

THE HON'BLE SRI JUSTICE M. SEETHARAMA MURTI

Appeal Suit No.868 of 1999

JUDGMENT:

This first appeal suit, under Section 96 of the Code of Civil Procedure, 1908, is originally preferred by the defendants 1, 3 to 7 & 8, assailing the judgment and decree, dated 16.09.1998, of the learned Senior Civil Judge, Kandukur, passed in OS.No.3/85 (OP.No.7 of 1984).

2. I have heard the submissions of Sri MVS.Suresh Kumar, learned senior counsel representing A. Srinivasa Rao, learned counsel appearing for the appellants-defendants, and of Smt. K. Sesha Rajyam, learned senior counsel representing Smt.G. Deepika, learned counsel appearing for the 2nd respondent-2nd defendant. I have perused the material record. Appeal suit against the 3rd respondent herein-9th defendant is dismissed for default.

3. Be it noted that during the pendency of this appeal suit, the 1st appellant-1st defendant died; and, his legal representatives were brought on record as appellants 8 & 9. Further, on the death of 6th defendant-5th appellant herein, his legal representatives were brought on record as appellants 10 & 11. On the death of 7th defendant-6th appellant herein, his legal representative was brought on record as 12th appellant. The 2nd defendant, who is the 2nd respondent herein is the daughter of the 1st respondent-plaintiff. The 3rd defendant-2nd appellant herein died even during the pendency of the suit. The 10th defendant-4th respondent herein also died during the pendency of the suit. The suit is dismissed as abated against the said defendants for not bringing their legal representatives on record during the pendency of the suit before the trial Court.

The suit against the 9th defendant-3rd respondent herein was also dismissed as evident from the judgment of the trial Court.

4. As this is a first appeal suit and this Court is the last Court of fact, it is necessary to advert to the pleadings of the parties.

5. The case of the plaintiff, in brief, is as follows:

The 1st defendant, aged about 50 years, is the son of Adiseshaiah. The 2nd defendant, aged about 37 years, is the wife of Ramaiah. The 3rd defendant, aged 35 years; the 4th defendant, aged 30 years; the 5th defendant, aged 27 years, are the sons of Gulla Ankaiah. The 6th defendant, aged 30 years, is the son of Narasimham. The 7th defendant, aged 60 years, is the son of Gangaiah. The 8th defendant, aged 30 years, is the son of Subbaiah. The 9th defendant is aged about 70 years; however, his father's name is not known to the plaintiff. The 10th defendant, aged about 50 years is the son of Kotaiah. All the defendants are cultivators. Defendants 1, 3 to 10 are residents of Moogachintala village of Kandukur Taluk. The 2nd defendant is resident of Viswanadhapuram of Kandkuru Taluk. Out of Ac.50.17 cents of plaint 'A' schedule properties, one Chaganti Babaiah owned about Ac.22.00 cents of lands; and, his brother-in-law, Mannem Parvatalu, owned about Ac.11.00 cents. Both Babaiah and Parvatalu lived together and enjoyed the total extent of Ac.33.00 cents as joint owners. The said Babaiah through his wife Kotamma has got three sons, namely, Chenchiah, Adiseshaiah and Basavaiah; and, four daughters, namely, Chenchamma, Subbamma, Punnamma and Ademma. Babaiah gave his daughter Subbamma in marriage to Mannem Kondaiah S/o. Parvatalu. Babaiah and his three sons constituted a Hindu joint family and enjoyed all the

joint family properties jointly without partition. Mannem Parvatalu, who lived in the same family, has got two sons, namely, Ankaiah and Kondaiah. Mannem Ankaiah separated away from the family and went to live in his father-in-law's house. As such, the properties of Parvatalu devolved upon his remaining son, Kondaiah; and, after the death of Kondaiah his wife, Mannem Subbamma came to own the properties of an extent of about Ac.11.00 cents. Chaganti Chenchiah, the 1st son of Babaiah and Chaganti Basavaiah, the 3rd son of Babaiah, died intestate and unmarried. Therefore, their shares devolved upon the co-parceners, Chaganti Babaiah and his son Adiseshaiah. While living jointly, Babaiah died intestate about 50 years prior to the institution of the instant suit. Therefore, all the joint family properties extending about Ac.22.00 cents devolved upon Adiseshaiah; and, the other Ac.11.00 cents of land continued to be owned by Mannem Subbamma. Hence, originally, in the plaint 'A' schedule properties, Chaganti Adiseshaiah has got Ac.22.00 cents and Mannem Subbamma has got Ac.11.00 cents and both of them lived together without any partition. Adiseshaiah from out of the income derived from the joint family nucleus purchased Ac.17.17 cents of land from others and augmented the family properties. So, in the plaint 'A' schedule properties, Adiseshaiah got Ac.39.17 cents. Adiseshaiah through his first wife Subbamma has got only one son-Pullaiah/1st defendant. The 1st wife of Adiseshaiah predeceased him and died about 40 years ago. Thereafter, Adiseshaiah married the plaintiff as his second wife; and, the 2nd defendant-Venkata Subbamma is their only daughter. Adiseshaiah and his son-Pullaiah/1st defendant continued to live jointly and enjoyed all their joint family properties jointly without any partition. While so, Adiseshaiah died intestate about 17 years prior to the

institution of the suit. As per Section 8 of the Hindu Succession Act, the joint family properties devolved upon the 1st defendant-Pullaiah with 4/6th share; 2nd defendant with 1/6th share; and, the plaintiff with 1/6th share, they being the son, daughter and widow of Adishesaiah respectively. They lived together enjoying the joint family properties jointly without any partition. Mannem Subbamma, about ten years ago, executed a registered Will bequeathing her Ac.11.00 cents of properties to the 1st defendant and thereafter she died. Therefore, her Ac.11.00 cents of land devolved upon the 1st defendant. As such, in the plaint 'A' schedule properties, Ac.11.00 cents has to be given to the 1st defendant and the remaining extent of Ac.39.17 cents is to be partitioned; and the plaintiff has to get 1/6th share; 1st defendant has to get 4/6th share; and, the 2nd defendant has to get 1/6th share in the said Ac.39.17 cents out of plaint 'A' schedule property. The plaint 'A' schedule properties are rich and fertile lands capable of yielding Rs.25,000/- net profits per annum and there is no necessity for the 1st defendant to borrow debts. The 1st defendant from about three years prior to the institution of the suit clandestinely began to execute spurious and nominal documents in favour of others so as to reduce the shares of the plaintiff and the 2nd defendant. In that regard, he executed sale deeds in respect of item 36 of plaint 'A' schedule in favour of 3rd defendant; item 37 in favour of the defendants 4 & 5; items 38, 39, 40 in favour of the 6th defendant; item 41 to defendants 7 & 8; and, items 42, 43, 44 to the defendants 9 & 10. The said documents are not intended to be acted upon; and, are only sham and nominal documents; and, no possession of the respective properties was delivered to the defendants 3 to 10. The plaintiff has every right to ignore such clandestine and nominal alienations made by the 1st defendant in favour of the

defendants 3 to 10. Considering the dangerous trend, the plaintiff could not, but, come to the conclusion that it is dangerous for her to remain joint any longer. The plaintiff personally and through elders called upon the 1st defendant to come for an amicable partition, but, the 1st defendant did not co-operate. Hence, the suit is filed for partition. In the plaint 'A' schedule properties, i.e., the total extent of Ac.50.17 cents, keeping apart Ac.11.00 cents to the 1st defendant, the remaining Ac.39.17 cents has to be partitioned and the possession of 1/6th separated share of the plaintiff has to be granted to the plaintiff.

6. The defence of the 1st defendant, in brief, is as follows:

The material allegations in the plaint are false. The particulars of plaint 'A' schedule properties are incorrect. It is false to state that out of Ac.50.17 cents Chaganti Babaiah owned about Ac.22.00 cents and his brother-in-law, Mannem Parvatalu owned about Ac.11.00 cents and thus a total extent of Ac.33.00 cents is being enjoyed by them as joint owners. The said allegations are invented for the purpose of the suit. Babaiah through his first wife has got three sons namely Chenchaiyah, Adishesaiyah and Basavaiah is false. To the knowledge of this defendant, Adishesaiyah and Basavaiah alone are the sons of Babaiah. Babaiah is a resident of Viswanadhapuram village. Chaganti Babaiah, Mannem Paravathu and his two sons, Kondaiah and Ankaiah, constituted a composite family and were entitled to 1/2 share each in their composite family properties. Chaganti Babaiah left Moogachinthala village about eighty years back and came to Viswanadhapuram, his son-in-law's place, that is, Thatikonda Yanadi's place about eighty years back relinquishing his half share in favour of Mannem Parvatalu. Thus, Babaiah or his sons, Adishesaiyah and Basavaiah, had

no properties at Moogachinthala village much less in the plaint 'A' schedule properties. Later, Parvatalu died. After his death, his two sons Kondaiah and Ankaiah partitioned their family properties. In the said partition, Kondaiah was given Ac.11.00 cents of land out of the plaint 'A' schedule properties. The plaint is quite silent about Ac.11.00 cents of land that were owned by Kondaiah. Therefore, the prayer in the plaint to set apart Ac.11.00 cents is quite vague and dubious. Thatikonda Yanadi is the 3rd son-in-law of Chaganti Babaiah, who has got two sons namely Govindu & Ramaiah and a daughter, Audemma. The said Ramaiah married the 2nd defendant, the daughter of the plaintiff. It is false to state that Chaganti Chenchaiyah, 1st son of Babaiah and Basavaiah, 3rd son of Babaiah, died unmarried and intestate and so their shares in the joint family devolved upon Chaganti Babaiah and his remaining son Adiseshaiah. The said allegations are invented. Babaiah himself relinquished his half share in favour of Parvatalu about eighty years back. It is equally false to state that joint family properties devolved upon Adiseshaiah and other Ac.11.00 cents of land continued to be owned by Mannem Subbamma and that both of them lived together without partition. It is false to state that Adiseshaiah from out of the income derived from the joint family nucleus has purchased Ac.17.17 cents from others and augmented the family properties. The plaint is quite silent regarding particulars of the purchases, namely, which items of plaint 'A' schedule were purchased by whom and from whom and on what dates etcetera. The said Adiseshaiah had no properties of his own to purchase the said Ac.17.17 cents; and, he was living with his father-in-law at Viswanadhapuram village as his only son-in-law to his father-in-law and was assisting in agriculture. It is false to state that Adiseshaiah and the 1st defendant

lived jointly enjoying all their joint family properties without any partition. The plaintiff is put to strict proof that Ac.39.17 cents of land from the plaint 'A' schedule properties belonged to Chaganti Adiseshaiah. It is false to state that after the death of Chaganti Adiseshaiah, the plaintiff and the 2nd defendant became entitled to 1/6th share each and the 1st defendant is entitled to 4/6th share and that they all are enjoying the same without any partition. Mannem Kondaiah and his wife, Subbamma, who are maternal uncle and aunt of this defendant, had no children and were affectionate to this defendant. The mother of this defendant died when this defendant is one year old. Mannem Subbamma brought up this defendant. This defendant was assisting them in their cultivation and was in their protection. Kondaiah and his wife Subbamma performed the marriage of this defendant. Thus, this defendant has been living from his childhood with the said Kondaiah and Subbamma. Kondaiah died intestate about 26 years back leaving behind him his widow Subbamma. Subbamma became entitled to the plaint 'A' schedule mentioned properties. After the death of the said Kondaiah, his wife Subbamma became entitled to the estate of Kondaiah including the plaint 'A' schedule mentioned properties. Subbamma sold the following extents: 'An extent of Ac.0.60 cents of land in Sy.No.304/2 of Moogachinthala village corresponding to item no.41 of the plaint 'A' schedule to Jampu Subbaiah and Papaiah, 7th defendant, for consideration of Rs.3,000/- under an agreement of sale letter in the year 1971 and put them in possession of the same on the same day; an extent of Ac.1.14 cents in Sy.No.309 corresponding to items 27 & 29; an extent of Ac.0.99 cents in Sy.no.310 corresponding to item no.41; an extent of Ac.1.01 cents in Sy.No.307 corresponding to item no.38 of plaint 'A' schedule properties to the

father of the 6th defendant under an agreement of sale in the year 1971 for a valuable consideration of Rs.4,600/- and put him in possession of the same on the same day.' Subbamma also sold item no.36 of the plaint 'A' schedule properties to the 3rd defendant under an agreement of sale letter and put them in possession of the same; and, after her death, this defendant has executed the registered sale deed, on 10.12.1979. The vendees are in possession and enjoyment of their respective lands and paying land revenue. The said Subbamma has executed a registered Will, on 25.09.1975, in a sound and disposing state of mind bequeathing her properties in favour of this defendant wherein the said alienations made by her earlier were also mentioned directing this defendant to execute registered sale deeds in favour of the purchasers. The said Will was duly executed and attested. The plaintiff is fully aware about the registered Will, dated 25.09.1975, executed by Subbamma and also the sale agreement letter/s executed by her and the possession of the alienee/s. Therefore, the plaintiff is estopped from claiming partition of the plaint 'A' schedule mentioned properties. Mannem Subbamma died in or about 1975. Thus, the above registered Will, dated 25.09.1975, was her last and final one and it came into operation. As per the said Will, this defendant became the full and absolute owner of the plaint 'A' schedule mentioned properties except items 27, 29, 38, 40 and 41. Later the alienees demanded for execution of registered sale deeds in pursuance of the sale agreements. As per the direction in the Will, this defendant had sold item no.37 of plaint 'A' schedule mentioned property to the defendants 4 & 5, on 10.12.1979. The said vendees are in possession and enjoyment of the same in their own right and are paying cist to the knowledge of the plaintiff. The plaintiff admitted the registered Will, dated

25.09.1975, executed by Subbamma in favour of this defendant. The present suit for partition is untenable and is misconceived. The Court fee paid under Section 34(2) of the Court Fees & Suits Valuation Act is not correct in as much as the plaintiff is not in joint possession of the plaint 'A' schedule properties with the 1st defendant. The suit for partition is not maintainable and is liable for dismissal in as much as there is no joint family property to be partitioned. This defendant is the absolute owner of the schedule mentioned properties, the same being his self acquired properties. The allegations that the plaint 'A' schedule properties are rich fertile lands and are capable of yielding Rs.25,000/- net profits per year and that this defendant executed nominal sale deeds in favour of defendants 3 to 5 in respect of items 36 & 37 and that they are not acted upon and that the possession of the lands was not delivered to them and that the plaintiff has a right to ignore such clandestine and nominal alienations etcetera are all false. The present suit for partition filed by the plaintiff without challenging or seeking to set aside the alienations made by this defendant in pursuance of the directions in the Will of Subbamma is liable to be dismissed *in limine*. The allegations that the suit is filed for partition as it is dangerous to remain joint with the 1st defendant and that amicable partition could not be done as this defendant did not co-operate are all false. There are no joint family properties of late Adiseshaiah in the hands of this defendant. Items 42 & 43 of plaint 'A' schedule properties do not belong to this defendant. The extent of items 42 to 44 of the plaint 'A' schedule is shown as Ac.5.00 cents; but, in-fact, this defendant is entitled to an extent of Ac.4.48 cents in item no.44. This defendant sold an extent of Ac.3.32 cents out of Ac.4.48 cents and an extent of Ac.0.80 cents in Sy.No.343 (not included in the plaint 'A' schedule)

to the 9th defendant under registered sale deed, dated 24.12.1979, for consideration of Rs.11,500/- and the remaining extent of Ac.1.16 cents in item no.44 and an extent of Ac.0.40 cents in Sy.no.343 (not included in the plaint 'A' schedule) to the 10th defendant under a registered sale deed, dated 24.12.1979, for valuable consideration of Rs.4,300/- and put them in possession of their respective plots sold to them. The revenue authorities issued ryotwari pass book to this defendant in respect of his holding including some of the plaint 'A' schedule properties under the Record of Rights Act. Thus, either Chaganti Babaiah or his son, Adiseshaiah, had no title, interest in the plaint 'A' schedule property or possession of the same and, hence, the contention of the plaintiff that she and her daughter are entitled for a 1/6th share each is absolutely false. This defendant was and is in exclusive, continuous uninterrupted peaceful possession and enjoyment of the property to the knowledge of the plaintiff and thus perfected right, title and possession by adverse possession also. There is no cause of action against this defendant. The suit is liable to be dismissed.

7. Defendants 7 to 10 adopted the written statement of the 1st defendant.
8. The 2nd defendant filed a written statement supporting the case of the plaintiff, her mother. The averments therein, in brief, are as follows:

Chaganti Babaiah, the paternal grand father of this defendant, and Mannem Parvathalu lived as composite family members for a long time. The composite family had Ac.33.00 cents of landed properties at Moogachinthala village in which Babaiah has got Ac.22.00 cents and Parvatalu has got Ac.11.00 cents and they enjoyed the same together. Babaiah through his wife Kotamma had three sons – Chenchaiiah, Adiseshaiah and Basavaiah; and, four daughters -

Chenchamma, Subbamma w/o.Mannem Kondaiah, Punnamma and Audemma. Amongst the sons, Chenchiah and Basavaiah died without heirs. Babaiah and his only remaining son Adiseshaiah lived jointly. Babaiah died about 50 years. Therefore, his Ac.22.00 cents of land devolved upon his only son Adiseshaiah. Mannem Parvatalu, the composite family member, died leaving his two sons Kondaiah and Ankaiah. Kondaiah married Subbamma, the daughter of Babaiah. Adisesahaiah acquired Ac.17.00 cents of land on his own account and thus in the plaint 'A' schedule properties Adiseshaiah has got Ac.39.00 cents and Mannem Kondaiah, S/o.Parvatalu has got Ac.11.00 cents. The allegation that Babaiah belonged to Viswanadhapuram and that he came to Moogachintala in a hopeless state without any properties is false. Kondaiah died leaving his wife-Subbamma who inherited Ac.11.00 cents of land in plaint 'A' schedule properties. Adiseshaiah through his first wife Subbamma has got only one son-Pullaiah, the 1st defendant. As his wife died Adiseshaiah married the plaintiff. Through the said wife (plaintiff), he got one daughter Venkatasubbamma, this defendant. Thus, this defendant is the daughter of Adiseshaiah and the plaintiff. Adiseshaiah died intestate 17 years ago. As per the Hindu Succession Act, the plaintiff and the 2nd defendant have got 1/6th share each and the 1st defendant has got 4/6th share in the extent of Ac.39.00 cents out of the plaint 'A' schedule properties, i.e., out of the total extent of Ac.50.17 cents. Mannem Subbamma, w/o.Kondaiah bequeathed her Ac.11.00 cents of properties only to the 1st defendant. It is false to say that the plaint 'A' schedule properties belonged to Mannem Subbamma and that under the Will the 1st defendant has got all the properties. Mannem Subbamma brought up the 1st defendant exclusively is false. The 1st defendant is the only son of

Adiseshaiah and there is no scope for the 1st defendant to go to the house of Mannem Subbamma. It is false to state that Mannem Subbamma sold item no.41 to Jampu Papaiah and Jampu Subbaiah in the year 1971 and possession of the same was delivered. It is false to say that Subbamma sold items 27, 29, 38 & 40 to the father of the 6th defendant in the year 1971 under an agreement of sale. It is false to state that the vendees were put in possession of their respective properties. It is false to say that there were such agreements and the same were lost in cyclone in May, 1979. It is false to state that defendants 6,7 & 8 became entitled to items 41, 27, 29, 38 and 40 of the plaint 'A' schedule properties. 1st defendant who has got only 4/6th share has clandestinely affected alienations of items 36, 37, 39, 40, 41, 42, 43 and 44 to the defendants 3 to 10 disregarding the 1/6th share each of the plaintiff and this defendant. The said alienations are invalid, inoperative, void and not binding on the 1/6th share each of the plaintiff and of this defendant. The plaintiff and this defendant are entitled to ignore such alienations. It is false to state that the alienees came into possession of any lands prior to 1979 and paid cists. The 1st defendant is an ingenious schemer and to grab all the properties, he created the alienations. He got as a legatee of Mannem Subbamma, Ac.11.00 cents only and the remaining properties in the plaint 'A' schedule properties have to be partitioned amongst the plaintiff, 1st defendant and the 2nd defendant. Hence, the suit for partition may be decreed.

9. Though the 3rd defendant filed a written statement and the same is adopted by defendants 4 & 5, as already noted, the suit against 3rd defendant stood abated for not bringing on record his legal representatives. The 3rd

defendant's written statement is almost on the same lines as that of the 1st defendant. He asserted in his written statement the following aspects:

1st defendant, who is the owner of plaint 'A' schedule mentioned properties sold item no.36 therein to this defendant under a registered sale deed, dated 10.12.1979, and put him in possession of the same on the same day. Since then this defendant is in exclusive possession of the said property and paying land revenue; and, the plaintiff is fully aware of the same. Like wise the 1st defendant also sold item no.37 of the plaint 'A' schedule property to the defendants 4 & 5 on the same day and put them in possession of the same on the same day. Since then the defendants 4 & 5 are in possession of item no.37. The Court fee paid under Section 34(2) of the A.P. Court Fees & suits Valuation Act is not correct as the plaintiff is not in joint possession of the plaint 'A' schedule properties with the 1st defendant. Therefore, the suit for partition is not maintainable and is liable to be dismissed *in limine*.

10. The 6th defendant's written statement is almost on the same lines as that of the 1st defendant. He asserted in his written statement the following aspects:

Subbamma during her life time sold an extent of Ac.1.14 cents in Sy.No.309 corresponding to items 27 and 29; an extent of Ac.0.99 cents in Sy.No.310 corresponding to item no.40; and, an extent of Ac.1.01 cents in survey no.307 corresponding to item no.38 of plaint 'A' schedule properties to the father of this defendant under an agreement of sale letter in the year 1971 for a valuable consideration of Rs.4,600/- and put him in possession of the same on the same day. The said sale agreement letter is lost in the cyclone of May, 1979. This defendant's father was in possession of the said properties.

After his death, this defendant has been in continuous peaceful possession and enjoyment of the same to the knowledge of the plaintiff and was & is paying land revenue thereto and thus perfected title to items 27, 38, 39 and 40 of the plaint 'A' schedule mentioned properties by adverse possession. The said Subbamma executed a registered Will, on 25.09.1975, in a sound and disposing state of mind bequeathing her remaining properties shown in plaint 'A' schedule properties to the 1st defendant wherein the above said alienations in favour of the father of this defendant were also mentioned. The plaintiff is fully aware of the sale transactions and this defendant's possession. The plaintiff is, therefore, estopped from claiming the partition of items 27, 38, 39 and 40. The Court fee paid under Section 34(2) of the A.P. Court Fees & suits Valuation Act is not correct as the plaintiff is not in joint possession of the plaint schedule properties with the 1st defendant. Therefore, the suit for partition is not tenable and is liable to be dismissed with exemplary costs of this defendant.

11. Taking into consideration the above pleadings, the trial Court framed the following issues for trial:

1. Whether the plaintiff is entitled to 1/6th share in the 'A' schedule properties excluding Ac.11.00 therein as claimed by her in the plaint?
2. Whether the plaintiff is entitled for a direction for ascertainment of future profits?
3. Whether the A- schedule properties belonged absolutely to Mannem Kondaiah to the exclusion of the plaintiff's family?
4. Whether the will dt.25.9.75 alleged to have been executed by Mannem Subbamma, in favour of the 1st defendant is true, valid and binding on the plaintiff?

5. Whether the agreement of sale in 1971 alleged to have been executed by Mannem Subbamma in favour of 7th defendant for item 41 is true valid and binding on the plaintiff?
6. Whether the agreement of sale in 1971 alleged to have been executed by Mannem Subbamma in favour of the father of D6 for items 27, 29, 38, 40 is true, valid and binding on the plaintiff?
7. Whether the plaintiff is entitled for a partition as prayed for?
8. To what relief?

[Reproduced verbatim]

12. At trial, PWs1 to 4 and DWs1 to 6 were examined. Exhibits X1 to X6 and B1 to B18 were marked. As PW1 did not appear before the Court for completion of her evidence, which is partly recorded, her evidence was eschewed from consideration. Later, the 2nd defendant appeared as PW2 and gave evidence on her own behalf and also on behalf of the plaintiff. As already noted, the trial Court preliminarily decreed the suit. The operative portion of the judgment of the trial Court reads as under:

“In the result, preliminary decree is passed with costs. The plaintiff is entitled to equal share along with PW2 and DW1 out of the share of her demised husband Chaganti Adisheshaiah in the suit A schedule property excluding 11 acre of land and the lands covered by Exs.B15 to B18. The plaintiff being the widow of late Adisheshaiah is entitled to 1/6th share, PW2 being the daughter of late Adisheshaiah is entitled to 1/6th share and DW1 is entitled to 4/6th share in the remaining extent of the suit A schedule property. D6 and D7 are entitled to equities at the time of partition through Advocate Commissioner in the share of DW1. The plaintiff is liable to pay court-fees, and collect court fee from her. The suit against defendants 3,9 and 10 dismissed as abated.”

13. Learned senior counsel appearing for the contesting appellants reiterated the pleaded case of the 1st defendant and contended as follows:

The trial Court ought to have seen that Chaganti Babaiah relinquished his share in favour of Mannem Parvatalu and hence, the plaintiff is not entitled to any share as all the properties of the composite family devolved upon Mannem Subbamma. The trial Court erred in disbelieving the case pleaded by the 1st defendant and further erred in disbelieving the defence of the 1st defendant that late Babaiah left the village long back after relinquishing his share in favour of his brother-in-law Mannem Parvatalu. Hence, the trial Court ought to have held that Babaiah had no rights in the plaint 'A' schedule property after such relinquishment. The trial Court failed to see that Mannem Subbamma executed a registered Will, dated 25.09.1975, in favour of the 1st defendant and that by virtue of the said Will, the 1st defendant alone became entitled to the properties and that neither the plaintiff nor the 2nd defendant is entitled to any share in the plaint 'A' schedule properties. The trial Court erred in disbelieving the relinquishment on the ground that the aspect of indebtedness of Babaiah is not pleaded in the written statement. The trial Court failed to see that once Chaganti Babaiah has no share the question of Adisheshaiah having any share does not arise and the question of any property devolving upon Adisheshaiah under Section 8 of the Hindu Succession Act does not arise. The trial Court failed to see that the plaintiff did not adduce any evidence and that her evidence was eschewed from consideration. The trial Court ought to have dismissed the suit. The trial Court ought to have seen that the defendants 3, 9 & 10 died and their legal representatives were not brought on record; and, therefore, the suit against them stood dismissed as abated;

therefore, the trial Court ought to have dismissed the whole suit on that short ground. The trial Court failed to see that the suit filed by 3rd parties against Adisheshaiah does not confer any share on him when his father relinquished the entire half share in favour of Mannem Parvatalu. The trial Court failed to see that the 1st defendant became entitled to the property by virtue of exhibit B2-Will and that the mere fact that the 1st defendant gave half of his property to his son does not in any way affect the right of the 1st defendant; therefore, the inference drawn by the trial Court is erroneous. The trial Court erred in ignoring the documents, exhibits B6 & B7, B9 & B11 which clearly established the right of the 1st defendant and the further fact that he is exclusively entitled to the property.

14. Per contra, learned senior counsel appearing for the 2nd respondent-2nd defendant supported the decree and judgment of the trial Court while *inter alia* drawing the attention of the Court to the reasoning in the judgment of the trial Court on various aspects of the case.

15. To avoid repetition of the contentions, I shall deal with the contentions of both the learned senior counsel while dealing with the points for determination.

16. The points that arise for determination in this appeal suit are:

- (i) Whether the plaintiff & 2nd defendant are entitled to seek partition of Ac.39.17 cents or any other lesser extent out of Ac.50.17 cents of plaint 'A' schedule property after excluding Ac.11.00 cents and claim a 1/6th share each, in the facts and circumstances stated in the plaint and in the written statement of the 2nd defendant?
- (ii) Whether, as being contended by the 1st defendant, Adisheshaiah had no right, title and interest in any of the plaint 'A' schedule mentioned properties, in view of his

father Babaiah leaving Moogachinthala village for Viswanadhapuram after relinquishment of his rights in the property in favour of his brother-in-law Mannem Parvatalu? And, if so, whether Adiseshaiah has not become entitled to any property of his father? And, if so, whether the plaintiff, who is the 2nd wife of Adiseshaiah, and the 2nd defendant, who is their daughter, are not entitled to any share in the plaint schedule properties as being contended by the 1st defendant?

- (iii) Whether the suit is liable for dismissal for not separately giving the schedule of Ac.11.00 cents of property which is to be admittedly excluded from the total extent of Ac.50.17 cents of plaint schedule property and on account of the vagueness and lack of identity of Ac.11.00 cents to be excluded from the plaint schedule properties?
- (iv) Whether the plaintiff's suit is liable for dismissal as a sequel to the dismissal of the suit as abated against the defendants 3, 9 & 10 as being contended by the contesting appellants?
- (v) Whether the decree and judgment of the trial Court are unsustainable under facts and in law as being contended by the appellants.
- (vi) To what relief?

17. Now the points are taken up.

18. **POINTS 1 to 4:**

18.1 To begin with, it is necessary to deal with the relevant relationship between the parties, which is more or less undisputed before this Court. The said relationship, which is discernable from the pleadings and evidence brought on record and the allied aspects are as follows: - 'One Chaganti Babaiah and one Mannem Parvatalu are brothers-in-law. Parvatalu had two sons – Ankaiah and Kondaiah. Ankaiah separated from his family having went away to live in the house of his father-in-law. As such, the properties of Parvatalu devolved upon Kondaiah. Babaiah had three sons – Chenchiah, Adiseshaiah and Basavaiah. The plaintiff is the second wife of the said Adiseshaiah; the 2nd defendant, who is sailing with the plaintiff and who deposed as PW2 in the suit,

is the daughter of the plaintiff and the said Adiseshaiah; and, the 1st defendant is the son of Adiseshaiah through his first wife. Since Chenchiah and Basavaiah, the other sons of Babaiah, are said to have died intestate and unmarried, the main legal heir of Babaiah is Adiseshaiah. Babaiah had four daughters. One of his daughters is Subbamma. She was given in marriage to the said Kondaiah S/o Parvatalu. After the death of Kondaiah, the properties originally of Parvatalu devolved upon Subbamma.'

18.2 In this backdrop of relationship and allied facts, it is undisputed that Babaiah and Parvatalu, who possessed some extent of property each, together enjoyed their properties as joint owners.

18.3 The plaintiff and her daughter, the 2nd defendant, who are the wife and daughter of Adiseshaiah, claim that the properties of Adiseshaiah devolved upon Pullaiah/1st defendant and the plaintiff & the 2nd defendant and that, therefore, the plaintiffs are entitled to a 1/6th share each in the properties of Adiseshaiah and the remaining share is that of Pullaiah. The plaintiff admits that the property of Parvatalu from out of the property which was jointly enjoyed by Babaiah and Parvatalu devolved upon the son of Parvatalu, that is, Kondaiah, and that after the death of Kondaiah, that property of Parvatalu devolved upon Subbamma, wife of Kondaiah, who is no other than the daughter of Babaiah, and that by virtue of registered Will, exhibit B2, executed by Subbamma what all the properties of Parvatalu that eventually devolved upon Subbamma devolved upon the 1st defendant, Pullaiah, as per the bequests in the said Will.

18.4 It is apt to note now that the plaintiff's claim is as under: - 'Babaiah and Parvatalu jointly enjoyed Ac.33.00 cents. Out of the said extent of property, Babaiah owned Ac.22.00 cents and Parvatalu owned Ac.11.00 cents. The said Ac.11.00 cents undisputedly now belongs to the 1st defendant. Adiseshaiah, from out of the joint family nucleus, purchased Ac.17.17 cents. Therefore, on such augmentation, the total extent of the property of Adiseshaiah increased to Ac.39.17 cents. Thus, the plaintiff and the 2nd defendant are entitled to a 1/6th share each in the property of Adiseshaiah of an extent of 39.17 cents from out of Ac.50.17 cents of plaintiff 'A' schedule property. Hence, while granting a decree for partition accordingly, Ac.11.00 cents of Parvatalu which eventually devolved upon the 1st defendant has to be excluded from out of Ac.50.17 cents of the plaintiff 'A' schedule property.' Claiming accordingly, the suit was brought by the plaintiff, the second wife of Adiseshaiah, by impleading her daughter as 2nd defendant and Adiseshaiah's only son through his first wife as the 1st defendant and by also impleading some third parties, who are purchasers of some of the properties, as defendants.

18.5 Per contra, the 1st defendant's claim is as under: - 'The plaintiff's claim that Babaiah and Parvatalu enjoyed their properties jointly and as members of composite family and that Babaiah was the owner of Ac.22.00 cents and Parvatalu was the owner of Ac.11.00 cents is false. There is no basis for such a claim. During the life time of Babaiah, he relinquished his half share in the properties that were being jointly enjoyed in favour of Parvatalu, his brother-in-law, and went away to Viswanadhapuram, and, therefore, Parvatalu became entitled to the entire property, which was originally jointly enjoyed by him and Babaiah. Therefore, after the death of Babaiah, no property devolved upon

Adiseshaiah, his son. Thus, the entire property belonged to Parvatalu. On his death, the same devolved upon Kondaiah, his son. On his death it devolved upon his wife, Subbamma. Thereafter the same devolved upon the 1st defendant exclusively by virtue of exhibit B2-registered Will executed by Subbamma. Therefore, Adiseshaiah did not get any property from his father, Babaiah, and he did not own any joint family property on the date of his death, in view of the relinquishment of half share of Babaiah in favour of Parvatalu even before the death of Babaiah. Hence, the question of Adiseshaiah purchasing further Ac.17.17 cents from the joint family nucleus and augmenting the property does not arise. In that view of the matter, the plaintiffs are not entitled to claim any share in the plaint schedule properties, which exclusively belonged to Parvatalu and which eventually devolved upon the 1st defendant by virtue of exhibit B2 Will of Subbamma, W/o.Kondaiah, who is the son of Parvatalu.

18.6 It is pertinent to note that though the evidence of the sole plaintiff, PW1, was eschewed from consideration, the trial Court accepted the claim of the plaintiff taking into consideration the evidence including the evidence of PW2, the 2nd defendant, who is the daughter of the plaintiff and Adiseshaiah, and decreed the suit of the plaintiff holding that the plaintiff and the 2nd defendant are entitled to a 1/6th share each and that the 1st defendant is entitled to the remaining share in the plaint 'A' schedule total extent of Ac.50.17 cents after excluding Ac.11.00 cents, which even according to the plaintiff originally belonged to Parvatalu and also after excluding the extents of properties covered by exhibits B15 to B18-registered sale deeds. As noted, the suit against defendants 3, 9 & 10 was dismissed as abated.

18.7 In a suit for partition, the initial onus of proof lies on the plaintiff. The 2nd defendant, who is the daughter of the plaintiff, is sailing with the plaintiff and in-fact, deposed as PW2 after the evidence of plaintiff, PW1, was eschewed from consideration. Therefore, the initial onus of proof in the instant suit is on the plaintiff and the 2nd defendant, PW2. Now it is to be examined as to whether they established the case pleaded in the plaint and their entitlement to the relief of partition and a 1/6th share each from out of the plaint 'A' schedule property of a total extent of Ac.50.17 cents after excluding Ac.11.00 cents.

18.8 It is to be noted that the plaintiff, who is the second wife of Adiseshaiah, having brought the suit claiming that out of the total extent of Ac.50.17 cents of plaint 'A' schedule property, an extent of Ac.39.17 cents is liable for partition among the plaintiff and the defendants 1 & 2 failed to establish her case by giving evidence in support of her claim. Be that as it may. Her daughter, the 2nd defendant, who is supporting and sailing with the plaintiff, who is her mother, deposed as PW2. The age of PW1 as per her eschewed evidence is 65 years as on 20.06.1989. The age of PW2 is 50 years by the year 1994. The suit was instituted originally as an OP in the year 1984 as the plaintiff filed the suit *informa pauperis*. She stated that she accompanied her mother and that they both gave instructions to the advocate for filing the suit. Admittedly, the properties originally belonged to her grand father, Babaiah, and Parvatalu. She admitted in her cross examination that she does not know when her grand father Babaiah died and that Mannem Kondaiah, that is, the son of Parvatalu died 30 years back and that her marriage was performed when she was 17 years of age and that she cannot say the extent owned by Chaganti and Mannem families and that she did not file any revenue records showing the

ownership of properties of the two families. She further admitted that she does not know whether there is any registered sale deed for the property of Ac.3.12 cents purchased by her father from her senior paternal uncle and that she does not know the year of purchase. She admitted that 1st defendant was brought up by Subbamma after the death of his mother, but, denied the suggestion that Subbamma performed the marriage of 1st defendant. She also stated that she does not know whether her father paid revenue cist for the suit land and whether pass book was issued in favour of her father. She also admitted that Subbamma bequeathed her properties in favour of the 1st defendant under the Will. She stated that she does not know which Ac.11.00 cents is to be set apart from the plaint 'A' schedule property and where the remaining extent, which is to be partitioned, is situate. She admitted that the defendants (other defendants) are raising crops in the plaint schedule land and that she does not personally know what crops are being raised and the yield. She stated that her brother, the 1st defendant, cultivated the lands personally twelve years back and that he is presently not cultivating the lands and that he leased out the lands to others on sharing system. However, she stated that she cannot state the maktha being paid by the tenants to the 1st defendant. She also admitted that she was married when she was 17 years of age and that since the time of marriage, that is, since 30 years she is staying with her husband at Viswanadhapuram. She also stated that her father died 25 years back and that since then her mother is staying at Viswanadhapuram. From the above evidence of PW2, it is doubtful as to whether she had any personal knowledge of the joint enjoyment of the extents of properties by Babaiah and Parvatalu long time back, as stated in the plaint, and the other averments in the plaint.

However, she denied the following suggestions: - 'It is not true to say that my paternal grand father (Babaiah) relinquished the share in the properties of the composite family at Moogachinthala in favour of Mannem family and came over to and settled at Viswanadhapuram with his son-in-law, Thatikonda Yanadi. It is not true to say that Chaganti family has no share or interest and possession of the plaint 'A' schedule properties since last 90 years.' Thus, her evidence is not sufficient to establish that in the property of Ac.33.00 cents jointly enjoyed by Babaiah and Parvatalu, Babaiah owned Ac.22.00 cents and that her father purchased from out of the income of the joint family nucleus another Ac.17.17 cents and augmented the property. In-fact there is no basis for the claim that in the jointly enjoyed property, Parvatalu owned a lesser extent of Ac.11.00 cents. It is to be noted here that the 1st defendant's specific case is that in the property jointly enjoyed, Parvatalu had a half share and the case of the plaintiff that the share of Parvatalu is Ac.11.00 cents is false. Even if we go by the admission of the 1st defendant that in the jointly enjoyed property Babaiah and Parvatalu had half share each, on which the plaintiff wants to place reliance, yet, there is no evidence to show as to how much total extent was jointly enjoyed by Babaiah and Parvatalu. If the Court has to go by the total extent of the jointly enjoyed property as Ac.33.00 cents, the half share of Babaiah works out to Ac.16.50 cents and, therefore, the claim for partition of Ac.22.00 cents by stating that Babaiah owned the said extent appears to be untenable and not probable. Be that as it may. PW2 in her evidence did not exhibit a single document to substantiate the claim in the suit. The suit, as a Original Petition, was brought in the year 1984, that is, about one and a half decades after the death of Adiseshaiah, the husband of the plaintiff, and the

father of 2nd defendant, PW2. PW3 is a VAO. On summons he produced a prepared diglot of Moogachintala and 10(1) account. He stated that printed diglot is lost. He admitted that he did not prepare the diglot register and that 10(1) account is a permanent record. His evidence shows that the name of Chaganti Pullaiah and others is found in the 10(1) account register at relevant pages that is X1, X2, X3, X5 & X6. As per his evidence patta no.94 (exhibit X4) stands in the name of Chaganti Adiseshaiah, Mannem Kondaiah and others. His evidence also shows that patta no.131 does not stand in the name of Chaganti Pullaiah but stands in the name of Mannem Kondaiah and so also patta no.172. Thus, his evidence is not helpful to the plaintiff and PW2. PW4, aged 65 years as on 24.11.1995, was examined to establish that Adiseshaiah was a resident of Moogachintala and that he owned land and that he never lived at Viswanadhapuram. He deposed that Adiseshaiah owned Ac.50.00 cents of land. However, it is not even the case of the plaintiff. No document is filed in support of the contention that Ac.17.17 cents was acquired exclusively by Adiseshaiah from the joint family nucleus. If it is the case of the plaintiff and PW2 (2nd defendant) that Adiseshaiah acquired the said extent of property, it is for them to file documents like sale deeds or other record to prove such acquisition. In the absence of any documentary evidence, mere oral assertion of PW2 that an extent of Ac.17.17 cents was acquired by Adiseshaiah that too with the income derived from the joint family nucleus cannot be countenanced. Therefore, the evidence on the side of the plaintiff, on a harmonious consideration, is not sufficient to safely conclude that out of Ac.33.00 cents originally jointly enjoyed by Babaiah and Parvatalu, Babaiah owned Ac.22.00 cents and that later Adiseshaiah from out of the income derived from the joint

family nucleus purchased Ac.17.17 cents and augmented the property. It is also pertinent to note that the learned senior counsel appearing for the 2nd respondent-2nd defendant urged and laid emphasis on exhibit B6, ryotwari pass book, filed by the 1st defendant which reflects that the properties mentioned therein are 'pitrarjithamu' (ancestral). However, the learned senior counsel for the 1st defendant rightly pointed out that some other properties of some others are also included in this book, exhibit B6. Therefore, he contends that the entries therein are made in a casual manner and it is not much of relevance. Nonetheless, the said entry in the 1st defendant's document, that is, exhibit B6, has its own strength and need not be brushed aside totally for the mere reason pointed by the learned senior counsel appearing for the 1st defendant more particularly as it contains properties which are subject matter of the instant suit and as the 1st defendant who was formerly a Sarpanch of Moogachinthala village for about 11 years is aware of the value of the entries in records like exhibit B6 and as he has not made any attempts for amendment of any entries therein.

18.9 Coming to the defence and the evidence of DW1 wherein he reiterated the defence, it is to be first noted that he is also admitting joint/composite enjoyment of the property by Babaiah and Parvatalu; but, his specific case is that in that jointly enjoyed property, each of them had a half share each. He did not say in his pleading as to what was the total extent that was jointly enjoyed. If we go by the admission and the case of the plaintiff which is discussed supra and that the extent jointly enjoyed is Ac.33.00 cents, the half share each of Parvatalu and Babaiah works out to Ac.16.50 cents. In support of the contention that Babaiah left Moogachinthala after relinquishment and

was residing in Viswanadhapuram, reliance was placed on exhibit B1, copy of summons, dated 25.08.1938, in CC.No.485 of 1938, which on a perusal would show that the said summons was addressed to Babaiah showing his place of residence as Viswanadhapuram. Nevertheless, in support of the plea of relinquishment of the share of Babaiah in favour of Parvatalu, admittedly, there is no deed of relinquishment. The trial Court rightly observed that due to indebtedness Babaiah left Moogachinthala for Viswanadhapuram having relinquished his share has no foundation in the pleadings. Hence, exhibit B1, copy of summons, by itself is not sufficient by any standards to prove relinquishment of Babaiah's share in the jointly enjoyed properties in favour of Parvatalu. Therefore, the plea of relinquishment, which is not established by adducing required standard of evidence, needs no countenance. In that view of the matter, and on application of the test of preponderance of probabilities, it is possible to come to an affirmative conclusion that Adiseshaiah acquired right, title and interest in an extent of Ac.16.50 cents out of the jointly enjoyed property on the date of the death of his father, Babaiah. Admittedly, Adiseshaiah died intestate. On the above analysis and on the application of the test of preponderance of probabilities, it is possible to hold that out of the plaint 'A' schedule properties only an extent of Ac.16.50 cents which devolved upon Adiseshaiah is liable for partition and not the rest of the property. As a sequel, it is to be held that the plaintiff and the 2nd defendant are entitled to a 1/6th share each in the above said extent of Ac.16.50 cents only from out of the entire plaint 'A' schedule property. However, it is necessary to observe that while segregating the said extent from the total plaint 'A' schedule property, the properties covered by exhibits B15 to B18 must be first excluded in view of the

finding of the trial Court which has become final as the said finding that the said extents covered by the said deeds is not liable for partition is not challenged by the plaintiff or the 2nd defendant by an independent or a cross appeal.

18.10 This takes us to the other contentions which are raised by the 1st defendant.

Firstly, the contention is that Ac.11.00 cents, which the plaintiff wants to be excluded from the plaint 'A' schedule property, is not separately shown in a schedule by describing the said extent with necessary survey numbers, extents and boundaries and, therefore, the said extent of Ac.11.00 cents, which is to be excluded from the total extent of Ac.50.17 cents, is not identifiable and, therefore, it is not possible to identify and exclude the said extent from the total extent and consequently it is not possible to identify the balance extent of Ac.39.19 cents of property for which the suit is filed for partition. Based on this submissions, it is submitted that the suit is liable for dismissal on this short point. However, this Court held supra that Ac.16.50 cents is only partible and it is to be segregated from the plaint 'A' schedule property which is of an extent of Ac.50.17 cents after first excluding the property covered by exhibits B15 to B18. The property covered by the said exhibits is identifiable from the schedules appended to the said documents. After first excluding the property covered by exhibits B15 to B18 from the entire extent, from the rest of the property, the property of Ac.16.50 cents has to be necessarily carved out by working out equities at the time of actual partition as per terms of the final decree that may be required to be passed pursuant to the preliminary decree that would be granted in view of the finding that the plaintiff is entitled to seek

partition of Ac.16.50 cents. Since the plaintiff is the step mother and the 2nd defendant is the step sister of the 1st defendant, after excluding the properties covered by exhibits B15 to B18 and that of the third parties first, it is not impossible to work out equities and carve out Ac.16.50 cents, which is liable for partition, by having regard to good and bad qualities. Hence, in the considered view of this Court, this contention that on account of not separately giving a schedule for Ac.11.00 cents it is not possible to identify the property that is liable for partition does not merit consideration. Dealing now with the decision in **P. Chandrasekharan and others v. S. Kanakarajan and others** [(2007) 5 SCC 669] which was relied upon in support of the contention that no decree can be granted when the plaintiff fails to show that the property which is subject matter of the suit is adequately identifiable, it is to be noted that the facts of the cited case show that the suit was filed for possession and that in that suit the plaintiff failed to establish that the property is identifiable. Hence, it was observed in the said decision to the following effect: 'In case the suit is decreed, the executing Court must be able to deliver possession thereof and thus there cannot be any doubt whatsoever that the property in the suit must be adequately identifiable and that when such a relief is claimed the plaintiff must show what he had purchased and how the Court, in the event a dispute arises, would determine the identity of the property.' Since the instant suit is one for partition and as before a final decree is passed a Commissioner would be appointed for identifying on land and partitioning the property covered by the preliminary decree schedule under the supervision of the Court, there may not be any difficulty in the present case for adequately identifying the extent of property, which is now held to be liable for partition. Therefore, the cited

decision is not helpful to advance the contention of the 1st defendant. In any view of the matter, it is trite to observe that while identifying the partible extent, the Court concerned during the course of enquiry that may be conducted before the passing of the final decree, may, in its discretion, consider the aspects like giving the first option to the 1st defendant in the matter of identifying the property liable for partition in view of the sales affected and the long delay in instituting the suit for partition.

Secondly, coming to the aspects of delay in the institution of the suit by the plaintiff and the contention based on the record related to land reforms declaration filed by the 1st defendant alone in respect of the property, it is to be noted that exhibit B5 is the report, dated 8.11.1975, of the verifying officer relating to the holding of the 1st defendant. The rest of the record namely exhibit B7, verification report, dated 30.11.1992, of the MRO, Kondapi, exhibit B8, notice, dated 16.11.1992, issued to the 1st defendant by RDO, Kandukur, exhibit B9, orders, dated 08.04.1993, of RDO, Kandukur in LCC.1 of 1992 and exhibit B10, proceedings of the RDO, Kandukur relating to the excess holding of land by Chaganti Venkata Subba Rao and verification report sent to DW2 by MRO, Kondapi, exhibit B12, proceedings, dated 08.04.1993, of the RDO, Kandukur, related to declaration of excess holding of land by Chaganti Venkata Subba Rao, are all documents subsequent to the suit and are not of much evidentiary or probative value. Mere filing of declaration under land reform law by the 1st defendant, the male member of the family, in the facts and circumstances of the case, is not sufficient to disentitle the plaintiff and her daughter (PW2) to a share in the above said limited extent of property, more particularly when there was no plea of adverse possession coupled with

ouster. It is also pertinent to restate that exhibit B6, ryotwari pass book, filed by the 1st defendant reflects that the properties mentioned therein are 'pitrarjithamu' (ancestral). It is also well-settled that in order to establish adverse possession of one co-heir as against another it is not enough to show that one out of them is in sole possession and enjoyment of the profits of the properties. Ouster of the non-possessing co-heir by the co-heir in possession, who claims his possession to be adverse, should be made out. The possession of one co-heir is considered, in law, as possession of all the co-heirs. When one co-heir is found to be in possession of the properties it is presumed to be on the basis of joint title. The co-heir in possession cannot render his possession adverse to the other co-heir not in possession merely by any secret hostile animus on his own part in derogation of the other co-heir's title. It is a settled rule of law that as between co-heirs there must be evidence of open assertion of hostile title, coupled with exclusive possession and enjoyment by one of them to the knowledge of the other so as to constitute ouster. [See: **P. Lakshmi Reddy vs. L. Lakshmi Reddy**:: (AIR1957SC314)].

18.11 In **Karbalai Begum v. Mohd. Sayeed and Anr.**:: [1981]1SCR863, the law has been stated by the Supreme Court in the following terms:

"....It is well settled that mere non-participation in the rent and profits of the land of a co-sharer does not amount to an ouster so as to give title by adverse possession to the other co-sharer in possession..."

In **Darshan Singh and Ors. v. Gujjar Singh (Dead) by LRs. and Ors.**:: [2002]1SCR91, it is stated :

“...It is well settled that if a co-sharer is in possession of the entire property, his possession cannot be deemed to be adverse for other co-sharers unless there has been an ouster of other co-sharers.”

“In our view, the correct legal position is that possession of a property belonging to several co-sharers by one co-sharer shall be deemed that he possesses the property on behalf of the other co-sharers unless there has been a clear ouster by denying the title of other co-sharers and mutation in the revenue records in the name of one co-sharer would not amount to ouster unless there is a clear declaration that title of the other co-sharers was denied.”

In the case on hand, no plea of adverse possession coupled with ouster is taken by the 1st defendant and the defence plea of relinquishment is not accepted by this Court. Even in cases where plea of adverse possession is taken, the Courts are consistently holding as under: ‘Long and continuous possession by itself, it is trite, would not constitute adverse possession. Even non-participation in the rent and profits of the land does not amount to ouster so as to give title by prescription. A co-sharer in possession, as is well settled, becomes a constructive trustee of other co-sharer, who is not in possession of the properties, and the right of the said co-sharer not in possession would thus be deemed to be protected by the trustee. However, ‘ouster’ does not mean actual driving out of the co-sharer/co-owner from the property. It will, however, not be complete unless it is coupled with all other ingredients required to constitute adverse possession. Broadly speaking, three elements are necessary for establishing the plea of ouster in the case of co-owner. They are (i) declaration of hostile animus, (ii) long and uninterrupted possession of the person pleading ouster, and (iii) exercise of right of exclusive ownership openly and to the knowledge of other co-owner. [See: **Md. Mohammad Ali (Dead) by Lrs. vs. Sri Jagadish Kalita and Ors.:** (2004)1SCC271]. In that view of the matter the delay in coming to Court by itself or the filing of the Land

Reforms Declaration by the 1st defendant alone are not sufficient to non suit the plaintiff.

18.12 Dealing finally with the point as to whether the plaintiff's suit is liable for dismissal as a sequel to the dismissal of the suit as abated against the defendants 3, 9 & 10 as being contended by the contesting appellants, it is to be noted that the said defendants are not sharers and this Court already held that while arriving at the partible extent of Ac.16.50 cents the properties of third parties including those of the defendants 3, 9 & 10 shall also be excluded besides the property covered by exhibits B15 to B18. In that view of the matter and as no rights in respect of the properties of the said defendants would be affected by the instant preliminary decree, the dismissal of the suit against the said defendants as abated does not entail the dismissal of the suit in its entirety.

18.13 On the detailed analysis of the facts, submissions and evidence, and for the reasons assigned and the findings recorded supra, this Court accordingly holds that the plaintiff is entitled to seek partition of Ac.16.50 cents out of the plaint schedule property and claim a 1/6th share each for herself and her daughter, the 2nd defendant. The points are accordingly answered partly in favour of the plaintiff and the 2nd defendant.

18.14 Dealing with the aspect of future mesne profits, it is to be noted that the trial Court while decreeing the suit for partition did not grant a decree for mesne profits and the judgment and decree of the trial Court are silent with regard to the said relief. It is well settled that when the decree and judgment are silent on a relief claimed it shall be deemed that such a relief had been refused by the Court. Though no decree for mesne profits has been granted,

the plaintiff did not prefer an appeal or cross appeal assailing the decree of the trial Court in that regard. Therefore, this Court holds that the plaintiff is not entitled to a decree for future mesne profits. Even otherwise, having regard to the peculiar facts of the case and the long and abnormal delay in the institution of the suit by the plaintiff, and as the property of an extent of Ac.16.50 cents liable for partition has to be carved out after the necessary procedure and exercise, this Court holds that this is not a fit case to grant mesne profits.

19. POINT No.3:

As a sequel to the aforestated findings of this Court on points 1 & 2 supra, this Court holds that the judgment of the trial Court holding that 'the plaintiff is entitled to equal share along with PW2 and DW1 out of the share of her demised husband Chaganti Adiseshaiah in the suit A schedule property excluding 11 acre of land and the lands covered by Exs.B15 to B18. the plaintiff being the widow of late Adiseshaiah is entitled to 1/6th share, PW2 being the daughter of late Adiseshaiah is entitled to 1/6th share and DW1 is entitled to 4/6th share in the remaining extent of the suit A schedule property and that D6 and D7 are entitled to equities at the time of partition through Advocate Commissioner in the share of DW1' is unsustainable under facts and in law. On carefully evaluating the pleadings and the oral & documentary evidence and after going through the judgment of the trial Court, this Court, for the reasons assigned in this judgment, finds itself partly in agreement with the findings recorded by the trial Court and hence, and as a sequel holds that the plaintiff is entitled to a preliminary decree for partition in part, that is, for Ac.16.50 cents as indicated in the preceding paragraphs of this judgment.

Point is accordingly answered partly in favour of the plaintiff and partly in favour of the appellants.

20. POINT No.4:

In the result and for all the reasons assigned, the appeal suit is allowed in part and while setting aside the decree and judgment of the trial Court, the suit OS.No.56 of 1990 is decreed, without costs, in part, granting a preliminary decree in favour of the plaintiff for partition of Ac.16.50 cents out of the plaint 'A' schedule property of a total extent of Ac.50.17 cents after first excluding the properties covered by exhibits B15 to B18 and also all the properties that are sold to third parties prior to the institution of the suit and directing allotment of 1/6th share each from out of the said Ac.16.50 cents only to the plaintiff and the 2nd defendant after converting joint possession into separate possession. However, the said Ac.16.50 cents which is to be partitioned shall accordingly be segregated by metes and bounds keeping in view the equities and good and bad qualities and the interests of third parties if any created during the pendency of the suit and this first appeal suit.

The plaintiff shall pay the Court fee payable as per the procedure established by law as per the terms of the preliminary decree now granted by this Court.

Miscellaneous petitions pending, if any, shall stand closed.

M. SEETHARAMA MURTI, J

11.04.2018
Vjl