Act, after due enquiry, a protected tenant will become the absolute owner of the tenancy land in his individual capacity. A person cannot be treated as protected tenant on one hand and as owner on the other hand in respect of the same land. The submission of the learned counsel for the plaintiff has no basis to treat the first defendant as a protected tenant even after his death in view of Section 38-E of the Act. The right of the protected tenant would merge into ownership right immediately after issuance of ownership certificate. In such circumstances, the question of inheriting the tenancy rights of the first defendant, by his family members, more particularly the plaintiff, is illusion and myth. Viewed from any angle, I am unable to accept the contention of the learned counsel for the plaintiff that the first defendant remained as protected tenant till his death. By no stretch of imagination it can be presumed that the first defendant is the protected tenant of Item No.1 of the suit schedule property so as to press into service Section 40 of the Act.

38 The predominant contention of the learned counsel for the plaintiff is that the courts below have committed grave error while placing reliance on Ex.B.1-Will. In this context, the learned counsel for the plaintiff has drawn the

attention of this Court to the ratio laid down in **Bhagat Ram vs. Suresh**⁵. On the other hand, the learned counsel for the defendants has drawn the attention of this Court to the ratio laid down in **Naresh Charan Das Gutpa vs. Paresh Charan Das Gutpa**⁶ and **Rambai Padmakar Patil vs. Rukminibai Vishnu Vekhande**⁷. From the above three decisions, the following principles can be deduced: 1) the propounder of the Will has to dispel the suspicious circumstances surrounding the execution of the Will, and (2) in order to prove the Will, one of the attestors has to be examined in view of Section 68 of Indian Evidence Act and Section 63 of the Indian Succession Act.

39 Normally, the parties will fight with regard to the validity or otherwise of the Will after the death of the testator or testatrix, as the case may be. The present case is an exception for the simple reason that the grandson challenged the validity of the Will during the lifetime of his grandfather. The first defendant filed written statement, in unequivocal terms, admitting that he executed Ex.B.1 Will on 06.01.1992 bequeathing Item Nos.1, 4 and 5 of the suit schedule property in favour of third defendant and his children.

40 Defendant Nos.3 and 7 who were examined as D.Ws.1 and 5 categorically deposed that the first defendant

⁵ (2003) 12 SCC 35

⁶ AIR 1955 SC 363

⁷ AIR 2003 SC 3109

executed Ex.B.1 Will bequeathing part of the suit schedule properties in favour of the defendant No.4. As seen from the testimony of D.W.4, he along with one Katta Gopaiah are the attestors of the Will. As per his testimony, the first defendant executed Ex.B.1 bequeathing Acs.6.00 and odd of dry land in favour of the third defendant and the house situated at Wyra in favour of fourth defendant. His testimony further reveals that the first defendant got prepared the Will at the Sub-Registrar Office at Khammam and that he (D.W4) attested the Will in the Sub-Registrar Office in the presence of the first defendant. The testimony of D.W.4 remains unchallenged so far as the execution of Ex.B.1 Will by the first defendant in his presence at the Sub-Registrar Office, Khammam. Ex.B.1 Will was executed on 06.01.1992, whereas the first defendant died during the pendency of the suit. Nothing is elicited in the cross-examination of D.Ws.1, 2 and 4 that the first defendant was not in a sound and disposing state of mind at the time of execution of the Will. The defendants have dispelled the suspicious circumstances surrounding the execution of the Will by the first defendant. Having regard to the facts and circumstances of the case and also the principle enunciated in the cases cited supra, I am fully endorsing the concurrent findings of fact recorded by the courts below with regard to the validity of Ex.B.1 Will.

41 The plaintiff is also challenging the validity of Ex.B.3 Gift deed dated 27.07.1989 executed by the first defendant. It is apposite to refer to proviso to Section 68 of the Indian Evidence Act, which reads as under:

68. Proof of execution of document required by law to be attested:-

... ..

Provided that it shall not be necessary to call an attesting witness in proof of the execution of any document, not being a will, which has been registered in accordance with the provisions of the Indian Registration Act, 1908 (16 of 1908), unless its execution by the person by whom it purports to have been executed is specifically denied.

42 In the instant case, the first defendant, who is the donor/executant of Ex.B.3 Gift deed, filed written statement, in unequivocal terms, admitting the same. Under Ex.B.3, he gifted property in favour of his daughter. As per the principle laid down in **Annam Uttarudu (died) v. Annam Venkateswararao**⁸, **Pindiganti Lakshminarayana (died) per L.Rs vs. Pindiganti Venkata Subbarao**⁹ and **Surendra Kumar vs. Nathulal**¹⁰ a registered deed of gift can be received in evidence without examining one of the attestors, if the donor / executant admits the same. As per Section 58 of the Indian Evidence Act, admitted facts need not be proved. In **Nagindas Ramdas vs. Dalpatram locharam alias Brijramand**¹¹ the Hon'ble apex Court held at Para No.26 as under:

26. From a conspectus of the cases cited at the bar, the principle that emerges is, that if at the time of the

⁸ 2014 (3) ALD 119

⁹ 2000 (6) ALT 295

¹⁰ 2001 (4) ALD 26 (SC)

¹¹ AIR 1974 SC 471

passing of the decree, there was some material before the Court, on the basis of which, the Court could be prima facie satisfied, about the existence of a statutory ground for eviction, it will be presumed that the Court was so satisfied and the decree for eviction, though apparently passed on the basis of a compromise, would be valid. Such material may take the shape either of evidence recorded or produced in the case, or, it may partly or wholly be in the shape of an express or implied admission made in the compromise agreement, itself, Admissions, if true and clear, are by far the best proof of the facts admitted. Admissions in pleadings or judicial admissions, admissible under section 58 of the Evidence Act, made by the parties or their agents at or before the hearing of the case, stand on a higher footing than evidentiary admissions. The former class of admissions are fully binding on the party that makes them and constitute a waiver of proof. They by themselves can be made the foundation of the rights of the parties. On the other hand evidentiary admissions which are receivable at the trial as evidence, are by themselves, not conclusive. They can be shown to be wrong.

Section 70 of the Evidence Act reads as under:

70. Admission of execution by party to attested document:-

The admission of a party to an attested document of its execution by himself shall be sufficient proof of its execution as against him, though it be a document is in the handwriting of that person.

43 A perusal of the above section at a glance clearly demonstrates that if the party to the attestable document admits execution of the same, that itself is sufficient proof of its execution against him. Having regard to the facts and circumstances of the case and also the principle enunciated in the cases cited supra, I am of the considered view that the Courts below have not committed any error while placing reliance on Ex.B.3 Gift deed.

44 As seen from the testimony of D.W.3, his wife purchased an extent of Ac.3.00 from defendant Nos.1 and 4 under the original of Ex.X.1. In the cross-examination of this witness, nothing is elicited to disbelieve his testimony. First defendant also categorically admitted, in the written

statement, that he sold landed property in favour of the wife of D.W.3. First defendant, being the absolute owner of the suit schedule property, is entitled to sell the same. Therefore, Ex.X.1 is not only binding on the first defendant but also the persons who are claiming right through him.

45 The learned counsel for the defendants submitted that the plaintiff filed the suit without any cause of action. *Per contra*, the learned counsel for the plaintiff submitted that even after the death of the first defendant, he is entitled to a share in the suit schedule properties, even assuming but not conceding that the suit schedule properties are self acquired properties of the first defendant.

46 This Court has already given a specific finding supra, that the suit schedule properties are the self acquired properties of the first defendant. In that view of the matter, none of the legal heirs of the first defendant is entitled to file a suit against him during his lifetime seeking partition of the suit schedule property. When the second defendant himself has no right whatsoever to file suit seeking partition of the suit schedule properties, how the plaintiff, who is the son of the second defendant, is entitled to file the suit is a debatable question. Admittedly, the plaintiff will not fall within the ambit of Class-I heirs as contemplated under Hindu Succession Act. A son or a daughter of a predeceased son or daughter being Class-I heir can seek

partition of the joint family properties. The plaintiff is not entitled to file the suit as Class I heir, so long as the second defendant is alive. Of course, cause of action consist bundle of facts and basing on one of such facts, a party is entitled to file the suit. In the instant case, the plaintiff filed the suit as if the first defendant purchased the suit schedule properties with the joint family nucleus. The stand taken by the plaintiff so far as the joint family nucleus is without any basis and hence falls to ground. If viewed from this angle, maintainability of the suit is very much doubtful.

47 Another interesting aspect is, the plaintiff is not entitled to challenge the validity of Ex.B.1 Will so long as the first defendant is alive. As observed earlier, the plaintiff filed the suit during the lifetime of the first defendant. Strictly speaking, no cause of action accrued in favour of the plaintiff to challenge the validity of Ex.B.1 as on the date of filing of the suit. Merely because the first defendant died during the pendency of the suit, that itself, will not automatically cure the defect of non-accruing of cause of action in favour of the plaintiff as on the date of filing of the suit. Viewed from this angle also, the plaintiff filed the suit without any cause of action as well as semblance of legal right. Accruing of cause of action in favour of a person is *sine qua non* to approach the civil court for redressal by filing appropriate suit. It is needless to say that any suit

filed without cause of action is nothing but a futile attempt of claiming imaginary relief. This is a classic example of one such case.

48 Even if the court assumes or presumes that the plaintiff filed the suit under a bona fide impression that the suit schedule properties are joint family properties, still the maintainability of the suit is very much doubtful. The plaintiff has not disclosed in the plaint that he is having one sister. During the cross examination, the plaintiff, as P.W.1, admitted that he is having one sister. A partition suit, seeking partition of joint family properties, is not maintainable without impleading all the members of the joint family as well as without including all the properties of the joint family. The learned counsel for the defendants has drawn the attention of this Court to the following decisions:

(i) **K.Bhaskar Rao vs. K.A. Rama Rao**¹² wherein this Court held at Para No.22 as under:

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.

¹² 2010 (5) ALD 339

(ii) **Nalla Venkateshwarlu vs. Porise Pullamma**¹³

wherein this Court held at para No.10 as follows:

10. Though the provisions of Order I, Rule 9 say that no suit shall be defeated by reason of the misjoinder or non-joinder of parties, and the Court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it, the proviso makes it clear that this rule does not apply to non-joinder of necessary parties. Therefore, if necessary party is not impleaded in a suit or an appeal, it will have to be dismissed on that ground.

49 As per the principle enunciated in the cases cited supra, a suit for partition is not maintainable without impleading all the members of the joint family. The plaintiff filed the suit claiming share in the suit schedule properties as one of the members of the joint family. If that is so, his sister also becomes one of the sharers. The learned counsel for the plaintiff submitted that if ultimately the court decrees the suit, the plaintiff will implead his sister in the final decree proceedings. Suffice it to say, the rights of the parties will be adjudicated while passing the preliminary decree in a suit for partition. To put it in a different way, the rights of the parties over the suit schedule property will be crystal clear in the preliminary decree. In the final decree proceedings the court will allot the shares by metes and bounds as per good and bad qualities to the parties to the preliminary decree. It is needless to say that the final decree shall be passed in consonance with the preliminary decree. The final decree proceedings cannot go beyond the scope of the preliminary

¹³ AIR 1994 AP 87

decree in the normal course. During the pendency of the final decree, if one of the parties to the preliminary decree dies, his legal representatives have to be brought on record. The shares allotted to the parties in the preliminary decree, as per their entitlement, may vary in the final decree, by operation of law. A person who is not a party to the suit is not entitled to come on record at the time of passing of the final decree except in exceptional cases. When no share was allotted to the plaintiff's sister in the preliminary decree, this court is unable to understand how she will be brought on record during the final decree proceedings. Non-disclosing of the factum of plaintiff having a sister is undoubtedly fatal to the case of the plaintiff. Viewed from this angle also, the suit is not maintainable under law.

50 The findings recorded by the trial Court are based on sound reasoning and logical conclusion and they are supported by evidence, more so, legally admissible evidence. The first appellate Court has not committed any error while endorsing the findings recorded by the trial Court. This Court shall not lightly interfere with the concurrent findings of fact recorded by the courts below. Suffice it to say that the first appellate court is the fact finding final Court. All the questions raised by the learned counsel for the plaintiff are purely questions of fact, which cannot be gone into by this Court, while exercising jurisdiction under Section 100 CPC.

51 It is needless to say that if the concurrent findings of fact recorded by the courts below are neither found to be contrary to the pleadings nor the evidence or any provisions of law, or so found perverse, then, in my considered view, such concurrent findings of fact cannot be interfered with. I find no merit in any of the arguments advanced by the learned counsel for the appellants, which are only based on facts and evidence. This Court cannot reappreciate the evidence again *de novo* while hearing this second appeal.

52 In **Municipal Committee, Hoshiarpur v. Punjab SEB**¹⁴, while dealing with the scope of Section 100 of C.P.C., the Hon'ble apex Court held at paragraph No.16 as follows:

16. ... A second appeal cannot be decided merely on equitable grounds as it lies only on a substantial question of law, which is something distinct from a substantial question of fact. The court cannot entertain a second appeal unless a substantial question of law is involved, as the second appeal does not lie on the ground of erroneous findings of fact based on an appreciation of the relevant evidence. The existence of a substantial question of law is a condition precedent for entertaining the second appeal; on failure to do so, the judgment cannot be maintained. The existence of a substantial question of law is a sine qua non for the exercise of jurisdiction under the provisions of Section 100 CPC. ...

53 Having regard to the facts and circumstances of the case and also the principles enunciated in the case cited *supra*, I am of the considered view that no question of law much less substantial question of law is involved in this second appeal and accordingly the same is liable to be dismissed.

¹⁴ (2010) 13 SCC 216

54 For the foregoing discussion, the Second Appeal is dismissed at the stage of admission. There shall be no order as to costs. Consequently, Miscellaneous Petitions, if any, pending in this Second Appeal shall stand closed.

T. SUNIL CHOWDARY, J.

Date: 05.1.2018

L.R. COPY BE MARKED : **YES** / NO

Kvsn

