HIGH COURT OF ANDHRA PRADESH

* * * *

THE HON'BLE SRI JUSTICE RAVI NATH TILHARI
&
THE HON'BL SRI JUSTICE MAHESWARA RAO KUNCHEAM

A. S. No. 80 of 2018
&
C. R. P. Nos. 3813, 5818 and 5836 of 2017

A.S.No. 80 of 2018
Between:
Ayalasomayajula Bhavani Sankara Shastry

.....APPELLANT

AND
Smt. Ayalasomayajula Lakshmi Narasamma (died)
Ayyalasomayajula Kanaka Rama Sarma and others

.....RESPONDENTS

CRP No. 3813 of 2017
Between:
Ayalasomayajula Bhavani Sankara Shastry

.....PETITIONER

AND
Smt. Ayalasomayajula Lakshmi Narasamma (died)
Ayyalasomayajula Kanaka Rama Sarma and others

.....RESPONDENTS

CRP No. 5818 of 2017
Between:
Ayalasomayajula Bhavani Sankara Shastry

.....PETITIONER

AND
Smt. Ayalasomayajula Lakshmi Narasamma (died)
Ayyalasomayajula Kanaka Rama Sarma and others

.....RESPONDENTS

CRP No. 5836 of 2017
Between:
Ayalasomayajula Bhavani Sankara Shastry

.....PETITIONER

AND
Smt. Ayalasomayajula Lakshmi Narasamma (died)
Ayyalasomayajula Kanaka Rama Sarma and others

.....RESPONDENTS

DATE OF JUDGMENT RESERVED : **21.08.2025**
DATE OF JUDGMENT PRONOUNCED: **17.12.2025**
DATE OF JUDGMENT UPLOADED : **18.12.2025**

SUBMITTED FOR APPROVAL:

THE HON'BLE SRI JUSTICE RAVI NATH TILHARI
&
THE HON'BLE SRI JUSTICE MAHESWARA RAO KUNCHEAM

1. Whether Reporters of Local newspapers may be allowed to see the Judgments? Yes/No

2. Whether the copies of judgment may be marked to Law Reporters/Journals Yes/No

3. Whether Your Lordships wish to see the fair copy of the Judgment? Yes/No

_____
RAVI NATH TILHARI, J

_____
MAHESWARA RAO KUNCHEAM, J

*** THE HON'BLE SRI JUSTICE RAVI NATH TILHARI**
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THE HON'BLE SRI JUSTICE MAHESWARA RAO KUNCHEAM

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Ayyalasomayajula Kanaka Rama Sarma and others
.....RESPONDENTS

! Counsel for the Appellant/ Petitioner : Sri Sunil H. Ganu, Senior Advocate, Assisted by and for M. Chalapathi Rao

Counsel for the Respondents : Sri V. R. N. Prashanth

< Gist :

> Head Note:

? Cases Referred:

1. (1995) 2 SCC 543
2. (1980) 2 SCC 247
3. AIR 2007 SC 218
4. 2022 SCC OnLine SC 1307
5. (2024) 3 SCC 705
6. (2020) 6 SCC 387
7. (2003) 10 SCC 310
8. 2025 SCC OnLine SC 877
9. AIR 2004 Mad 529
10. (2023) 9 SCC 734
11. (2021) 11 SCC 277
12. AIR 1956 SC 593
13. (2006) 4 SCC 385
14. (2007) 6 SCC 167
15. 2006 SCC OnLine AP 123
16. (2012) 2 SCC 300
17. (2008) 5 SCC 117

THE HON'BLE SRI JUSTICE RAVI NATH TILHARI
&
THE HON'BL SRI JUSTICE MAHESWARA RAO KUNCHEAM

A. S. No. 80 of 2018
&
C. R. P. Nos. 3813, 5818 and 5836 of 2017

COMMON JUDGMENT: (per Hon'ble Sri Justice Ravi Nath Tilhari)

Heard Sri Sunil H. Ganu, Senior Advocate, assisted by and for M. Chalapathi Rao, learned counsel for the appellant/petitioner and Sri V. R. N. Prashanth, learned counsel for the respondents.

I. Facts:

(A). A. S. No.80 of 2018:

2. This Appeal under Section 96 of the Code of Civil Procedure (in short 'CPC') has been filed by the appellant/plaintiff in O. S. No. 94 of 2010 in the Court of X Additional District and Sessions Judge, Visakhapatnam District at Anakapalle, challenging the dismissal of the said suit, vide judgment and decree dated 22.11.2017.

3. O. S. No. 94 of 2010 was filed by Ayalasomayajula Bhavani Sankara Shastry for partition of immovable properties in the plaint schedule, Item Nos. I to IV into 5 equal shares; for partition of Item Nos. V and VI into 5 equal shares; and for partition of Item No. VII into 70 equal shares and to allot 11 such shares to the plaintiff; and also to partition of Item No. VIII into 10 equal shares, and to allot one such share to the plaintiff and to put him/deliver the

same to him by converting the joint possession into separate possession, as also for future profits and costs of the suit.

4. The respondents are the defendants in the suit. Respondent Nos.12 to 15, were the defendants and were added as legal representatives of the deceased 6th defendant. Respondent Nos.5, 8 and 9 were the defendant Nos.5, 8 and 9 in the suit and were set *ex parte* before the learned trial Court.

(i). <u>Plaintiff's case:</u>

5. The case of the plaintiff/appellant is that the plaintiff-Ayalasomayajula Bhavani Sankara Shastry and the defendant Nos.2 to 5 are the sons of late Ayalasomayajula Rama Lakshmi Narasimha Sarma (hereinafter referred to as ('ARLN Sarma') and deceased 1st defendant- Smt. Ayalasomayajula Lakshmi Narasamma (mother) (hereinafter referred to as '1st defendant'). Defendant Nos.6 and 8 in the suit, and the mother of the defendant Nos.9 to 11 in the suit, namely, late Nemani Subbalakshmi, are the daughters of ARLN Sarma and the 1st defendant.

6. As per the plaintiff's case, Item Nos. I to IV of the plaint schedule properties are jointly purchased from the joint business of late ARLN Sarma, plaintiff and defendants No.2 to 5 before the death of late ARLN Sarma, Item Nos. V and VI of the plaint schedule properties are said to be the properties jointly purchased from the joint business of plaintiff, and defendants No.2 to 5 after the death of their father ARLN Sarma, and the property under Item No.VII was said to be the property jointly purchased by late ARLN Sarma, plaintiff, defendants No.2 to 5 and the mother of defendants No.9 to 11. Item No. VIII

i.e., gold, silver and brass items were acquired by the plaintiff's father and were said to be in the custody of defendants No.1 to 8.

7. The plaintiff claimed to have 1/5th share in Item Nos. I to IV; 1/5th share in Item Nos. V and VI; 11/70th share in Item No.VII; and 1/10th share in Item No.VIII of the plaint schedule.

8. The plaintiff's further case is that the defendants No.2 to 5 had 1/5th share each in Item Nos. I toIV; 1/5th share in Item Nos. V and VI, and defendants No.2 to 5 and defendants No.9 to 11 together 1/7th share each in Item No.VII of the plaint schedule properties.

9. The plaintiff's further case is that the father of the plaintiff died in the month of November 1981 intestate leaving behind him (the plaintiff) and the defendants (widow, sons and daughters), who succeeded to their respective shares in different items. The plaintiff himself and the defendants No.2 to 5 jointly run the saw mill business in Item No.III of the plaint schedule property in the name and style of M/s. A.R.L.N. Sarma and sons, but the defendants No.2 to 5 were not rendering the account of the said business. His further case is that the father of the plaintiff also entered into a registered agreement to sell with regard to the property at Anakapalle and during the year 1980 the Government proposed to acquire part of the land in Item No. VII of the plaint schedule properties for widening the National Highway No.5 and paid compensation. The 2nd defendant, on behalf of the plaintiff and on behalf of the other claimants received the compensation and thereafter paid the legitimate share out of the said compensation to the plaintiff. After completion

of his MBBS and MS, the plaintiff was eking out his livelihood by working at various places and at the time of presentation of the suit, he was at Mussoorie and on his request defendants No.2 to 5 were managing the properties and on many occasions the 2nd defendant informed the plaintiff that the 2nd defendant was working on, for effecting partition of the schedule properties, but no such partition took place as per law or as per any draft partition deed prepared by the 2nd defendant though such assurance was being given. The case of the plaintiff is that the plaint schedule properties were never partitioned and the defendants No.2 to 5 also failed to render accounts with regard to the joint business in Item No.3. Further, the plaintiff got issued a notice to the defendants for partition by metes and bounds which was received by them, but they submitted no reply and also failed to comply with the said notice. As such, the defendants No.1 to 5, 8 and 9 were deemed to have knowledge of the plaintiff's notice and being a joint family member, the plaintiff shall be deemed to be in joint possession of all the items of the plaint schedule properties and so, the suit was filed for determination of the plaintiff's share and partition by metes and bounds, and for delivery of separate possession.

(ii). <u>Written Statement:</u>

10. The 2nd defendant filed written statement. He denied all the material averments of the plaint. The plea taken was that the plaintiff was the natural son of late ARLN Sarma and the 1st defendant. But, they had given the plaintiff in adoption to their relative, namely, Ayyalasomayajula Sanyasirao (hereinafter referred to as 'Sanyasirao') as per Hindu caste, custom and law. So, the

plaintiff was said to be the adopted son of Sanyasirao, who worked as Pump Operator in SE Railway, Kurdha Road, Puri District, Orissa State. It was also the case of the 2nd defendant that the Orissa High Court had declared the plaintiff as the adopted son of Sanyasirao. His medical degree certificate also exhibited the same. So, the plaintiff was not the son of ARLN Sarma and the 1st defendant. So, he was having no concern with the plaint schedule properties in view of the provisions of Hindu Adoption and Maintenance Act. Item Nos. I to VII of the plaint schedule properties were denied as joint family properties and the plaintiff was asked to put to strict proof thereof. Rest of the averments, such as, demand of partition by the plaintiff, service of legal notice etc., were also denied. So, in nutshell, the case set up in the written statement was that the plaintiff had been given in an adoption and was not entitled to any share in the plaint schedule properties in the family of his natural father late ARLN Sarma. The plea was also taken that the suit was bad for non-joinder of necessary party i.e., Ayyalasomayajula Surya Prabhavathi and the suit was also bad for non-joinder of entire properties, that there were no *bona fides* in filing the suit, which was not maintainable under law, for which, there was also no cause of action. The plaintiff was not in joint and constructive possession of the suit schedule properties. The suit was also barred by limitation and the court fee paid was not correct, the market value as mentioned was also denied and it was prayed that the Court may dismiss the suit with costs.

(iii). <u>Issues:</u>

11. The learned trial Court framed the following issues for trial:

(1) "Whether the plaintiff is the son of late Ayyalasomayajula Rama Lakshmi Narasimha Sarma?
(2) Whether the plaint schedule properties are the joint family properties of plaintiff and defendants?
(3) Whether the suit is bad for non-joinder of necessary and proper parties and non-joinder of necessary properties?
(4) Whether the plaintiff is entitled for partition as prayed for?
(5) Whether the plaintiff is entitled for future profits as prayed for?
(6) To what relief?"

(iv). <u>Evidence:</u>

12. During the course of trial the plaintiff examined PWs 1 to 3, namely, A. Bhavani Sankara Sastry (plaintiff), Miriyala Venkata Laxmi Narasimha Rao (Attestor of Ex.A6) and Vadlamani Krishna Rao (Attester of Ex.A6) and got marked Exs.A1 to A11, viz., Ex.A1-Office copy of Lawyer Notice, dated 04.11.2009, Ex.A2-Original Postal Receipts (11 in number), Ex.A3-Served Postal Acknowledgments (four in number) (original), Ex.A4-Original un-served Postal Covers (seven in number), Ex.A5-Public Notice published in Eenadu Daily along with Bill dated 05.11.2009, Ex.A6-Original Will (marked through PW 1), dated 17.03.2010, Ex.A7-Certified copy of Petition Affidavit in I.A.No.1153/2012 in O.S.No.541/2006 of PJCJ, Court, Anakapalle, Ex.A8-Certified copy of amended plaint in O.S.No.541/2006 of PJCJ Court, Anakapalle, Ex.A9-Certified copy of written statement of AKR Sarma in O.S.No.338/2011 of II ADJ Court, Visakhapatnam, Ex.A10-The signature of D.W.1 only; and Ex.A11-The contents of Registered Letter. (EXs.A7 to A11 were marked through cross examination of DW 1).

13. On behalf of the defendants, DW 1-Ayyalasomayajula Kanaka Rama Sarma (2nd defendant) was examined and Ex.B1-Photograph of plaintiff/Doctor (marked through PW 2) was marked.

14. The Appendix of Evidence to the judgment of the learned trial Court does not show that any copy of the judgment of the Orissa High Court in writ proceeding declaring the plaintiff as adopted son of Sanyasirao, to prove the written statement case, was filed in the trial Court.

(v). <u>Findings of the learned trial Court:</u>

15. The learned trial Court recorded the finding on Issue No.1, that the plaintiff was the son of ARLN Sarma. It recorded that the stand taken by the 2nd defendant that, the plaintiff was given in adoption was without any substance of proof.

16. On Issue No.2, the learned trial Court held that there was no substantial proof to establish that the plaint schedule properties Item Nos.I to VIII, were the joint family properties of the plaintiff along with the defendants. It was further recorded that the plaintiff (PW 1) being Doctor had not resided at Anakapalle but resided at various places and so, he was not able to establish his joint possession and enjoyment of the plaint schedule properties along with the defendants.

17. On Issue No.3, the finding was recorded by the learned trial Court that the suit was bad for non-joinder of necessary parties and also bad for non-joinder of necessary properties. It was so held observing that Item No.V of the plaint schedule properties was purchased by Smt. Ayyalasomayajula Surya

Prabhavathi, and was not the joint family property, and as Ayyalasomayajula Surya Prabhavathi was not impleaded, the suit was bad for non-joinder of necessary parties and on this ground along the suit was liable to be dismissed.

18. On Issue No.4, the learned trial Court recorded the finding that the plaintiff was not entitled for partition as prayed for. Consequently, on Issue No.5, it was held that the plaintiff was not entitled for future profits and on Issue No.6, it was held that the suit was liable to be dismissed as the plaintiff was not entitled for any relief.

(vi). <u>Suit Dismissed:</u>

19. Accordingly, the suit was dismissed by the judgment and decree dated 22.11.2017 by the learned X Additional District and Sessions Judge, Visakhapatnam at Anakapalle.

(vii). <u>A.S.No.80 of 2018:</u>

20. Challenging the decree dated 22.11.2017, the plaintiff has filed this appeal.

(B). <u>CRP No.3813 of 2017:</u>

21. At this stage, it be mentioned that in the suit, the plaintiff filed I.A.No.492 of 2014 under Order VI Rule 17 CPC to amend the plaint and to add Item Nos. I and II mentioned in the petition as Item Nos. IX and X in the plaint schedule with consequential prayer. The plea of the plaintiff/petitioner in support of the amendment application was that the proposed Item Nos. IX and X were purchased by the 2nd defendant in the suit in his name, though out of the joint family funds, acting as Manager of joint family.

22. The learned X Additional District and Sessions Judge, Anakapalle rejected that application, vide Order dated 20.06.2017, observing that there was no record that the 2nd defendant managed the joint family affairs of the plaintiff and other defendants and in view of the objection raised of the 2nd defendant and other defendants No.7, 10 and 11 that those properties were their self-acquired properties under the sale deeds, it was difficult to accept the plea of the plaintiff for amendment that those proposed Item Nos. IX and X were purchased from outcome of the joint family funds. It also appears to us, from consideration of the order of rejection dated 20.06.2017 that, the learned trial Court made verification of those documents, the sale deeds and observing that there was no reference or clear cut evidence that those proposed Item Nos. IX and X were purchased from out of the joint family funds and those three documents' recitals were in a manner that the 2nd defendant purchased exclusively and so, the plaintiff was making an attempt to cause pendency of the suit on the one or other ground and so, it was difficult to accept the plea of the plaintiff that those properties were purchased by the 2nd defendant in the capacity of manager. So observing further that, the plea of the plaintiff did not hold water, the amendment application was rejected.

23. Challenging the said Order dated 20.06.2017 in I.A.No. 492 of 2014, CRP.No.3813 of 2017 has been filed.

(C). <u>CRP No.5818 of 2017:</u>

24. In the suit, the plaintiff filed another I.A.No.986 of 2017 under Order VI Rule 17 CPC read with Sections 151, 153 CPC to amend the plaint to add

paragraph-III (k) so as to raise the plea on an unregistered Will dated 17.03.2010 in plaintiff's favour by the 1st defendant, also submitting that the original Will Deed was in the custody of brother of the 1st defendant (mother), by name P. S. Rao, who gave it to the plaintiff after demise of the 1st defendant, who died on 08.01.2011. On an earlier petition of the plaintiff in I.A.No.1363 of 2011 the learned trial Court was pleased to keep the said Will deed in the safe custody of the Court in a sealed cover and from that date 18.08.2011 the said Will was in the custody of the Court. So, the plaintiff claimed to be entitled to the entire property/share of his mother (1st defendant). The plaintiff also prayed to add the prayer in the prayer clause to the plaint to that effect.

25. However, the amendment petition I.A.No. 986 of 2017 was dismissed by Order dated 13.09.2017 by the X Additional District & Sessions Judge, Anakapalle, mainly on the ground that in the suit which was of the year 2010, previously also the plaintiff filed many applications, one under Order VI Rule 17 CPC, another under Order II Rule 27 CPC and under Section 151 CPC, and also filed an application for transfer of the suit and made efforts to conduct joint trial, which was negatived by the Court. The application for amendment was filed for protracting the litigation and there was no *bona fide* in filing the application for amendment.

26. Challenging the Order, dated 13.09.2017, the plaintiff filed CRP No.5818 of 2017, which is also clubbed to the appeal.

(D). <u>CRP No.5836 of 2017:</u>

27. In the suit, the plaintiff filed I.A.No. 981 of 2017 under Order XIV Rule 5 CPC to amend the issue No.1 framed on 19.07.2017, by deleting the issue No.1 as was framed and to frame the new issue, as follows:

> "Whether the alleged adoption of the plaintiffs by his natural parents to one Ayyalasomayajula Sanyasi Rao is true, valid and binding on the plaintiff?"

The learned trial Court had originally framed the issue No.1 as under:

> "Whether the plaintiff is the son of late Ayyalasomayajula Rama Lakshmi Narasimha Sarma?"

28. The learned X Additional District and Sessions Judge, Anakapalle dismissed the I.A.No. 981 of 2017 vide Order dated 13.09.2017.

29. The rejection was almost on the same grounds that the suit was of the year 2010, previously I.A.No.492 of 2014 was filed under Order 6 Rule 17 CPC, which was dismissed on 20.06.2017; I.A.No.937 of 2012 was filed under Order 2 Rule 27 CPC which was dismissed on 19.07.2017; I.A.No.894 of 2017 was filed under Section 151 CPC to club O.S.No.30 of 2017 and to conduct joint trial, which was also dismissed on 22.08.2017; and further, that the plaintiff was making efforts to prolong the suit.

30. Challenging the Order, dated 13.09.2017, CRP No.5836 of 2017 has been filed.

II. <u>Submission of the learned counsels</u>

(i) <u>for the Appellant:</u>

31. Learned counsel for the appellant submitted that the 2nd defendant examined as DW 1, gave the details and admitted that most of the properties either belonged to or purchased by father or maternal grandfather. He referred to the deposition and submitted that Item No.1 was purchased by father under registered sale deed dated 02.04.1973, Item No.2 was purchased by maternal grandfather vide registered sale deed dated 11.03.1925, Item No.3 was purchased by the Partnership firm of ARLN Sarma and Sons vide registered sale deed 27.06.1978, Item No.4 was purchased by father vide registered sale Deed dated 24.09.1969, Item No.5 was the self-acquired property of the wife of the 2nd defendant, Item No.6 was the self acquired property of the 9th defendant, wife of the 5th defendant vide registered gift settlement deed dated 31.03.2006, Item No.7 was purchased by father under registered sale deed dated 03.02.1968 in his name; in the name of his wife, 1st defendant and in the name of his daughter Nemani Subba Lakshmi.

32. Learned counsel for the appellant submitted that in addition to the above, DW 1 admitted signatures on Ex.A10 and on Ex.A11. Ex.A10 is signature of DW 1 and Ex.A11 is the letter in which he specifically admitted that all are joint family properties and in fact he was seeking partition. His written statement in O.S.No.338 of 2011, Ex.A9, also contained admissions in paragraphs 3, 4, 5, 6 and 8. He submitted that after the finding on Issue No.1 being in favour of the plaintiff being the natural son of late ARLN Sarma and the 1st defendant, and further in view of the evidence on record, including the

admission of the 2nd defendant with respect to many items of the plaint schedule property being the joint family property, the learned trial Court acted illegally in dismissing the suit, after ignoring the admissions of the 2nd defendant and the contents of Ex.A9 and Ex.A11. He thus submitted that the learned trial Court has committed error of fact and law both in dismissing the suit.

33. Learned counsel for the appellant further submitted that from the evidence it was clear that the property was either purchased by the father or the maternal grandfather and also that there was sufficient nucleus to acquire the properties. With respect to Item No.5 of the plaint schedule property, DW 1 stated that Item No.5 was in the name of his wife Smt. A. Surya Prabhavathi and it was not purchased with the joint family funds, however, no evidence was lead to show an independent source of her income. On the contrary, DW 1 deposed that she was housewife and not doing any business or any other job.

34. Learned counsel for the appellant further submitted with respect to Item No.6 of the plaint schedule property that DW 2 (1st defendant) denied it to have been acquired with the joint family funds and that the name of A. Usha (wife of the 9th defendant) was to be the nominal, but she was also the housewife and was not doing any business or any job. He further submitted that in the cross examination DW 1 admitted that after the death of ARLN Sarma, they had not partitioned anyone of the properties and all the immovable properties were in the custody of the 2nd defendant along with the brothers and the family members.

35. Learned counsel for the appellant further submitted that even in the chief examination, DW 1 in paras 4 to 16 deposed that the properties were being owned by the father and the father died intestate. Learned counsel for the appellant submitted in the alternative that even if for the sake of argument, Items No.5 and 6 stood in the name of the wife of the 2nd defendant and the wife of the 9th defendant, which were not made parties to the suit and even if it be taken that those were the individual properties, even then, based on evidence at least the other joint family properties were available for partition and therefore, the suit could not be dismissed in its entirety.

36. Learned counsel for the appellant further submitted that merely because the plaintiff being doctor, residing at different places, it could not be held that the plaintiff was not in joint possession. He submitted that the possession of one co-owner is for all.

37. Learned counsel for the appellant/plaintiff placed reliance on the following judgments in support of his contentions:

1) ***Annasaheb Bapusaheb Patil v. Balwant***[1]
2) ***Neelavathi v. N. Natarajan***[2]
3) ***Appasaheb Peerappa Chandgade v. Devendra Peerappa Chandgade***[3]

(ii). <u>For the Respondents:</u>

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[1] (1995) 2 SCC 543
[2] (1980) 2 SCC 247
[3] AIR 2007 SC 218

38. Learned counsel for the respondents submitted that late ARLN Sarma, the father of the plaintiff/appellant (son), defendants No.2 to 5 (sons) and defendants No.6 to 8 (daughters), died in November 1981 intestate. Their mother late A. Lakshmi Narasamma, 1st defendant in the suit, died during pendency of the suit on 08.01.2011. They also had one more daughter N. Subbalakshmi. She had died previous to the date of institution of the suit, so, her legal heirs came on record as defendants No.9 to 11 in the suit. After the death of 6th defendant during the pendency of the suit, defendants No.12 to 15 were impleaded as her legal heirs.

39. Learned counsel for the respondents/defendants submitted that no supporting document was filed to prove the plaint pleadings with respect to Item Nos.1, 2, 4 and the respective Item No.3. The plaintiff's evidence as PW 1, was in the cross examination that the said property stood in the name of a partnership firm 'ARLN Sarma & Co.' and with respect to Item No.5, the said property was said to be in the name of Smt. Surya Prabhavathi, wife of the 2nd defendant. Item No.6 was pleaded to be jointly purchased from the joint business of the father, plaintiff and defendants No.2 to 5 before the death of the father, but the plaintiff as PW 1, had deposed that the said property stands in the name of the 9th defendant. With respect to Item No.7 of the plaint schedule property, he submitted that the same was registered in the names of the father, 1st defendant and the mother of defendants No.9 to 11, on which there was no dispute. But the same was sold to Chandana Brothers Shopping Mall and possession was delivered to the said firm, as per the deposition of DW

1 and though O.S.No.30 of 2017 seeking cancellation of the sale deed in favour of Chandana Brothers was filed by the plaintiff/appellant, but in view of the sale, Item No.7 stood excluded from the partition, of the alleged joint family properties and merely on the ground of pendency of the O.S. No. 30 of 2017 for cancellation of the sale deed, Item No.7, could not be made the subject matter of partition.

40. Learned counsel for the respondents further submitted that the burden lies on the plaintiff to prove that the plaint schedule properties belong to joint family. There is no presumption of the suit properties being joint family property nor the existence of a nucleus. The burden of proof is on the person who alleges the same to be the joint family property. He submitted that the plaintiff did not plead that there was nucleus with which the joint family properties were acquired, and much less any evidence on that aspect, despite denial of the existence of the joint family by the defendants in their written statement. He submitted that the admission of the defendant No.2 (DW 1) in Ex.A9 or in any document could not be conclusive proof of the nature of the suit property as joint Hindu family property. He further submitted that the documentary evidence got marked by the plaintiff is only the lawyer notice, acknowledgments, public notice and an alleged Will and of like nature which did not establish that the suit schedule properties are joint family properties. So, the plaintiff grossly failed to establish that the suit schedule properties are the joint family properties and liable for division.

41. With respect to Item No.7 of the plaint schedule property, the learned counsel for the respondents further submitted that though the Will could not be proved from the 1st defendant, in favour of the plaintiff/appellant, but, even if it be taken that there was a Will, as alleged by the plaintiff, since Item No.7 had already been sold, there would be no question of the plaintiff having any right to Item No.7 of the plaint schedule property based on the Will.

42. Learned counsel for the respondents further submitted that on Issue No.6, the learned trial has rightly recorded the finding that since the plaintiff/appellant was not in joint possession he would be liable to pay the court fee.

43. Learned counsel for the respondents also supported the findings on all the issues as recorded by the learned trial Court, and categorically submitted before us, with respect to Issue No.1 that, the finding on Issue No.1 is not under challenge by the defendants/respondents.

44. Learned counsel for the respondents submitted that the applications for amendment were rightly rejected by the learned trial Court, as those were filed after the commencement of trial.

45. Learned counsel for the respondents has placed reliance on the following judgments in support of his contentions:

1) ***Moreshar Yadaorao Mahajan v. Vyankatesh Sitaram Bhedi (D) thr. LRs.***[4]

2) ***Basavaraj v. Indiara***[5]

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[4] 2022 SCC OnLine SC 1307
[5] (2024) 3 SCC 705

3) ***Bhagwat Sharan v. Purushottam***[6]

4) ***D. S. Lakshmaiah v. L. Balasubramanyam***[7]

5) ***Angadi Chandranna v. Shankar***[8]

46. We have considered the submissions of the learned counsels for both parties and perused the material on record.

III. <u>Points for determination:</u>

47. In view of the submissions advanced by the learned counsels for the parties, the following points arise for our consideration and determination:

A. Whether the learned trial Court failed to apply correctly the fundamental principles of law, governing the suit for partition, as also failed to consider and appreciate the relevant evidence on record in recording findings on Issue Nos.2 to 5 ?

B. Whether the judgment of the learned trial Court suffers from error of fact and law, and it acted illegally in dismissing the suit ?

C. Whether the Orders impugned in the CRP Nos. 3813, 5818 and 5836 of 2017 call for interference ?

IV. <u>Analysis:</u>

<u>On Points 'A & B':</u>

48. Both the points are interconnected. So, those are taken together.

49. The main point for consideration is the nature of the plaint schedule property so as to liable for partition amongst the plaintiff and the defendants.

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[6] (2020) 6 SCC 387
[7] (2003) 10 SCC 310
[8] 2025 SCC OnLine SC 877

50. There remains no dispute with respect to finding on Issue No.1 that the plaintiff/appellant is the son of late ARLN Sarma and the 1st defendant. The plea of the defendant No.2 in written statement that the plaintiff was given in adoption was not accepted. Learned counsel for the defendants/respondents also did not put any challenge to the finding on Issue No.1. Further, the document on record Ex.A7 (certified copy of the petition affidavit in I.A.No.1153 of 2012 in O.S.No.541 of 2006 of the Principal Junior Civil Judge's Court, Anakapalle) is the own affidavit of the 2nd defendant herein, filed to bring on record the legal representative of the 1st plaintiff of that suit (the mother, the 1st defendant herein). The present 2nd defendant filed that affidavit with the prayer in O.S.No.541 of 2006, in which he was the 2nd plaintiff, to bring on record the plaintiff/appellant of this suit as one of the legal representatives of the deceased 1st plaintiff therein (the mother/1st defendant of the present suit).

51. We would first refer to some precedents on the subject of partition *qua* joint Hindu family property.

52. In ***D. S. Lakshmaiah*** (supra), it was held that the legal principle is that there is no presumption of a property being joint family property only on account of existence of a joint Hindu family. The one who asserts has to prove that the property is a joint family property. If, however, the person so asserting proves that there was nucleus with which the joint family property could be acquired, there would be presumption of the property being joint and the onus would shift on the person who claims it to be self-acquired property to prove

that he purchased the property with his own funds and not out of joint family nucleus that was available.

53. Paragraph 18 of ***D. S. Lakshmaiah*** (supra) reads as under:

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

54. In ***Appasaheb Peerappa Chandgade*** (supra), the Hon'ble Apex Court held that whenever a suit for partition and determination of share and possession thereof is filed, then the initial burden is on the plaintiff to show that the entire property was a joint Hindu family property and after initial discharge of the burden, it shifts on the defendants to show that the property claimed by them was not purchased out of the joint family nucleus and it was purchased independent of them.

55. Paragraph-9 of ***Appasaheb Peerappa Chandgade*** (supra) reads as under:

"**12.** So far as the legal proposition is concerned, there is no gainsaying that whenever a suit for partition and determination of share and possession thereof is filed, then **the initial burden is on the plaintiff to show that the entire property was a joint Hindu family property and after initial discharge of the burden, it shifts on the defendants to show that the property claimed by them was not purchased out of the joint family**

nucleus and it was purchased independent of them. This settled proposition emerges from various decisions of this Court right from 1954 onwards."

56. In ***Angadi Chandranna*** (supra), the Hon'ble Apex Court, recently, reiterated that the settled principle of law is that there is no presumption of a property being joint family property only on account of existence of a joint Hindu family. The one who asserts has to prove that the property is a joint family property. The Hon'ble Apex Court referred to ***R. Deivanai Ammal (Died) v. G. Meenakshi Ammal***[9] wherein it was laid down *inter alia* that in a Hindu joint family, if one member sues for partition on the foot that the properties claimed by him are joint family properties then three circumstances ordinarily arise. The **first** is an admitted case when there is no dispute about the existence of the joint family properties at all. The **second** is a case where certain properties are admitted to the joint family properties and the other properties in which a share is claimed are alleged to be the accretions or acquisitions from the income available from joint family properties or in the alternative have been acquired by a sale or conversion of such available properties. The **third** head is that the properties standing in the names of female members of the family are *benami* and that such a state of affairs has been deliberately created by the manager or the head of the family and that really the properties or the amounts standing in the names of female members are properties of the joint family.

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[9] AIR 2004 Mad 529

57. In ***Angadi Chandranna*** (supra) the Hon'ble Apex Court held that it is a settled principle of law that there is no presumption of a property being joint family property only on account of existence of a joint Hindu family. The one who asserts has to prove that the property is a joint family property. If, however, the person so assert proves that there was nucleus with which the joint family property could be acquired, then there would be presumption of the property being joint and the onus would shift on the person who claims it to be self-acquired property to prove that he purchased the property with his own funds and not out of joint family nucleus that was available. That apart, while considering the term 'nucleus' it should always be borne in mind that such nucleus has to be established as a matter of fact and the existence of such nucleus cannot normally be presumed or assumed on probabilities. It was further held that the nucleus should be such that with its help the property claimed to be joint could have been acquired.

58. Paragraph 13 of ***Angadi Chandranna*** (supra) deserves to reproduction as under:

> "**13.** Further, it is a settled principle of law that there is no presumption of a property being joint family property only on account of existence of a joint Hindu family. The one who asserts has to prove that the property is a joint family property. If, **however, the person so asserting proves that there was nucleus with which the joint family property could be acquired, then there would be presumption of the property being joint and the onus would shift on the person who claims it to be self-acquired property to prove that he purchased the property with his own funds and not out of joint family nucleus that was available**. That apart, while considering the term 'nucleus' it should always be borne in mind that such nucleus has to be established as a

matter of fact and the existence of such nucleus cannot normally be presumed or assumed on probabilities. This Court in *R. Deivanai Ammal (Died)* v. *G. Meenakshi Ammal*[12], dealt with the concept of Hindu Law, ancestral property and the nucleus existing therein. The relevant paragraphs are extracted below for ready reference:

"13. ***First let us consider the nature of the suit properties, namely, self-acquired properties of late Ganapathy Moopanar or ancestral properties and whether any nucleus was available to purchase the properties. Under the Hindu Law it is only when a person alleging that the property is ancestral property proves that there was a nucleus by means of which other property may have been acquired, that the burden is shifted on the party alleging self-acquisitions to prove that the property was acquired without any aid from the family estate. In other words the mere existence of a nucleus however small or insignificant is not enough. It should be shown to be of such a character as could reasonably be expected to lead to the acquisition of the property alleged to be part of the joint family property****. Where the doctrine of blending is invoked against a person having income at his disposal and acquiring property, the reasonable presumption to make is that he had the income at his absolute disposal unless there is evidence to the contrary. If a coparcener desires to establish that a property in the name of a female member of the family or in the name of the manager himself has to be accepted and treated as property acquired from the joint family nucleus, it is absolutely essential that such a coparcener should not only barely plead the same, but also establish the existence of such a joint family fund or nucleus. Even if the joint family nucleus is so established, the prescription that the accretions made by the manager or the purchases made by him should be deemed to be from and out of such a nucleus does not arise, if there is no proof that such nucleus of the joint family is not an income-yielding apparatus. The proof required is very strict and the burden is on the person who sets up a case that the property in the name of a female member of the family or in the name of the manager or any other coparcener is to be treated as joint family property. There should be proof of the availability of such surplus income or joint family nucleus on the date of*

such acquisitions or purchases. The same is the principle even in the cases where moneys were advanced on mortgages over immoveable properties. The onus is not on the acquirer to prove that the property standing in his name was purchased from joint family funds. That may be so, in the case of a manager of a joint family, but not so in the case of all coparceners. For a greater reason it is not so in the case of female members.

14. The doctrine of blending of self-acquired property with joint family has to be carefully applied with reference to the facts of each case. No doubt it is settled that when members of a joint family by their joint labour or in their joint business acquired property, that property, in the absence of a clear indication of a contrary intention, would be owned by them as joint family property and their male issues would necessarily acquire a right by birth in such property. But the essential sine qua non is the absence of a contrary intention. If there is satisfactory evidence of an intention on the part of the acquirer such property to treat it as his own, but not as joint family property, the presumption which ordinarily arises, according to the personal law of Hindus that such property would be regarded as joint family property, will not arise.

15. It is a well-established principle of law that where a party claims that any particular item of property is joint family property, the burden of proving that it is so rests on the party asserting it. ***Where it is established or admitted that the family possessed some joint property which from its nature and relative value may have formed the nucleus from which the property in question may have been acquired, the presumption arises that it was joint property and the burden shifts to the party alleging self-acquisition to establish affirmatively that the property was acquired without the aid of the joint family.*** *But no such presumption would arise if the nucleus is such that with its help the property claimed to be joint could not have been acquired. In order to give rise to the presumption, the nucleus should be such that with its help the property claimed to be joint could have been acquired. A family house in the occupation of the members and yielding no income could not be nucleus out of which acquisitions could be made even though it might be of considerable value.*

16. ***In a Hindu joint family, if one member sues for partition on the foot that the properties claimed by him are joint family properties then three circumstances ordinarily arise. The first is an admitted case when there is no dispute about the existence of the joint family properties at all. The second is a case where certain properties are admitted to the joint family properties and the other properties in which a share is claimed are alleged to be the accretions or acquisitions from the income available from joint family properties or in the alternative have been acquired by a sale or conversion of such available properties. The third head is that the properties standing in the names of female members of the family are benami and that such a state of affairs has been deliberately created by the manager or the head of the family and that really the properties or the amounts standing in the names of female members are properties of the joint family.*** *While considering the term 'nucleus' it should always be borne in mind that such nucleus has to be established as a matter of fact and the existence of such nucleus cannot normally be presumed or assumed on probabilities. The extent of the property, the income from the property, the normal liability with which such income would be charged and the net available surplus of such joint family property do all enter into computation for the purpose of assessing the content of the reservoir of such a nucleus from which alone it could, with reasonable certainty, be said that the other joint family properties have been purchased unless a strong link or nexus is established between the available surplus income and the alleged joint family properties. The person who comes to Court with such bare allegations without any substantial proof to back it up should fail.*

17. It is also a well-established doctrine of Hindu Law that property which was originally self-acquired may become joint property if it has been voluntarily thrown by the coparcener into the joint stock with the intention of abandoning all separate claims upto it. But the question whether the coparcener has done so or not is entirely a question of fact to be decided in the light of all the circumstances of the case. It must be established that there was a clear intention on the part of the coparcener to waive his separate rights and such an intention will not be inferred from acts which may have been done from

kindness or affection. The important point to keep in mind is that the separate property of a Hindu coparcener ceases to be his separate property and acquires the characteristics of his joint family or ancestral property, not by mere act of physical mixing with his joint family or ancestral property, but by his own volition and intention by his waiving or surrendering his special right in it as separate property. Such intention can be discovered only from his words or from his acts and conduct."

59. Keeping in view the aforesaid principles, we now proceed to consider the present case.

60. The consideration made by the learned trial Court (answered) to Issue No.4 shows that the plaintiff failed to place any document with regard to Item Nos.I to VIII of the plaint schedule properties and also failed to prove the joint possession and enjoyment.

61. In that regard, the learned trial Court referred to the evidence of the plaintiff as PW 1, during his cross examination observing that, that got significance for consideration. Referring to the averment of the plaintiff in the plaint with respect to Item No.VII of the plaint schedule properties, the learned trial Court observed that Item No.VII, as per the own admission of the plaintiff in the plaint, stood in the name of the father of the plaintiff, 1st defendant (mother of the plaintiff) and mother of the defendants 9 to 11. So, the plaintiff though seeking relief of Item No.VII, but for that, no documents stood in his name, i.e., in the name of the plaintiff. The learned trial Court thereafter referred to the evidence of PW 1 in the cross examination and observing that the said cross-examination was quite inconsistent to the plaint pleadings, on the one hand the plaintiff/PW 1 was seeking relief of partition and on the other

hand admitting that Ac.0.75¼ cents stood in the name of his mother and Ac.0.62 cents stood in the name of his father and Ac.0.30½ stood in the name of his sister Nemani Subbalakshmi purchased out of their joint family funds. So, once the property stood in the individual capacity, no one was expected to seek relief of partition. The learned trial Court further observed that the plaintiff as PW 1 wanted to have partition and relief sought for against Item No.I as if he was one of the persons to the said property concerned, but there was no such record that Item No.VII of the plaint schedule properties was purchased by the joint family funds, and contrary to that, PW 1/plaintiff admitted that his father earned the property by doing 'Powrohityam'.

62. At this stage, before proceeding further, we observe that the reasoning of the learned trial Court is wholly unsatisfactory. The reasoning given is that once the property stands in the individual capacity, no one was expected to seek relief of partition. The reasoning and the applicability of law is wholly incomprehensive. The reason is that once the evidence was there, may be in the cross examination of PW 1, to which the learned trial Court gave much credence, that some part of the property in Item No.VII was recorded in the name of the plaintiff's father, and also in the name of the plaintiff's mother to another extent, and the learned trial Court having already recorded the finding in Issue No.1, that, the plaintiff was the son of ARLN Sarma and the 1st defendant (mother), as to how the son would not be entitled to any share in such property, along with his brother and sister. It is not the finding recorded by the learned trial Court that the plaintiff's father did not die intestate. So,

once the property was found recorded in the name of the father, the plaintiff admittedly being the natural son, and the plea raised by the 2nd defendant that the plaintiff had been given in adoption, having been rejected, we find no reason for the learned trial Court to hold that the plaintiff had no share in the property, at least those which stood recorded in the name of the plaintiff's father or/and the mother.

63. So far as the part of the Item-VII of the plaint schedule property, recorded to certain extent in the name of the plaintiff's mother (1st defendant) is concerned, the 1st defendant died during pendency of the suit. The plaintiff had projected an unregistered Will dated 17.03.2010 (Ex.A6) by his mother 1st defendant in favour of the plaintiff. The learned trial Court observed that the fact of Ex.A6 dated 17.03.2010 was nowhere mentioned in the original plaint dated 15.03.2010 (or) amended neat copy of the plaint dated 01.07.2013. The learned trial Court further observed that the date of the Will (dt.17.03.2010) was after two days of filing of the suit, so it was not a document as on the date of filing of the suit dated 15.03.2010; that it was an unregistered document, which was disputed by the 2nd defendant. It further observed that the plaintiff as PW 1 during his cross-examination made inconsistent depositions. It also disbelieved the evidence of PW 2, scribe of the Will and PW 3, one of the attesting witness to the Will. On such grounds, i.e., the Will date was after the date of institution of the suit, it disbelieved the Will, observing further that, the said document/Will was not got registered and it was only an immersive

attempt on the part of PW 1 to get the property in dispute in order to gain wrongfully.

64. On the aforesaid aspect also, we are of the view that the learned Additional District Judge failed to appreciate and apply the law on the subject of proof of Will as also on the subject of succession to the property or share in property of the mother, as per the Hindu Succession Act, in the absence of testamentary disposition or even if a Will set up could not be established.

65. With respect to proof of a Will, law is well settled, in ***Meena Pradhan v. Kamla Pradhan***[10] the Hon'ble Apex Court, observed and held that the requirements enshrined under Section 63 of the Succession Act have to be categorically complied with for the execution of the Will to be proven in terms of Section 68 of the Evidence Act.

66. Paragraphs 10 and 11 of ***Meena Pradhan*** (supra) are reproduced as under:

> "**10.** Relying on *H. Venkatachala Iyengar* v. *B.N. Thimmajamma* [*H. Venkatachala Iyengar* v. *B.N. Thimmajamma*, 1958 SCC OnLine SC 31 : 1959 Supp (1) SCR 426 : AIR 1959 SC 443] (three-Judge Bench), *Bhagwan Kaur* v. *Kartar Kaur* [*Bhagwan Kaur* v. *Kartar Kaur*, (1994) 5 SCC 135] (three-Judge Bench), *Janki Narayan Bhoir* v. *Narayan Namdeo Kadam* [*Janki Narayan Bhoir* v. *Narayan Namdeo Kadam*, (2003) 2 SCC 91] (two-Judge Bench), *Yumnam Ongbi Tampha Ibema Devi* v. *Yumnam Joykumar Singh* [*Yumnam Ongbi Tampha Ibema Devi* v. *Yumnam Joykumar Singh*, (2009) 4 SCC 780 : (2009) 2 SCC (Civ) 348] (three-Judge Bench) and *Shivakumar* v. *Sharanabasappa* [*Shivakumar* v. *Sharanabasappa*, (2021) 11 SCC 277] (three-Judge Bench), we can deduce/infer the following principles required for proving the validity and execution of the will:

[10] (2023) 9 SCC 734

10.1. The court has to consider two aspects : firstly, that the will is executed by the testator, and secondly, that it was the last will executed by him;

10.2. It is not required to be proved with mathematical accuracy, but the test of satisfaction of the prudent mind has to be applied.

10.3. A will is required to fulfil all the formalities required under Section 63 of the Succession Act, that is to say:

(*a*) The testator shall sign or affix his mark to the will or it shall be signed by some other person in his presence and by his direction and the said signature or affixation shall show that it was intended to give effect to the writing as a will;

(*b*) It is mandatory to get it attested by two or more witnesses, though no particular form of attestation is necessary;

(*c*) Each of the attesting witnesses must have seen the testator sign or affix his mark to the will or has seen some other person sign the will, in the presence and by the direction of the testator, or has received from the testator a personal acknowledgment of such signatures;

(*d*) Each of the attesting witnesses shall sign the will in the presence of the testator, however, the presence of all witnesses at the same time is not required;

10.4. For the purpose of proving the execution of the will, at least one of the attesting witnesses, who is alive, subject to the process of court, and capable of giving evidence, shall be examined;

10.5. The attesting witness should speak not only about the testator's signatures but also that each of the witnesses had signed the will in the presence of the testator;

10.6. If one attesting witness can prove the execution of the will, the examination of other attesting witnesses can be dispensed with;

10.7. Where one attesting witness examined to prove the will fails to prove its due execution, then the other available attesting witness has to be called to supplement his evidence;

10.8. Whenever there exists any suspicion as to the execution of the will, it is the responsibility of the propounder to remove all legitimate suspicions

before it can be accepted as the testator's last will. In such cases, the initial onus on the propounder becomes heavier.

10.9. The test of judicial conscience has been evolved for dealing with those cases where the execution of the will is surrounded by suspicious circumstances. It requires to consider factors such as awareness of the testator as to the content as well as the consequences, nature and effect of the dispositions in the will; sound, certain and disposing state of mind and memory of the testator at the time of execution; testator executed the will while acting on his own free will;

10.10. One who alleges fraud, fabrication, undue influence et cetera has to prove the same. However, even in the absence of such allegations, if there are circumstances giving rise to doubt, then it becomes the duty of the propounder to dispel such suspicious circumstances by giving a cogent and convincing explanation.

10.11. Suspicious circumstances must be "real, germane and valid" and not merely "the fantasy of the doubting mind [*Shivakumar* v. *Sharanabasappa*, (2021) 11 SCC 277] ". Whether a particular feature would qualify as "suspicious" would depend on the facts and circumstances of each case. Any circumstance raising suspicion legitimate in nature would qualify as a suspicious circumstance, for example, a shaky signature, a feeble mind, an unfair and unjust disposition of property, the propounder himself taking a leading part in the making of the will under which he receives a substantial benefit, etc.

11. In short, apart from statutory compliance, broadly it has to be proved that : (*a*) the testator signed the will out of his own free will, (*b*) at the time of execution he had a sound state of mind, (*c*) he was aware of the nature and effect thereof and (*d*) the will was not executed under any suspicious circumstances."

67. In ***Shivakumar v. Sharanabasappa***[11] the Hon'ble Apex Court on the same aspect of proof of will, held in paragraph 12 as under:

[11] (2021) 11 SCC 277

"**12.** For what has been noticed hereinabove, the relevant principles governing the adjudicatory process concerning proof of a will could be broadly summarised as follows:

12.1. Ordinarily, a will has to be proved like any other document; the test to be applied being the usual test of the satisfaction of the prudent mind. Alike the principles governing the proof of other documents, in the case of will too, the proof with mathematical accuracy is not to be insisted upon.

12.2. Since as per Section 63 of the Succession Act, a will is required to be attested, it cannot be used as evidence until at least one attesting witness has been called for the purpose of proving its execution, if there be an attesting witness alive and capable of giving evidence.

12.3. The unique feature of a will is that it speaks from the death of the testator and, therefore, the maker thereof is not available for deposing about the circumstances in which the same was executed. This introduces an element of solemnity in the decision of the question as to whether the document propounded is the last will of the testator. The initial onus, naturally, lies on the propounder but the same can be taken to have been primarily discharged on proof of the essential facts which go into the making of a will.

12.4. The case in which the execution of the will is surrounded by suspicious circumstances stands on a different footing. The presence of suspicious circumstances makes the onus heavier on the propounder and, therefore, in cases where the circumstances attendant upon the execution of the document give rise to suspicion, the propounder must remove all legitimate suspicions before the document can be accepted as the last will of the testator.

12.5. If a person challenging the will alleges fabrication or alleges fraud, undue influence, coercion et cetera in regard to the execution of the will, such pleas have to be proved by him, but even in the absence of such pleas, the very circumstances surrounding the execution of the will may give rise to the doubt or as to whether the will had indeed been executed by the testator and/or as to whether the testator was acting of his own free will. In such eventuality, it is again a part of the initial onus of the propounder to remove all reasonable doubts in the matter.

12.6. A circumstance is "suspicious" when it is not normal or is "not normally expected in a normal situation or is not expected of a normal person". As put by this Court, the suspicious features must be "real, germane and valid" and not merely the "fantasy of the doubting mind".

12.7. As to whether any particular feature or a set of features qualify as "suspicious" would depend on the facts and circumstances of each case. A shaky or doubtful signature; a feeble or uncertain mind of the testator; an unfair disposition of property; an unjust exclusion of the legal heirs and particularly the dependants; an active or leading part in making of the will by the beneficiary thereunder et cetera are some of the circumstances which may give rise to suspicion. The circumstances abovenoted are only illustrative and by no means exhaustive because there could be any circumstance or set of circumstances which may give rise to legitimate suspicion about the execution of the will. On the other hand, any of the circumstances qualifying as being suspicious could be legitimately explained by the propounder. However, such suspicion or suspicions cannot be removed by mere proof of sound and disposing state of mind of the testator and his signature coupled with the proof of attestation.

12.8. The test of satisfaction of the judicial conscience comes into operation when a document propounded as the will of the testator is surrounded by suspicious circumstance(s). While applying such test, the court would address itself to the solemn questions as to whether the testator had signed the will while being aware of its contents and after understanding the nature and effect of the dispositions in the will?

12.9. In the ultimate analysis, where the execution of a will is shrouded in suspicion, it is a matter essentially of the judicial conscience of the court and the party which sets up the will has to offer cogent and convincing explanation of the suspicious circumstances surrounding the will."

68. The submission of the learned counsel for the respondents with respect to Item No.7 of the suit schedule property is that the same had been sold. We are of the view that once it is admitted that the same was recorded in

the name of the father and also mother to a certain extent, the same, in the hands of the defendants legal heirs, would certainly be a property in which the plaintiff would also have right to share being the son and merely because the other defendants or some of them had already transferred the said property to Chandana Brothers, in our view, that could not take away the property, which could not be liable for partition. By such transfer the right of a coparcener or the legal heir equally entitled to have a share, could not be defeated. Even the learned trial Court has not rejected the suit with respect to Item No.7 schedule property on such a ground.

69. Even if it be taken, as per the argument of the learned counsel for the respondents that the property Item No.7 was transferred, so it could not be partitioned, we are of the view that on establishing the right or entitlement of share with respect to that property of Item No.7, the plaintiff would certainly be entitled in law, may not be the same property in the hands of some other person, but then for some adjustments against other joint family property or for value equivalent to his share, which adjustment would be required to be made so as to give the plaintiff his right and due share. It cannot be that, in Item No.7, plaintiff would be completely deprived of his share on the ground, that the property had already been transferred by the other co-sharers. Such an aspect when raised before the learned trial Court, required consideration, but what the learned trial Court has done is that, in spite of finding that Item No.7 of plaint schedule was recorded in the name of the father and also the mother to certain extent, it still dismissed the suit observing that since the property was

recorded in the individual name, it could not be partitioned, as it was not the joint family property. The property Item No.7 though recorded individually with respect to different area, but it was so recorded in the name of the father and mother as well. So, after their death intestate, for the time being at this stage even if the plaintiff's case of Will from mother be taken as not established, all the legal heirs would be entitled in such property, in view of the provisions of the Hindu Succession Act, but that legal provision was also not taken due care of by the learned trial Court.

70. Learned counsel for the appellant referred to the evidence of DW 1 and the documentary evidence in support of his contention that, the evidence established the suit property to be the joint Hindu family property and that there was sufficient nucleus.

71. In his chief examination, as DW 1 (2nd defendant) in the suit, he deposed;

> "I submit that the **Item No.1 of plaint schedule property purchased by my father** by virtue of registered sale deed dt.02.04.1973 and **Item No.2 of the plaint schedule property my maternal grandfather** Sriramulu Garu by virtue of a registered sale deed dt.11.03.1925. **Item No.4 of the plaint schedule property purchased by my father ARLN Sarma** by virtue of a registered sale deed dt.24.09.1969 (vide para No.04)"

72. In his chief examination, vide paragraphs 5, and 6, DW 1 denied the Item Nos.3, 5 and 6 as the joint family property. Originally, Item No.3 of the plaint schedule property was purchased by M/s.ARLN Sarma and Sons under a registered sale deed dated 27.06.1978 but not in personal capacity. The

partnership Firm was dissolved and fresh partnership was entered between defendants No.2 and 3 with 50% and 50% share in the same name and style of the Firm, and later on in the year 2006 the said Firm was dissolved, which was not in existence. For Item No.5, he deposed that the same was also not the joint family property, but was the property of his wife and Item No.6 was the property of the wife of the 9th defendant and so not the joint family property.

73. Further, with respect to Item No.7, DW 1 deposed in his chief examination itself in para-9 as under:

> "I respectfully submit that **Item No.7 of the plaint schedule property is joint family property purchased by my father with the joint family funds and a registered sale deed was obtained on dt.03.02.1968 for Ac.0.75½ cnts in the name of his wife i.e. 1st defendant who is my mother. Likewise, my father late ARLN Sarma purchased Ac.0.35½ cents in his favour and he also obtained another registered sale deed to an extent of Ac.0.27½ cents in his favour. My father acquired the said property by utilizing the joint family funds. My father also obtained another sale deed on 24.10.1977 in the name of my sister Nemani Subba Lakshmi**. Thus, the total property covered under the above sale deeds in respect of Item No.7 schedule property originally Ac.1.51¼ cents. Subsequently, Ac.0.07 cents of land acquired by the National Highway Authority of India for lying four roads and another Ac.0.23 cents of land also acquired for establishment of pipe line. Thus, there remains only Ac.1.21¼ cents in Item No.7 of the plaint schedule property."

74. In the cross examination the 2nd defendant as DW 1 in the present suit, deposed that,

> "Ex.A9 is certified copy my written statement in above said O.S.338/2011.
>
> It is true that averments in my written statement at para 3 and 4 in OS.338/2011 are true and correct."

75. Further, the 2nd defendant as DW 1 in the present suit, deposed that,

"Ex.A10 is the Signature on document which was showed to me.

The letter containing in which my signature Ex.A10 is there is letter addressed by me to my other shares to effect partition and give my share to me in the presence of my mother/Deceased D1.

Ex.A11 is the contents of the letter, dated 21-07-2004.

Even after Ex.A11 no partition was effected as requested by me as none were came forward to co-operate with me."

76. Further, with respect to O.S.No.541 of 2006 in the Court of the Principal Junior Civil Judge, Anakapalle, the copy of the plaint was filed as Ex.A8. In the cross-examination, DW 1 (2nd defendant of the present suit), (O.S.No.94 of 2010) deposed as under:

"Ex.A8 is certified copy of amended plaint in OS.541/2006. It is true the plaintiff filed suit in OS.30/2017 on the file of this Honourable Court for cancellation of sale deeds, which I have referred in 8 and 9 of my affidavit towards my chief examination. **As having executed by all the members of the family in favour of CMR Shopping Mall**.

It is true in the sale deeds in which I have referred in Page Nos.8 and 9 of my affidavit towards my chief examination it is noted Dr. Ayyalasomayajula Bhavani Sankara Sastry, S/o. ARLN Sarma."

77. DW 1 (2nd defendant in the present suit) deposed in his cross examination that those sale deeds had been executed by all the members of the family in favour of CMR Shopping Mall.

78. Ex.A9, filed in the present suit, is the copy of the written statement filed by the 1st defendant (the present 2nd defendant) in O.S.No.338 of 2011, and in paragraph-4 of the said written statement it was averred as under:

"4. This defendant submits that this defendant is the eldest male member of his joint family and he has been looking after the family welfare and family affairs including their joint family properties including schedule properties since several years. However, this defendant, defendants 2 and 3 and 6 to 11 are having joint right title possession and enjoyment of all their joint family properties including schedule property."

79. Learned counsel for the appellant submitted that defendant No.2 having admitted in Ex.A9, as also in his examination as DW 1, the suit property was proved to be joint Hindu family property. The admission is the best evidence which can be used against the person making admission.

80. Learned counsel for the respondents placing reliance on the judgment in ***Bhagwat Sharan*** (supra) submit that the averments in the written statement of the 2nd defendant, in O.S.No.338 of 2011 (1st defendant therein) even if be an admission, would at best be only a piece of evidence and not conclusive proof of what was stated in the written statement. The plaintiff had still to prove that the property was joint Hindu family property or purchased from its nucleus.

81. In ***Bhagwat Sharan*** (supra), the Hon'ble Apex Court held that an admission made by a party is only a piece of evidence and not conclusive proof of what is stated therein. In the said case, the admission was made in the written statement that the defendants constituted trading joint Hindu family. The Hon'ble Apex Court observed that the admission was with regard to a trading family and not Hindu Undivided Family (HUF). It was further observed that not only jointness of the family has to be proved but burden lies upon the

person alleging existence of a joint family to prove that the property belongs to the joint Hindu family and unless there is material on record to show that the property is the nucleus of the joint Hindu family or that it was purchased through funds coming out of its nucleus, merely because the business is joint would not raise the presumption that there is a joint Hindu family property.

82. In the case of ***Bhagwat Sharan*** (supra), the Hon'ble Apex Court also referred to its previous judgment in the case of ***Nagubai Ammal* v. *B. Shama Rao***[12] in which it was held that an admission is not conclusive as to the truth of the matters stated therein. It is only a piece of evidence; the weight to be attached to which must depend on the circumstances under which it is made. It can be shown to be erroneous or untrue, so long as the person to whom it was made has not acted upon it to his detriment, when it might become conclusive by way of estoppel. In the said case, the Hon'ble Apex Court recorded that it did not find any clear-cut admission with regard to the existence of an HUF. At best, from the recitals in the mortgage deed and averments in the written statement, all that can be said is that at the relevant period of time the property was treated to be a joint property.

83. Paragraphs-21 & 22 of ***Bhagwat Sharan*** (supra) are reproduced as under:

> "**21. An admission made by a party is only a piece of evidence and not conclusive proof of what is stated therein**. It is in this light that we have to examine the admission made by Hari Ram and his brothers while filing the written statement to the suit filed by Seth Budhmal. In Para 6, the averment was that the defendants constituted trading joint Hindu family. It is obvious that the

[12] AIR 1956 SC 593

admission was with regard to a trading family and not HUF. In view of the law cited above, it is clear that not only jointness of the family has to be proved but burden lies upon the person alleging existence of a joint family to prove that the property belongs to the joint Hindu family unless there is material on record to show that the property is the nucleus of the joint Hindu family or that it was purchased through funds coming out of this nucleus. In our opinion, this has not been proved in the present case. Merely because the business is joint would not raise the presumption that there is a joint Hindu family. As far as Para 8 is concerned, in our view, there is no clear-cut admission. The allegation made was that the minors were represented by Defendants 1 to 3, who were head of their respective branches. In reply to this it was stated that Defendants 1 to 3 were neither the head or the karta, nor was the mortgage transaction made in that capacity. This admission cannot be said to be an unequivocal admission of there being a joint family.

22. In *Nagubai Ammal* v. *B. Shama Rao* [*Nagubai Ammal* v. *B. Shama Rao*, 1956 SCR 451 : AIR 1956 SC 593] which is the locus classicus on the subject, it was held as follows : (AIR p. 599, para 18)

"*18*. **An admission is not conclusive as to the truth of the matters stated therein. It is only a piece of evidence, the weight to be attached to which must depend on the circumstances under which it is made. It can be shown to be erroneous or untrue,** so long as the person to whom it was made has not acted upon it to his detriment, when it might become conclusive by way of estoppel." [This view has been consistently followed by this Court in a large number of cases including *Bharat Singh* v. *Bhagirathi*, (1966) 1 SCR 606 : AIR 1966 SC 405; *Uttam Singh Duggal & Co. Ltd.* v. *United Bank of India*, (2000) 7 SCC 120; *Himani Alloys Ltd.* v. *Tata Steel Ltd.*, (2011) 15 SCC 273 : (2014) 2 SCC (Civ) 376.]

It would be pertinent to mention that in *Himani Alloys Ltd.* v. *Tata Steel Ltd.* [*Himani Alloys Ltd.* v. *Tata Steel Ltd.*, (2011) 15 SCC 273 : (2014) 2 SCC (Civ) 376] , it was also held that the admission should be categorical, should be conscious and deliberate act of the party making it. As far as the present case is concerned, we do not find any clear-cut admission with regard to the existence

of an HUF. At best, from the recitals in the mortgage deed and averments in the written statement, all that can be said is that at the relevant period of time the property was treated to be a joint property."

84. There cannot be any dispute on the proposition of law that admission is only a piece of evidence and can always not be a conclusive proof of what has been stated, but certainly it is a piece of evidence which require consideration along with the other evidences on record. The admission, it is well known in law, is best piece of evidence. So, the best evidence in the form of admission of a party against him shall not be ignored. Some weight is to be attached to such admission and what weight is to be attached, it depends upon the facts and circumstances of each case. It cannot be said that the admission not being conclusive proof, no weight is to be attached to the admission and the same be not taken in to consideration.

85. From the deposition of DW 1 (2nd defendant in the present suit) in the chief examination and also the cross examination, coupled with his written statement filed in O.S.No.338 of 2011, it cannot be said that the admission in the written statement (Ex.A9) did not carry any weight.

86. However, the learned trial Court did not consider such evidences on record. It also did not consider as to what weight it should have given to the admission of the defendant in the written statement, though the admission may not be the conclusive proof. The learned trial Court has thus miserably failed to consider and appreciate the entire evidence, on record. Though it referred to the evidence of PW 1, in its judgment by reproducing some part thereof, but it did not touch the material and relevant evidence of DW 1, and other material

evidence on record, by referring and making appraisal of the entire evidence, to arrive at the proper finding, with respect to each item of the plaint schedule properties.

87. The learned trial Court did not consider this aspect of the matter as to whether the plaintiff had proved the sufficient nucleus of the joint family property out of which certain plaint schedule properties could be purchased. It has not recorded any finding that the plaintiff failed to prove the joint family nucleus, and so, the burden remained on the plaintiff. Some of the plaint schedule properties were recorded in the name of the father of the plaintiff and the defendant No.1 mother, also in the name of the sister even as per the deposition of DW 1, the father had purchased in the name of his wife and also in the name of the daughter (sister of plaintiff and defendant No.2). As per the written statement also the business was carried by the defendants 7, 10 & 11. So, the learned trial Court ought to have considered this material aspect and ought to have recorded finding of there being sufficient nucleus of the joint family and depending upon such finding it ought to have proceeded as to on whom the burden was there to prove the joint family property. Whether the burden to prove the property purchased from the nucleus of that property, was still on the plaintiff, or had shifted on the defendants to prove that the plaint schedule properties or some of those were the self-earned properties of the defendants. Such consideration should have been made for each item of the plaint schedule property, which has not been done.

88. The learned trial Court further fell in error of law in not applying the correct principle of law on the point of possession by one co-owner. On Issue No.2 it held that the plaintiff had not resided at Anakapalli but resided at different places being a doctor. So, he was not able to establish his joint possession and enjoyment of the plaint schedule property along with the defendants. Based on such finding, it also recorded finding on payment of court fee against the plaintiff.

89. In ***Annasaheb Bapusaheb Patil*** (supra), the Hon'ble Apex Court held that in the case of a Hindu joint family, there is a community of interest and unity of possession among all the members of the joint family and every coparcener is entitled to joint possession and enjoyment of the coparcenary property. The mere fact that one of the coparceners is not in joint possession does not mean that he has been ousted. The possession of the family property by a member of the family cannot be adverse to the other members but must be held to be on behalf of himself and other members. The possession of one therefore is the possession of all.

90. Paragraph-16 of ***Annasaheb Bapusaheb Patil*** (supra) reads as under:

> "**16.** In the case of a Hindu joint family, there is a community of interest and unity of possession among all the members of the joint family and every coparcener is entitled to joint possession and enjoyment of the coparcenary property. **The mere fact that one of the coparceners is not in joint possession does not mean that he has been ousted. The possession of the family property by a member of the family cannot be adverse to the other members but must be held to be on behalf of himself and other members.**

> **The possession of one, therefore, is the possession of all.** The burden lies heavily on the member setting up adverse possession to prove adverse character of his possession by establishing affirmatively that to the knowledge of other member he asserted his exclusive title and the other members were completely excluded from enjoying the property and that such adverse possession had continued for the statutory period. Mutation in the name of the elder brother of the family for the collection of the rent and revenue does not prove hostile act against the other. The right of the plaintiff to file suit for partition had arisen after the Act has come into force and re-grant was made by the Collector under sub-section (1) of Section 5. The defendant, therefore, must plead and prove that after the re-grant, he asserted his own exclusive right, title and interest to the plaint schedule property to the knowledge of the plaintiff and the latter acquiesced to such a hostile exercise of the right and allowed the defendant to remain in continuous possession and enjoyment of the property in assertion of that hostile title during the entire statutory period of 12 years without any let and hindrance and the plaintiff stood thereby."

91. In ***Neelavathi*** (supra) also the Hon'ble Apex Court laid down that the general principle of law is that in the case of co-owners, the possession of one is in law possession of all, unless ouster or exclusion is proved. To continue to be in joint possession in law, it is not necessary that the plaintiff should be in actual possession of the whole or part of the property. Equally it is not necessary that he should be getting a share or some income from the property. So long as his right to a share and the nature of the property as joint is not disputed, the law presumes that he is in joint possession unless he is excluded from such possession. The Hon'ble Apex Court further observed that it is necessary that there should be a clear and specific averment in the plaint that the coparcener had been excluded from the joint possession to which he is

entitled in law. There should be a specific averment that he was excluded from possession.

92. Paragraph-8 of ***Neelavathi*** (supra) reads as under:

"**8.** Section 37 of the Tamil Nadu Court Fees and Suits Valuation Act relates to partition suits. Section 37 provides as follows:

"37. (1) In a suit for partition and separate possession of a share of joint family property or of property owned, jointly or in common, by a plaintiff who has been excluded from possession of such property, fee shall be computed on the market value of the plaintiff's share.

(2) In a suit for partition and separate possession of joint family property or property owned, jointly or in common, by a plaintiff who is in joint possession of such property, fee shall be paid at the rates prescribed."

It will be seen that the court fee is payable under Section 37(1) if the plaintiff is "excluded" from possession of the property. The plaintiffs who are sisters of the defendants, claimed to be members of the joint family, and prayed for partition alleging that they are in joint possession. Under the proviso to Section 6 of the Hindu Succession Act, 1956 (Act 30 of 1956) the plaintiffs being the daughters of the male Hindu who died after the commencement of the Act, having at the time of the death an interest in the Mitakshara coparcenary property, acquired an interest by devolution under the Act. It is not in dispute that the plaintiffs are entitled to a share. The property to which the plaintiffs are entitled is undivided "joint family property" though not in the strict sense of the term. **The general principle of law is that in the case of co-owners, the possession of one is in law possession of all, unless ouster or exclusion is proved. To continue to be in joint possession in law, it is not necessary that the plaintiff should be in actual possession of the whole or part of the property. Equally it is not necessary that he should be getting a share or some income from the property. So long as his right to a share and the nature of the property as joint is not disputed the law presumes that he is in joint possession unless he is excluded from such possession.** Before the plaintiffs could be called upon to pay court fee under Section 37(1) of the Act

> on the ground that they had been excluded from possession, it is necessary that on a reading of the plaint, there should be a clear and specific averment in the plaint that they had been "excluded" from joint possession to which they are entitled in law. The averments in the plaint that the plaintiffs could not remain in joint possession as they were not given any income from the joint family property would not amount to their exclusion from possession. We are unable to read into the plaint a clear and specific admission that the plaintiffs had been excluded from possession."

93. So, the finding on those issues of joint possession and court fee are also unsustainable. The possession of one co-owner is for all, unless the plea of ouster is taken and proved.

On Point 'C':

94. So far as **CRP No.5836 of 2017** is concerned, learned counsel for the plaintiff/appellant/petitioner submitted that since issue No.1 as originally framed has been decided in favour of the plaintiff/petitioner holding that he is son of late ARLN Sarma and that the plaintiff was not given in adoption, the CRP No.5836 of 2017 is rendered infructuous. He submitted that even if the CRP is allowed and the issue No.1 as originally framed is re-framed as per the prayer of the plaintiff, it would serve no useful purpose. The finding has already been recorded in plaintiff's/petitioner's favour. Consequently, CRP No.5836 of 2017 deserves to be dismissed as having been rendered infructuous in view of the finding recorded on issue No.1, as framed, by the learned trial Court in favour of the plaintiff/appellant.

95. So far as the **CRP No.3813 of 2017** is concerned, the rejection of the amendment application is not on any justifiable ground. In fact, the

learned trial Court at the stage of consideration of the application to add Item Nos.IX and X in the plaint schedule property, claiming to have been purchased from the joint family property and consequently liable to partition, had conducted mini trial with respect to those properties, as to whether those were purchased from joint family funds by the 2nd defendant in the capacity of Manager of the joint family or in his individual capacity. The learned trial Court observing that there was nothing on record to indicate that those properties were purchased out of the joint family funds by the 2nd defendant in that capacity of Manager or Karta of joint family, rejected the petition for amendment.

96. The relevant consideration while deciding an application for amendment under Order VI Rule 17 CPC are well settled, but the learned trial Court did not keep in view those statutory requirements viz., (i) The amendment must be necessary to resolve the actual issues between the parties; (ii) the amendment should not fundamentally alter the nature of the case or introduce an entirely new cause of action; and (iii) even in cases where the amendment is sought after the trial has begun, the court must be satisfied that the party could not have raised the issue before the commencement of the trial despite due diligence.

97. We do not find any such consideration by the learned trial Court in rejecting I.A.No.482 of 2014, but find that the rejection is by entering into the correctness of the plea taken, to be added at the very stage of consideration if amendment is or is not to be allowed. It is well settled in law that at the stage

of the amendment application, the merit or correctness of the plea to be added has nothing to do for the disposal of the application for amendment. We also find that the learned trial Court has not recorded any finding that the proposed amendment was not necessary for an effective adjudication of the matter involved in the suit.

98. In ***Rajesh Kumar Aggarwal v. K. K. Modi***[13]***,*** the Hon'ble Apex Court held that it is the primary duty of the Court to decide whether an amendment is necessary to decide the real dispute between the parties. It was further held that the rule of amendment is essentially a rule of justice, equity and good conscious and should be exercised in the larger interest of doing full and complete justice to the parties before the Court.

99. Paragraphs 18 and 19 of ***Rajesh Kumar Aggarwal*** (supra) read as under:

> "**18.** As discussed above, **the real controversy test is the basic or cardinal test and it is the primary duty of the court to decide whether such an amendment is necessary to decide the real dispute between the parties. If it is, the amendment will be allowed; if it is not, the amendment will be refused.** On the contrary, the learned Judges of the High Court without deciding whether such an amendment is necessary have expressed certain opinions and entered into a discussion on merits of the amendment. In cases like this, the court should also take notice of subsequent events in order to shorten the litigation, to preserve and safeguard the rights of both parties and to subserve the ends of justice. **It is settled by a catena of decisions of this Court that the rule of amendment is essentially a rule of justice, equity and good conscience and the power of amendment should be exercised in the larger interest of doing full and complete justice to the parties before the court**.

[13] (2006) 4 SCC 385

> **19.** While considering whether an application for amendment should or should not be allowed, **the court should not go into the correctness or falsity of the case in the amendment. Likewise, it should not record a finding on the merits of the amendment and the merits of the amendment sought to be incorporated by way of amendment are not to be adjudged at the stage of allowing the prayer for amendment**. This cardinal principle has not been followed by the High Court in the instant case."

100. In ***Andhra Bank v. ABN Amro Bank N. V.***[14] the Hon'ble Apex Court observed and held that while allowing an application for amendment of the pleadings, the Court cannot go into the question of merit of such amendment. The only question at the time of considering the amendment of the pleadings would be whether such amendment would be necessary for decision of the real controversy between the parties in the suit. In the said case, the party therein filed application for amendment so as to take an additional defence based on Section 230 of the Contract Act that the suit itself was not maintainable. The Hon'ble Apex Court held that it is well settled, that at the time of considering the prayer for amendment of the written statement it would not be open to the Court to go into the fact whether in fact the suit was or was not maintainable in view of Section 230 of the Contract Act.

101. In the aforesaid case of ***ABN Amro Bank N. V.*** (supra), it was reiterated that the delay in filing the application for amendment cannot stand in the way of allowing the application for amendment. So, mere delay is not a ground to reject the amendment application.

102. Paragraph 5 of ***ABN Amro Bank N. V.*** (supra) reads as under:

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[14] (2007) 6 SCC 167

"**5.** We have heard Mr Rohit Kapadia, learned Senior Counsel appearing for the appellant and Mr S. Ganesh, learned Senior Counsel for the respondent. We have perused the original written statement as well as the application for amendment of the written statement. After going through the written statement and the application for amendment of the written statement, we are of the view that the amendment sought to be introduced by the appellant must be allowed. From a perusal of the impugned order of the Special Court we find basically that two grounds have been taken by the Special Court for rejecting the prayer for amendment of the written statement. **The first ground is that considerable delay has been caused by the appellant in filing the application for amendment of the written statement. It is well settled that delay is no ground for refusal of prayer for amendment.** Mr Ganesh, appearing for ABN AMRO Bank submits before us that by filing of such an application for amendment of the written statement which has been filed with long delay, the appellant sought to stall the hearing of the suit which has been fixed on 13-7-2007. In response to this Mr Kapadia, learned counsel for the appellant, submits that in the event the prayer for amendment is allowed by us his client undertakes to file the amended written statement by day after tomorrow i.e. 12-7-2007 before the Special Court. Since, we are of the view that delay is no ground for not allowing the prayer for amendment of the written statement and in view of the submissions made by Mr Kapadia, **we do not think that delay in filing the application for amendment of the written statement can stand in the way of allowing the prayer for amendment of the written statement. So far as the second ground is concerned, we are also of the view that while allowing an application for amendment of the pleadings, the Court cannot go into the question of merit of such amendment. The only question at the time of considering the amendment of the pleadings would be whether such amendment would be necessary for decision of the real controversy between the parties in the suit.** From a perusal of the amendment application we find that the appellant in its prayer for amendment has only taken an additional defence that in view of Section 230 of the Contract Act, the suit itself is not maintainable. **It is well settled, as noted herein earlier, that at the time**

of considering the prayer for amendment of the written statement it would not be open to the Court to go into the fact whether in fact the suit in view of Section 230 of the Contract Act was or is not maintainable."

103. In ***Pabba Shiva Koti v. Uma Maheswari Boiled Rice Unit, Janagaon***[15] the erstwhile High Court of Andhra Pradesh held that the Court while considering the application for amendment of pleading, need not dwell upon the merits and de-merits of the proposed amendment, which the parties intend to introduce in the respective pleadings, but the same may have to be decided at the appropriate stage.

104. Paragraph 7 of ***Pabba Shiva Koti*** (supra) reads as under:

"**7.** The learned Judge had taken into consideration the averments made in the affidavit filed in support of the application and the stand taken in the counter, recorded reasons commencing from paras 7 to 11 and ultimately allowed the application praying for the amendment of plaint. Respondents 1 and 2 initially filed a suit for perpetual injunction and it is their case that during the pendency of the suit, the revision petitioners-defendants 1 and 2 forcibly occupied the plaint schedule property and several other facts, inclusive of an agreement also had been referred to. The same was resisted. It is not in serious controversy that the first revision petitioner also filed a suit O.S. No. 65 of 1998 praying for the relief of specific performance. **It is needless to say that the merits and demerits of the proposed amendment need not be considered at this stage and the same may have to be decided at the appropriate stage.** It may be true that certain particulars relating to the date of trespass and date of dispossession had not been specified. It is also brought to the notice of this Court that the first revision petitioner had obtained an interim injunction in the suit for specific performance. In *Adusumilli Venkateswar Rao* v. *Chalasani Hymavathi* (supra) wherein a suit for permanent injunction was initially filed, an application was moved for amendment of plaint, praying for the relief of

[15] 2006 SCC OnLine AP 123

recovery of possession and such an application can be allowed since such conversion does not amount to alteration of the nature of the suit. Same view was expressed in *Kasinadhuni Kumareswara Rao* v. *Kaivaram Rajyalakshmamma*, 1970 (1) APLJ 309. **As already referred to supra, the Court while considering the application for amendment of pleading, need not seriously dwell upon the merits and de-merits of the proposed amendment, which the parties intend to introduce in the respective pleadings, but the same may have to be decided at the appropriate stage.**"

105. We are further of the view that law is well settled with respect to the amendment that amendment can be allowed even after commencement of the trial, subject however to the conditions in the proviso that there should be due diligence or the explanation as to why in spite of due diligence the proposed amendment could not be sought earlier i.e., before the commencement of trial. The proviso does not bar absolutely the prayer for amendment after the commencement of trial. In ***J. Samuel v. Gattu Mahesh***[16] the Hon'ble Apex Court while considering the scope of the proviso to Order 6 Rule 17 CPC observed and held that there is an exception to the said Rule i.e., if the Court comes to the conclusion that in spite of due diligence, the party could not have raised the matter before the commencement of the trial, such application for amendment may be allowed. Also explaining the 'due diligence', the Hon'ble Apex Court held that the due diligence is the idea that reasonable investigation is necessary before certain kinds of relief are requested. It was observed that a party requesting a relief stemming out of a

[16] (2012) 2 SCC 300

claim is required to exercise due diligence and it is a requirement which cannot be dispensed with.

106. Paragraphs No.13, 19 and 20 of ***J. Samuel*** (supra) read as under:

> "**13.** After stiff resistance by the litigants and the members of the Bar, again Order 6 Rule 17 was reintroduced with proviso appended therein. As per the said proviso, no application for amendment shall be allowed after the trial has commenced. However, **there is an exception to the said Rule i.e. if the court comes to the conclusion that in spite of due diligence, the party could not have raised the matter before the commencement of the trial, such application for amendment may be allowed**."
>
> "**19.** Due diligence is the idea that reasonable investigation is necessary before certain kinds of relief are requested. Duly diligent efforts are a requirement for a party seeking to use the adjudicatory mechanism to attain an anticipated relief. An advocate representing someone must engage in due diligence to determine that the representations made are factually accurate and sufficient. The term "due diligence" is specifically used in the Code so as to provide a test for determining whether to exercise the discretion in situations of requested amendment after the commencement of trial.
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> **20.** A party requesting a relief stemming out of a claim is required to exercise due diligence and it is a requirement which cannot be dispensed with. The term "due diligence" determines the scope of a party's constructive knowledge, claim and is very critical to the outcome of the suit."

107. In ***Chander Kanta Bansal v. Rajinder Singh Anand***[17] the Hon'ble Apex Court held that though first part of Rule 17 makes it clear that amendment of pleadings is permitted at any stage of the proceeding, the proviso imposes certain restrictions. It makes it clear that after the commencement of trial, no application for amendment shall be allowed.

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[17] (2008) 5 SCC 117

However, if it is established that in spite of "due diligence" the party could not have raised the matter before the commencement of trial depending on the circumstances, the court is free to order such application.

108. Paragraphs 15 and 16 of ***Chander Kanta Bansal*** (supra) read as under:

> "**15.** As discussed above, though first part of Rule 17 makes it clear that amendment of pleadings is permitted at any stage of the proceeding, the proviso imposes certain restrictions. It makes it clear that after the commencement of trial, no application for amendment shall be allowed. However, **if it is established that in spite of "due diligence" the party could not have raised the matter before the commencement of trial depending on the circumstances, the court is free to order such application**.
>
> **16.** The words "due diligence" have not been defined in the Code. According to *Oxford Dictionary* (Edn. 2006), the word "diligence" means careful and persistent application or effort. "Diligent" means careful and steady in application to one's work and duties, showing care and effort. As per *Black's Law Dictionary* (18th Edn.), "diligence" means a continual effort to accomplish something, care; caution; the attention and care required from a person in a given situation. "Due diligence" means the diligence reasonably expected from, and ordinarily exercised by a person who seeks to satisfy a legal requirement or to discharge an obligation. According to *Words and Phrases* by Drain-Dyspnea (Permanent Edn. 13-A) "due diligence", in law, means doing everything reasonable, not everything possible. "Due diligence" means reasonable diligence; it means such diligence as a prudent man would exercise in the conduct of his own affairs."

109. In ***Basavaraj*** (supra) also, upon which learned counsel for the respondents placed reliance, the Hon'ble Apex Court held that the proviso to Order 6 Rule 17 CPC provides that no application for amendment shall be

allowed after the trial has commenced, unless the Court comes to the conclusion that in spite of due diligence, the party could not have raised the matter before the commencement of trial.

110. Paragraph-10 of ***Basavaraj*** (supra) is as under:

> "**10.** The proviso to Order 6 Rule 17CPC provides that no application for amendment shall be allowed after the trial has commenced, unless the court comes to the conclusion that in spite of due diligence, the party could not have raised the matter before the commencement of trial….."

111. So, as per the aforesaid judgment, in ***J. Samuel*** (supra) etc., if the party applies for amendment, he can show due diligence, and that, in spite thereof of, the proposed amendment, could not sought before the commencement of trial, and then the amendment can be allowed even after commencement of trial. But this aspect has also not been considered by the learned trial Court while rejecting the applications for amendment.

112. We also find that ultimately the suit has been dismissed recording the finding that the suit is bad for non-joinder of necessary properties as well, though without observing, what those necessary properties were, which were not added in the plaint. On the one hand rejecting the amendment application to add the properties (in Appendix 1 & 2 of I.A.No.482 of 2014) as Item Nos.IX and X in the plaint and then dismissing the suit on the finding that the suit for partition is bad for non-joinder of necessary properties (in other words, not adding all the properties claiming liable for partition) is wholly unsustainable and an unjustified view taken by the learned trial Court.

113. We are of the view that the rejection of I.A.No.492 of 2014 cannot be sustained. The grounds on which the application has been rejected is unsustainable. At the stage of amendment, whether those properties sought to be added as Item Nos. IX and X in the plaint schedule property, were joint family properties or they were the properties purchased in individual capacity or those were purchased from the joint family funds, or the like questions, are questions which deserved trial based on evidence, only after the amendment was allowed.

114. Consequently, the Order dated 20.06.2017 in I.A.No.492 of 2014 deserves to be set aside, and CRP No.3813 of 2017 deserves to be allowed, and consequent upon setting aside the Order impugned in the said CRP, I.A.No.492 of 2014 deserves to be revived for fresh consideration by the learned trial Court.

115. So far as **CRP No.5818 of 2017** is concerned, the rejection of I.A.No.986 of 2017 vide Order dated 13.09.2017, impugned therein, is also unjustified. The rejection is on the ground, which cannot be sustained in the eyes of law. In the said Order also, the learned trial Court did not consider the relevant aspects of the matter and did not decide the application in the light of the legal provisions of Order VI Rule 17 CPC. Any consideration as to why such amendment was not necessary for effective adjudication of issue involved in the suit has not been made. The plaintiff's case was of execution of the Will by the mother in his favour with respect to certain properties. The mother was the 1st defendant and she died after institution of the suit. So, even if the date of the Will is after the date of the institution of the suit, that was not such a

circumstance so as to reject the petition for amendment. The finding of the trial Court that the document executed after the date of the suit cannot be looked into is not of universal application. Once it is the case of the plaintiff that the Will was executed by one of the parties to the suit (mother/defendant No.1) and after institution of the suit, the amendment could not be rejected on the ground that the document was after the institution of the suit and particularly when it was a case of Will said to be by mother (1st defendant) in favour of one of her sons (plaintiff). No law prohibits execution of a Will during pendency of the suit nor provide that any such Will cannot be pleaded by way of amendment. The only requirement after amendment would be to prove the Will as per the provisions of Section 63(c) of Indian Succession Act and Section 68 of the Indian Evidence Act as also to remove the suspicious circumstance, if any, surrounding the execution of the Will.

116. Here again, the learned trial Court while dismissing the suit, observed that there was no pleading of Will in the plaint. Rejecting the amendment petition to take the plea of Will and then dismissing the suit on one such grounds taken, 'want of pleading of Will' in our view, cannot be sustained.

117. We are of the view that the rejection of I.A.No.986 of 2017 is wholly unjustified and the grounds of rejection cannot be sustained in view of the settled legal position on amendment in various judgments referred to in the earlier part of this judgment.

118. CRP No.5818 of 2017 also deserves to be allowed setting aside the Order dated 13.09.2017 in I.A.No.986 of 2017 and restoring the said application for fresh consideration by the learned trial Court.

119. We are not oblivious that the appellate Court has the same powers of appreciation of evidence as of the trial Court. So also that, the matter being old remand should ordinarily not be made. But, here we are of the view that the matter deserves to be remanded, as the learned trial Court has not considered the entire evidence on record, it has missed many vital evidence or/and relevant part of evidence of the witnesses, though considered some part, it also missed to consider the documentary evidence, which *prima facie* contained the admission, and failed to consider what weight is to be attached to such admission, it also failed to apply the correct basic principles of law of succession, joint Hindu family property, partition, amendment and the Will. We also find fault with the rejection of the amendment applications without applying correct principles. So, we are of the view that the learned trial Court should take that exercise and record proper findings on proper consideration and appreciation of the evidence on record, applying the correct principles of law. It is also so considered necessary, so that the party if aggrieved from determination of the learned trial Court now made after remand, may not lose the opportunity of appeal which is a statutory right. Consequently, we find it a fit case for remand for fresh decision by the learned trial Court, except to the finding on Issue No.1.

V. <u>Conclusions:</u>

120. We are of the view that the learned trial Court ought to have determined the nature of the property with respect to each item, separately, on consideration and appreciation of the evidence on record, which has not been done. The fundamental principles governing a suit for partition have not been kept in view and the suit for partition even with respect to those items which were admitted by the 2nd defendant to have been purchased from joint family fund and/or recorded in the name of the father and the mother, has been dismissed. The evidence on record including the admissions of the 2nd defendant, having an impact on the nature of the property being joint family property having been ignored; the existence of nucleus having been ignored; not even considering the weight of evidence/admission of DW 1, in the light of the other evidence on record, has resulted into the findings recorded, except on issue No.1, (on the point of the plaintiff being the natural son of ARLN Sarma and not given in adoption to A. Sanyasirao), not according to law and suffering from perversity. The fundamental principles of law governing the amendment of pleadings have been ignored in rejecting I.A.Nos.492 of 2014 and 986 of 2017. The Orders dated 20.06.2017 in I.A.No.492 of 2014 and dated 13.09.2017 in I.A.No. 986 of 2017, as also the ultimate judgment cannot be sustained which deserve to be set aside and the matter deserves to be remanded for fresh decision, except on Issue No.1, which finding, in favour of the plaintiff/appellant, has not been put to any challenge.

VI. <u>Result:</u>

121. Accordingly, we allow the Appeal and set aside the judgment and decree dated 22.11.2017 in O.S.No.94 of 2010 in the Court of X Additional District and Sessions Judge, Visakhapatnam District at Anakapalle, except its finding on Issue No.1, and remand the matter to the learned trial Court for fresh decision, in accordance with law, on due consideration and appraisal of entire evidence on record, with due opportunity to the parties.

122. **CRP No.5818 of 2017** is allowed, setting aside the Order dated 13.09.2017 in I.A.No.986 of 2017, restoring the said application to its original number for fresh decision.

123. **CRP No.3813 of 2017** is allowed, setting aside the Order dated 20.06.2017 in I.A.No.492 of 2014, restoring the said application to its original number for fresh decision.

124. **CRP No.5836 of 2017** is dismissed as infructuous.

125. Let the suit be decided afresh, expeditiously, say within a period of one year from the date of production of copy of this judgment before the learned trial Court.

126. No order as to costs.

Pending miscellaneous petitions, if any, shall stand closed in consequence.

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RAVI NATH TILHARI, J

MAHESWARA RAO KUNCHEAM, J

Date: 17.12.2025
Dsr

Note:
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