

(1994) 10 AP CK 0018

In the Andhra Pradesh High Court

Case No : A.S. No. 1013/82 and Tr. A.S. No. 3194/82

Garimella Annapurnayya

APPELLANT

Vs

Kota Appalanarasimhamturthy and Others

RESPONDENT

Date of Decision : 31-10-1994

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 6 Rule 3, 151, 75
Evidence Act, 1872 — Section 114, 13, 4, 56, 57
Hindu Succession Act, 1956 — Section 14, 15, 16, 8

Citation : (1994) 3 ALT 491 : (1995) 1 APLJ 284

Hon'ble Judges : B.K. Somasekhara, J

Bench : Single Bench

Advocate : C. Poornaiah, in A.S. No. 1013/82 and M.S.K. Sastry, in Tr. A.S. No. 3194/83, for the Appellant; C. Poornaiah in Tr. A.S. No. 3194/82 and M.S.K. Sastry in A.S. No. 1013/82, for the Respondent

Final Decision : Dismissed

Judgement

B.K. Somasekhara, J.—The common judgment and decree rendered in O.S. No. 86/77 (O.S.57/77) and O.S. No. 5/78 (O.S.101/77), dated 31-12-1980 by the learned Sub Judge (Sri B. Venkateswara Rao), Chodavaram, Visakhapatnam district have lead to these two appeals. The two suits and appeals are between the same parties inter vivos involving common questions of fact and law. The arrayal of them in the capacity of plaintiff and defendants in the suit correspondingly make them parties in the appeal as appellant and respondents and vice versa. The plaintiff in O.S. No. 86/77 is the appellant and the defendants therein are the respondents in A.S. No. 1013/82. The plaintiffs in O.S.5/78 are the appellants and the defendant therein is the respondent in A.S. No. 3194/82. So the style of parties as they occupied in the suits as plaintiff and defendants shall be repeated for reference in these appeals.

2. The parties litigated over the subject matter of the suits described in Plaint Schedules A to E comprising movable and immovable properties and cash. The

suit O.S. No. 86/77 is for partition and separate possession of 8 shares out of 20 equal shares in plaint A, B, C and Item No. 2 in E-schedule properties, for recovery of possession of D-Schedule properties from the defendants 1 and 2, for mesne profits and such other reliefs as the Court may deem fit to grant in the circumstances of the case. In OS. No. 5/78 the plaintiffs want to recover Rs. 7,907-60 from the defendant (plaintiff in the other suit) which is said to have been wrongly paid to him by the Co-operative Central Bank, Chodavaram on 6-6-1974, for costs and such other reliefs. Both the suits were resisted by the respective defendants.

3. The learned Sub Judge has succinctly and neatly recorded the admitted facts and the controversies between the parties: One late Kota Somayajulu of Arjunagiri has been the pivotal figure of the litigation. Defendant No. 2 is the widow, defendant No. 1 is the son and late Annapurnamma and defendants 3 and 4 are the daughters of Somayajulu. The plaintiff is the son of Somayajulu and also the husband of Annapurnamma the daughter of Somayajulu. The plaintiff married her in the year 1944. Annapurnamma died on 22-9-72 at K.G. Hospital, Visakhapatnam and her dead body was cremated at Arjunagiri. Somayajulu died on 6-6-72. The family of Somayajulu is mainly an agricultural family with money-lending business and other businesses. At the time of marriage of Annapurnamma with the plaintiff, some of the gold ornaments as mentioned in plaint D-Schedule were given to her. She used them till she died. Annapurnamma died intestate and issueless. Somayajulu had deposited Rs. 29,000-00, his money, in Co-operative Central Bank, Chodavaram. After his death, the plaintiff and his wife had laid claim for the money. The Bank after enquiry, felt that the plaintiff and his wife were each entitled to 1/5th share and accordingly each of them including the surviving daughters of Somayajulu got Rs. 5,814. These are the uncontroverted facts for both the sides. The plaintiff pleaded that he, his brothers, Somayajulu and his brothers were living together as a composite family and acquired by their joint efforts a house and some lands at Arjunagiri. Somayajulu had acquired some properties 20 years back in a partition. The plaintiff specifically pleaded that in these parts (where the parties reside), illatom affiliation is prevailing in all agricultural families irrespective of the caste from ancient times. At the time-of the marriage of the plaintiff with Annapurnamma, he was taken as an illatom son-in-law by Somayajulu with an understanding and promise to give him 1/4th share in all the properties then existing and other properties that may be acquired by the family in future. At the time of the marriage, the defendant No. 1 was a young boy of six years and Somayajulu had no assistance to carry on agricultural operations. Therefore, the plaintiff and his relatives accepted the understanding and promise of Somayajulu as above and consequently, the plaintiff went into the house of Somayajulu as illatom son-in-law and he was looking after the agricultural operations of the family. Somayajulu treated the plaintiff as his illatom son-in-law openly proclaiming that he will be giving 1/4th share of his properties, and at no time defendants raised any objection in this regard. Somayajulu acquired vast

movable and immovable properties detailed in the plaint schedules with the assistance of the plaintiff and by his own labour and he had no ancestral properties. Therefore, by virtue of the agreement, the plaintiff is entitled to 1/4th share in all the plaint schedule properties and in the remaining 3/4th share of his wife, he is entitled to 1/5th share (which he is entitled to 3 upon 20th share) and as a whole the plaintiff is entitled to 5/20th share in the plaint A, B and C schedule properties. When Annapurnamma died in the hospital, she was having gold ornaments on her body and when the dead body was taken to Arjunagiri for cremation, the gold ornaments were removed from the body and were handed over to defendant No. 2 to the knowledge of defendants 1, 3 and 4 in the presence of several relatives. On the death of Annapurnamma the plaintiff is entitled to the movable properties mentioned in D-schedule. The plaintiff further pleaded that when he went into the family of Somayajuiu, he took his properties mentioned in the plaint E-schedule which he got in a partition along with his brothers. Out of them, only item No.1 was given to the plaintiff by the defendants. The plaintiff had got Rs. 4,000/- in his family partition and he kept them with Somayajuiu. The defendant No.1 purchased some properties with the funds of the joint family and put them in the names of some of his relatives. There was also money-lending transaction in the family supported by pronotes. The plaintiff pleaded that he is entitled to get a share in such amounts covered by promissory notes. When the plaintiff demanded his share from the defendants, after the death of Annapurnamma and Somayajuiu, they did not concede it and therefore, he got a lawyer's notice dated 11-9-75 issued to the defendants claiming his share in the said properties and also possession of the properties, without any result and therefore, he had to file the suit for the reliefs stated. These are all the controverted pleas and facts.

4. In addition to controverting the case of the plaintiff as above, the defendants came out with their defence in certain clear terms. Somayajuiu had five brothers. Out of them, Narasimham pre-deceased him in the year 1938 leaving behind him his wife. Somayajuiu had three sisters including Sureedamma the mother of the plaintiff. The other two sisters were issueless widows. The father of the plaintiff was a native of Kandivaram. He could not maintain himself there and therefore, he came away to Arjunagiri wherein Somayajuiu and his brothers maintained him. In the year 1926 Somayajuiu and his brothers divided their properties into five equal shares. The family of plaintiff's parents was big enough with six children living in financial difficulties. Therefore, during the partition Ac.1 0.00 of dry land, wet land and a house site were given to the plaintiff's mother by Somayajuiu and his brothers. The other widowed sisters were maintained by Somayajuiu and after his death by the defendants. It is pleaded by the defendants that the plaintiff, his brothers and his mother were residing separately in a house constructed in the site allotted to his mother. The plaintiff and his brothers divided the land given to his mother and were enjoying their shares separately. While denying that there was any custom of taking illatom sons-in-law as pleaded by the plaintiff, the defendants have pleaded that in the

Brahmin families including the family of Somayajulu, there was never a custom of taking illatom son-in-law. The defendant No.1 was a major by 1945 and Somayajulu was in his middle age by then and thus, there was no need to take any person to assist in agricultural operations. The plaintiff who was living separately and looking after his own land, had nothing to do with the lands of Somayajulu. The properties acquired by Somayajulu have thrown into common hotch-potch of joint family and they have assumed the character of joint family properties of Somayajulu and his son defendant No.1. It is contended that since Annapurnamma died issueless, her properties reverted back to her father's family and not to the plaintiff. It is pleaded by the defendants that Somayajulu got Ac.27-00 of land to his share in the partition among him and his brothers and after the marriage of defendant No.1, he and his father could not live together and therefore, they partitioned their properties in the year 1961 into two shares and were living separately. This is pleaded to the knowledge of the plaintiff. Therefore, defendant No.1 has contended that he has perfected his title to such properties by adverse possession and therefore, the suit is barred by time. It is contended that Annapurnamma was not entitled to 1/5th share in any of the family properties as she died issueless. It is further contended that the payment of the amount to the plaintiff by the Bank is illegal and he is not entitled to the same. The defendants have pleaded that being unaware of the legal position, they allowed the plaintiff to draw the amount from the bank along with them and therefore, they are entitled to get back that amount from the plaintiff in the suit filed by them. The plaintiffs in the respective suits sought for the decrees as prayed for whereas the defendant and the defendants in the respective suits sought for the dismissal of the suits with costs.

5. These were the issues settled in the respective suits:

O.S.No.86/77:-

(1) Whether the plaintiff was taken as an illatom son-in-law at the time of his marriage to late Annapurnamma the daughter of late Somayajulu in 1944 with an understanding and promise to give a 1/4th share in all the properties then existing and that may be subsequently acquired.

(2) Whether there is any custom of taking i llatom adoption or affiliation prevalent in these parts or any where in Andhra Pradesh among the Brahmin community?

(3) Whether the plaintiff has acquired any right in the properties of late Somayajulu by reason of the alleged illatom adoption?

(4) Whether late Annapurnamma was given the D-schedule jewels at the time of marriage and if whether any or all of them were entrusted by the plaintiff to the 2nd defendant after her death after removing jewels from the dead body before cremation?

(5) Whether the plaintiff was entrusted the D-schedule properties as the heirs of

late Annapurnamma. Whether late Annapurnamma became entitled a 3/20th share in the A, B, C schedules properties on the death of late Somayajulu?

(6) Whether the plaintiff will be entitled to succeed to any of the movable or immovable properties inherited by her from her father as a heir under Hindu Law when Annapurnamma died issueless?

(7) Whether the plaint schedules are correct?

(8) Whether late Somayajulu had no ancestral property and all the properties are self-acquired?

(9) Whether 1st defendant and his father are joint or divided?

(10) Whether the plaintiff who has withdrawn Rs. 5,814.52 as his wife's share from the Co-operative Central Bank, Chodavaram has entrusted the same to the 1st defendant?

(11) Whether the plaintiff is entitled to any share of any of the properties described in any of the plaint schedules as an heir of his wife or otherwise?

(12) Whether defendants are entitled to exemplary costs in the suit?

(13) To what relief?

O.S.No.5/78:-

(1) Whether the defendant is the illatom son-in-law of the late Kota Somayajulu and as such he is entitled to 1/4th share of all the movable and immovable properties of late Somayajulu?

(2) Whether the alleged representations made by the defenant on 6-6-74 at the time of the payment of the amount by the Co-operative Central Bank Ltd., Chodavaram are true?

(3) Whether the defendant received the amount of Rs. 5,814.52 from the Co-operative Central Bank, Chodavaram, as alleged by plaintiffs?

(4) Whether the plaintiffs are entitled to recover the amount of Rs. 5,814.52 with interest from the defendant?

(5) Whether the plaintiffs are estopped from claiming the amount of Rs. 5,814.52?

(6) Whether the suit is not maintainable?

(7) Whether the suit is barred by time?

(8) To what relief?

6. During the trial of the two suits common evidence was recorded wherein the plaintiff examined himself as P.W.I and 7 witnesses as per P.Ws.2 to 8. Further defendant No.1 examined himself as D.W.I and five witnesses as per D.Ws.2 to 6

respectively. By way of documentary evidence, Exs.A-1 to A-7 were marked for the plaintiff and Exs.B-1 to B-36 were marked for the defendants.

7. The learned Sub Judge affording sufficient opportunities to both the sides to advance their arguments and with his elaborate dealing of the materials before him, meticulously without sparing any pains, as the judgment would bear testimony, disposed of the issues in a systematic and proper way leading to the dismissal of the suits. Issues 1 to 6 in O.S. No. 86/77 and Issue No.1 in O.S. 5/78 were dealt with together and held against the plaintiff. Further more, issues 8,9,10 and 11 in the said suit and issues 2 to 9 in the other suit were held against the plaintiff. IssueNo.7inO.S.86/77 and Issues 6 and 7 in O.S.5/78 were held in favour of the plaintiff. Issue No. 13 in OS. No. 86/77 and Issue No. 8 in the other suit concerning the relief to be or not to be given to the parties, were held against the plaintiffs in both the suits and consequently, both the suits came to be dismissed with costs.

8. In both the appeals, the findings of the learned Sub Judge against the respective parties, the reasoning preceding them and the final result suffered by them by way of dismissing the suits, have been generally challenged. The grounds of appeal in A.S. No. 1013/82 which are spread over in various paragraphs may be pressed into the following items:

(1) The judgment and decree resulting in the dismissal of the suit are contrary to law, weight of evidence and probabilities of the case.

(2) Proper issues from the pleadings are not settled by the learned Sub Judge.

(3) The appreciation of evidence by the learned Sub Judge is not proper and correct regarding:

(a) Illatom adoption of plaintiff by Somayajulu and the agreement by him to give 1/4th share in the properties to the plaintiff.

(b) Composite family of Somayajulu, his brothers the plaintiff and his brothers.

(c) Acquisition of properties by the members of the composite family for the benefit of all the members.

(d) Annapurnamma's share in the father's properties devolving on the plaintiff on her death and not reverting on heirs of her father.

(e) The existence (and removal) of jewellery of Annapurnamma with the defendants.

(f) The learned Sub Judge erred in not drawing adverse inference against defendant No. 2 for her non-examination.

(g) The learned Sub Judge erred in recording the finding that the plaintiff is not entitled to the share in the plaint schedule properties as claimed?

(4) The learned Sub Judge erred in dismissing the suit of the plaintiff?

9. The findings on the issues in O.S. 5/78 leading to the dismissal of the suit are generally challenged in all respects.

10. Having due regard to the totality of the gamut of the litigation in the two suits between the parties, the findings of the learned Sub Judge and the result of the dismissal of the two suits in addition to the grounds of appeal raised by the parties, this Court is duty bound to consider and dispose of these points for determination:

(1) Whether proper issues are framed in the suits?

(2) Whether there was composite family comprising the plaintiff's father, the plaintiff, his brothers on one hand and Somayajulu, his brothers and the defendant No.1 on the other, at Arjunagiri?

(3) Whether the plaint schedule properties were acquired by the alleged composite family or by Somayajulu, his brothers and the other members of his family?

(4) (a) Whether in the parts where the parties to the suits are residing, illatom affiliation is prevailing in all agricultural families irrespective of the caste, from ancient times?

(b) if so, whether such a custom is prevailing among the members belonging to Brahmin caste and

(c) Whether such a custom existed in the families of the plaintiff's father and Somayajulu?

(5) (a) Whether the father of the plaintiff was taken as an illatom son-in-law by the family of Somayajulu with an understanding to give him 1/4th share in all the properties of the family?

(b) If so, whether the father of the plaintiff was given some properties towards his share in pursuance of such an understanding and promise?

(6) (a) Whether at the time of marriage of the plaintiff with Annapurnamma, he was taken as an illatom son-in-law by Somayajulu with an understanding and promise to give him 1 /4th share in all the properties then existing and other properties that may be acquired by the family in future?

(b) If so, whether the plaintiff acquired any right to any of the properties of Somayajulu by reason of the alleged illatom affiliation?

(7) (a) Whether Annapurnamma was given Plaint B-Schedule jewellery at the time of her marriage?

(b) If so, any or all of them were entrusted by the plaintiff to defendant No. 2 after the death of Annapurnamma?

(8) (a) Whether the plaintiff was entrusted with the plaint A-schedule properties

as the heir of Annapurnamma?

(b) Whether Annapurnamma became entitled to 3 upon 20th share in the plain t A, B, C-schedule properties on the death of Somayajulu?

(c) If so, whether the plaintiff is entitled to succeed to any of the movable or immovable properties inherited by Annapurnamma from her father as a heir under Hindu Law when Annapurnamma died issueless?

(9) (a) Whether the plaintiff who withdrew Rs. 5,814-52 as his wife"s share from the Co-operative Central Bank, Chodavaram has entrusted the same to defendant No.1?

(b) If not, whether the plaintiff is entitled to retain Rs. 5,814-52 byway of his wife"s share in the amount?

(10) (a) Whether the plaintiff is entitled to the share in the plaint schedule properties as claimed?

(b) If not, to what share?

(11) Whether the defendants who are the plaintiffs in the other suit are entitled to recover Rs. 5,814-52 with interest from the plaintiff or whether they are estopped from claiming the amount from the plaintiff?

(12) Whether the appreciation of evidence by the learned Sub Judge in regard to the issues in the suits is either improper or incorrect?

(13) (a) Whether the findings of the learned Sub Judge on the issues in the two suits are incorrect?

(b) If so, on which of the issues and to what extent?

(c) Whether any of the findings on any of the issues by the learned Sub Judge deserve to be set aside and if so, to what extent?

(14) Whether the learned Sub Judge was wrong in dismissing the suits?

(15) (a) Whether the judgment and decree of the learned Sub Judge deserve to be set aside?

(b) If so, to what extent?

11. The failure of the learned Sub Judge to frame proper issues as assailed by the plaintiff in his appeal appears to have not been pursued and can be taken as given up. At the time of arguments it was not demonstrated as to how the issues settled by the learned Sub Judge are not correct or insufficient. This Court having gone through the pleadings and the issues in the suits, is of the considered opinion that all the necessary issues are fully and correctly settled by the learned Sub Judge.

12. Although the plaintiff has pleaded a composite family along with the family of

Somayajulu and his brothers, there is no specific plea that either his father was affiliated as an illa torn son-in-law by the family of Somayajulu and his brothers or that it was an instance of customary illatom affiliation in such families. However, such a theory finds an expression in the evidence of the plaintiff and considered by the learned Sub Judge to hold against the plaintiff. However, in regard to his taking in as an illatom son-in-law by Somayajulu with an agreement to give him 1/4th share in all the properties of Somayajulu, there is a specific plea in the plaint. Although such pleas of composite family and illatom affiliation are not pleaded specifically as the custom among the members belonging to Brahmin caste or the family of his father and Somayajulu by reading such pleas in the back-ground of such a distinct plea, the trial Court has considered such a plea of composite family and illatom affiliation as part of custom, while holding them against the plaintiff. Be as it may, to examine the merit and the worth of the case of the plaintiff and the defendants, we must deliberate on the concept and proof of such customs by the plaintiff in the suits.

13. A rumination over the concept of custom may centripete the issues raised. "Custom" is a popular legal expression more often than not mispleaded and non proved. When confronted to adjudicatory process, it is mostly glided by precedents to technicalities rather than plunging into depths to sprout out the results. Confusory ways also make it distortionary. Jurisprudentially custom is a known source of law and an integral part of the Lex non-script or unwritten law having law creating efficacy. It commends itself to the national and social conscience as principles of justice and public utility. "Custom is to society what law is to the State". Two broad classifications admit (1) legal custom and (2) conventional custom. Legal custom is operative per se as a binding rule of law independently of any agreement and whose legal authority is absolute. One which in itself and proprio vigore possesses the force of law. A conventional custom "operates only indirectly through the medium of agreements whereby it is accepted and adopted in individual instances as conventional law between the parties whose authority is conditional on its acceptance and incorporation in agreements between the parties to be bound by it. Legal custom is two kinds viz., (1) local custom prevalent and having the force of law in a particular locality only and (2) the general custom of the realm. Thus, the three classes of custom are: (1) conventional custom or usage, (2) local custom and (3) the general custom of the realm. If any of the classifications of custom do not answer the description, then such usage or practice akin to custom would no longer be a custom, but assume the character of source of rights called prescriptions. The parametres of prescription as a custom are deliberated by the jurists as:

".... Regarded historically, the law of prescription is merely a branch of the law of custom. A prescription was originally conceived as a personal custom, that is to say, a custom limited to a particular person and his ancestors or predecessors in title. It was distinguished from a local custom, which was limited to an individual place, not to an individual person. Local and personal customs were classed as the two species of particular customs and as together opposed to the general

customs of the realm.....In the common law, a prescription which is personal is for the most part applied to persons, being made in the name of a certain person and of his ancestors, or those whose estate he hath; or in bodies politique or corporate and their predecessors....."

(vide Salmond on Jurisprudence Twelfth Edn. Tripathi publications, page 204).

14. So judged in the back ground of the stipulations of custom in law, the plaintiff appears to have pleaded the local custom as part of conventional custom regarding illatom affiliation prevalent in all the agricultural families in the parts (where the parties are residing) irrespective of the caste, from ancient times, but appears to have drifted to a prescription as a personal custom limited to the family of his father and the family of Somayajulu and his ancestors. It is significant to note that while pleading the legal custom of illatom affiliation in all the agricultural families irrespective of the caste, the plea has inclined either towards the Brahmin caste/community or towards the family custom which may be styled as personal custom. Mr. C. Poornaiah, the learned Advocate for the plaintiff appears to be projecting the caste custom or the family custom and therefore, personal custom and not the conventional custom of the realm of all the agricultural families in the locality. Mr. M.S.K. Sastry, the learned Advocate for the defendants totally disputes the existence of such a local custom in any manner or in any form either in the locality or in the society or in the community of the parties, much less among their family members. Therefore, the parties in the suits appears to have added one more dimension to the custom of composite family and illatom affiliation either consciously or unconsciously. Both the sides also appear to have set up a composite theory of illatom affiliation resulting in composite family as in the present case.

15. The learned Sub Judge has totally disbelieved the plea of composite family set up by the plain tiff while dealing with it, as a pure question of fact. The pleas in this regard are found to be incompatible by themselves and contradicting in evidence. The variance in this regard is also noted from stage to stage. As already pointed out, the plea in Para-III(a) of the plaint is to the effect that Somayajulu, his brothers, the plaintiff and his brothers used to live as composite family and acquired by their joint efforts the house and some lands in Arjunagiri. The evidence of the plaintiff including his own testimony and that of his brother P.W.8 about his father Sheshaiah having been affiliated as an illatom son-in-law to the family of Somayajulu and having been brought to Arjunagiri from his place Kandivaram along with his family properties and blending them with the properties of the family of Somayajulu and living with them along with the properties of his own family to make an intergral family, in Arjunagiri, called composite family. The fundamental inconsistency is about his becoming a member of the composite family along with Somayajulu and his brothers at Arjunagiri as against the other theory that his father joining the composite family with the family of Somayajulu and his brothers. In his testimony, the plaintiff set up a new case that his father was brought to Arjunagiri by Somayajulu with an

agreement to give him 1/7th share in his property to his father and his father also got 1 /7th share both in the movable and immovable properties of Somayajulu. In the exchange of notices preceding the suit as per Exs.A-1 and A-2, plea of neither illatom affiliation of the plaintiff's father to the family of Somayajulu was set up, nor the theory of composite family as has been done by the plaintiff in his evidence, was set up. The plaintiff has not even whispered about the illatom affiliation of his father to the family of Somayajulu as a matter of fact and perhaps wants the Court to draw such an inference since his father was given some share or lands by Somayajulu, after he came over to Anjunagiri from Kandivaram. From the evidence properly gathered by the learned Sub Judge, it appears that Sessaiah the father of the plaintiff was a Purohit (Priest), he was in difficulties to maintain himself in his native place and therefore, he migrated to Arjunagiri along with his wife where he was accommodated by the family of Somayajulu and was assisted to settle down and acquire properties. The probability appears to be more towards such an inference than either illatom affiliation of plaintiff's father in the family of Somayajulu much less of any composite family. Admittedly, the parties are very close relatives. Plaintiff's mother Sooredamma is the sister of Somayajulu. It appears that the wife of defendant No.1 is also closely related to plaintiff's father. The plaintiff has five brothers and six sisters. Their daughters and sons have married inter se and such instances are innumerable. Arjunagiri appears to have provided a base for their existence, survival and flourishing. Such close relatives practically the members of the family helping each other in several ways, may not be infested with a speciality. It is true that some lands were given to the mother of the plaintiff who is the sister of Somayajulu by Somayajulu and his brothers. Regarding the extent of the land given to her, there is variance. But even defendant No.1 himself has admitted about giving of the lands to his sister. There is a plausible explanation on the part of the defendants in this regard. Because plaintiff's father was in difficulties and migrated to Arjunagiri, some lands were given to his wife and a house was also given. Nothing is brought out in the testimony of defendant No.1 about the illatom affiliation of plaintiff's father to the family of Somayajulu and the creation of the composite family. The several circumstances correctly pointed out by the learned Sub Judge from the evidence also go to show that there could not have been any illatom affiliation of plaintiff's father much less the constitution of a composite family. It is found from the evidence that plaintiff's father, the plaintiff and his brothers were all along living separately from the family of Somayajulu, they acquired properties separately, they partitioned their properties, cultivated their shares independently, paid the taxes to their properties independently and so on and so forth. It is also in the evidence that Somayajulu and his brothers acquired number of properties under the sale deeds Exs.B-1 to B-17 which are either in the name of one of the brothers of Kota family or in the name of all of them and no property was purchased either in the name of P.W.I or in the name of his father Sessaiah. Exs.B-29 to B-35 which are certified extracts of the village records regarding the lands of plaintiff and his brothers show that they were acquired by them quite

independently. It is in the evidence that P.W.8 the brother of the plaintiff officiated as a Karanam in the village and the plaintiff also worked as such for some time. In that situation they would not have forgotten or miss the opportunity of mentioning their names in the village records about the acquisition of the properties by the so-called composite family much less the joint possession or joint cultivation of such lands. The plaintiff and all the children of Seshiah were born at Arjunagiri. As rightly pointed out by the learned Sub Judge, there was not even a scrap of paper supporting the plaintiff's theory of his father's illatom affiliation or the so-called composite family with Somayajulu and his brothers. It is rightly noted that Somayajulu was the youngest among his brothers, there were elders in the family and it is improbable that Somayajulu would venture to have plaintiff's father as illatom to his family which was still joint in food and worship. Admittedly, there was no partition among Somayajulu and his brothers at the relevant time. When there were so many members in the joint family of Somayajulu and his brothers who were cultivating the family lands and acquiring the properties, there was no reason for grafting an illatom son-in-law to the family like plaintiff's father as an appendix to constitute a composite family. Therefore, their mere giving of some lands to the plaintiff's mother who is the sister of Somayajulu may not tilt the scale of probabilities in favour of either the illatom affiliation of the plaintiff's father or the composite family. There is not even a scrap of paper like voters' list, ration card or any such document made available to the Court in support of such theory. It appears that there are two widowed sisters of Somayajulu who were living with him and now with defendant No.1 who is maintaining them. Therefore, they are not given any lands as in the case of plaintiff's mother. Therefore, the finding of fact by the learned Sub Judge that there was no illatom affiliation of plaintiff's father and there was no composite family as pleaded or elaborated in the evidence, appears to be totally supported by evidence and circumstances of the case.

16. There we enter into the legal arena regarding composite family and illatom affiliation. As the legal texture, a composite family is neither related to coparcenary nor to a Hindu Joint Family. The institution has no basis in the original text of Hindu Law and is purely a creature of custom obtaining in some parts of the families. It is mostly prevalent in certain parts of South India especially in Andhra Pradesh. A "composite family" may be described as follows:

"....Where two or more families agree to live and work together, pool their resources, throw their gains into the joint stock, shoulder the common risks and utilise the resources of the units indiscriminately for the purpose of the whole family, such a case may well be within the ambit of composite family, provided there is a custom of such merger known to those families. A composite family is indeed constituted with some purpose and has evidently for its object the convenience and efficient management of the properties of the larger unit by the corporate effort of all the members of the smaller units composing the same. The spirit of co-operation and mutual help and the policy of all-for-each, and

each-for-all are the dominant factors permeating the constitution of such a family. The family is usually knit together by strong ties of matrimony and affection among its members, who though not descended from a common ancestor feel impelled to pool together their several resources and merge the same into a single unit under the same management. There are instances of such composite families in existence under the custom in which the husbands affiliate into the matrimonial home, the brothers of their wives and entrust them with the management of their household duties and cultivation. The requisites of a composite family are not satisfied if there is not a custom in the family and it will be fatal for such an institution if its origin is not traced to some engagement, expressed or implied. The blending should be so for complete as to make it appear in all its ventures and undertakings a complete unified whole. The resources of the unit must be available for the whole family without any discrimination and each member thereof must be in a position to act for the other members. And all this must be a necessary consequence of the original agreement between the parties. The extent of their shares will depend upon the terms of the agreement and unless it is agreed to the contrary the shares of the families will ordinarily be equal. If such an agreement is to be inferred from the circumstances, those circumstances must be such as to lead inevitably to that conclusion. The mere fact that one of the members of one family had been helping in the cultivation by the members of another family is not by itself sufficient to raise such a presumption when all the other circumstances brought to light go against the plea of composite family."

(pages 255 and 256 (Section 285-A) of Hindu Law by Mr. N.R. Raghavachariar - Principles and Precedents - 8th Edn. of 1987)

In Anchuru Veerapa Naidu Vs. Gurijala Venkaiah Chowdari, our own High Court has imported the true and correct meaning of a composite family as above. From the legal stipulations stated above, composite family as a creature of custom, has nothing to do with the illatom affiliation although it may be an incident or an event in such a situation. However, in Kakarla Subbayya and Others Vs. Makkena Sitaramamma and Another, it was observed that a long duration, say, the passing of few generations by common living may itself leave a presumption of merger some times - to call it, composite family. None of the expressions in any precedents or the authorships (Mayne's Hindu Law & Usage, Mulla's Hindu Law and Raghavachariar's Hindu Law) can be taken to mean that illatom affiliation is an integral part of a composite family. There may be composite family with or without illatom affiliation and the vice versa. In a proper legal estimation a composite family may in some form bear similarity to joint tenancy and not tenancy in common. The distinction between tenancy in common and joint tenancy is well marked. Coparcenary or the Hindu Joint Family are akin to tenancy in common. In the case of tenants in common, they own the property in ascertained or definite shares, but the property has not been divided into shares. In the case of joint tenancy, joint owners own the property and their shares have not been ascertained and cannot be ascertained except perhaps at the time of

partition. (Page 2401 of Venkataramaiya's Law Lexicon II Edn. Vol.4).

17. Now if we test the facts and circumstances in this case with the legal position regarding composite family as stated above, they fail to bring in the proof to any extent. In the first place, no such custom of composite family is established, by independent and reliable evidence, to have existed among the agricultural families in Arjunagiri or among the members of the Brahmin community or among the members of the family of plaintiff's father and the family of Somayajulu. The solitary instance of plaintiff's father said to have gone in illatom affiliation to the family of Somayajulu as an incident of composite family, let alone not established much less satisfies the requirement of proof of a custom to have the force of law.

18. A stage has ripen to examine the scope and the extent of proof required to establish such a custom of either composite family or illatom affiliation. The concept of relevancy and proof of custom is codified in Section 13 of the Indian Evidence Act (Act I of 1872). Nothing more than a repetition of the same would unfurl the implication:

"Section 13. Where the question is as to the existence of any right or custom, the following facts are relevant:-

(a) any transaction by which the right or custom in question was created, claimed, modified, recognized, asserted or denied, or which was inconsistent with its existence;

(b) particular instances in which the right or custom was claimed, recognized or exercised, or in which it was exercised, asserted or departed from."

Therefore, the relevancy of the proof of custom clearly is subject to sub-clauses (a) and (b) of the above provision. The Supreme Court has settled the law that the burden of proving custom in derogation of general law lies heavily on the party who sets it up, vide *Kochan Kani Kunjuraman Kani Vs. Mathevan Kani Sankaran Kani*, and *Mohammad Baqar and Others Vs. Naim-un-Nisa Bibi and Others*, . The mode and degree of proof of any type of custom can be stipulated in law in substratum: "in order that an alleged custom may be given the force of law. First the evidence should be such as to prove the uniformity and continuity of the usage, and the conviction of those following it that they were acting in accordance with law and this conviction must be inferred from the evidence. Secondly, evidence of acts of the kind, acquiescence in those acts, their publicity, decision of Courts, or even of panchayats upholding such acts, the statements of experienced and competent persons of their belief that such acts were legal and valid, will be admissible. But evidence of this latter kind will be of little weight, if unsupported by actual examples of the usage asserted..... Custom cannot be extended by analogy. It must be established inductively not deductively and it cannot be established by a priori methods", (page 145 of Sarkar on Evidence-Section 13). Family custom being a category of special custom, should have the attributes of antiquity, certainty and uniformity and it must be consciously

accepted as having the force of law and these conditions must be proved by clear and unambiguous evidence, Harihar Prasad Singh and Others Vs. Balmiki Prasad Singh and Others, and Pushpavathi v. Viswesumra, AIR 1964 SC 118. As a first measure, such a custom should be pleaded in specific terms what the custom is, upon which a party is relying on, for the purpose of proof. The law in this regard within the scope of Order VI Rule 3 of CPC appears to be settled by the Supreme Court in more than one precedent, Kochan Kani Kunjuraman Kani Vs. Mathevan Kani Sankaran Kani, and Saligram v. Munshi Ram, AIR 1961 SC 1374. A careful and proper reading of the plaint in this case appears to be contrary to the law so settled. Such a plea appears to be not specific much less categorical and at any rate, not whole-hearted. Stray expressions in the plaint here and there are sought to be patched up through evidence which is found to be unreliable and contradictory. It is also found by the learned Sub Judge that such a plea and proof appear to beat variance. The maxim of pleading and proof to be consistent and not contrary found in *allegans contraria non est audiendus* appears to have been totally ignored in this case. This case is an illustration of flouting a serious caution by our own High Court in Allam Gangadhara Rao Vs. Gollapalli Gangarao, that variance between pleading and proof is not permissible. The custom of composite family or the illatom affiliation for operation is not pleaded or proved to be observed as of right in this case. Finally as a most predominant ingredient of a custom as to its immemorial antiquity, there is a total lack on the part of the plaintiff to plead or prove the same. It is fundamental that a legal custom relates to the length of time during which it has been established. It must be immemorial, to mean, that the memory of man runneth not to the contrary. The expression "time immemorial" means in the civil and canon law and in the systems derived therefrom, and originally meant in England also, time so remote that no living man can remember it or give evidence concerning it, Custom was immemorial when its origin was so ancient that the beginning of it was beyond human memory, so that no testimony was available as to a time when it did not exist, (p.201 of Salmond on Jurisprudence 12th Edn. referred supra). However, in the modern trend of immemorial custom, it must be established that it existed for a substantial period such as the time of actual human memory which will be sufficient to raise a presumption of immemorial antiquity. But the merit of the immemorial antiquity to prove the custom appears to get a different meaning in India. It appears that there is no fixed period of enjoyment necessary to establish a custom, yet a custom in order to receive legal recognition, should have existed for a sufficiently long period. It will depend upon the circumstances of each case what antiquity must be established before a custom can be accepted, (page 871 of Field's Law of Evidence, 1985 Edn.). In AIR 1943 111 (Privy Council) a customary right which had been exercised for fifteen years did not receive legal recognition. But in Tula v. Sodhi, AIR 1962 H.P a customary right which had been exercised for a period of over 30 years was accorded legal recognition. However, in India, the trend of immemorial custom or its antiquity appears to date back atleast to twenty years and more. Regarding the instances of such custom, it appears that one Solitary instance or even four modern

instances are not sufficient to prove custom unless the other ingredients supra are brought out. At this stage, it can be vouchsafed to forbear that the plea of custom of composite family and illatom affiliation of the father of the plaintiff totally failed to fit into the principles supra. The plea of his illatom affiliation to the family of Somayajulu by the plaintiff appears to be independent of the analogy of his father's illatom affiliation. The learned Sub Judge has held it against the plaintiff both on facts and in law. The parties to the suit, the learned Sub Judge, the learned members of the Bar and the precedents appear to deal with the concept and scope of the subject "illatom" and "illatom affiliation" in the context of the facts and circumstances of particular cases. The need to consolidate them and to settle the principles has emerged.

19. Then what is illatom? Perhaps the origin and lex of the word appears to have not entered any popular or international dictionary. As its root is in custom and customary law, it is judicially noticed and has entered the law of precedents. To hasten to add, Law Lexicons have embraced the expression with the aid of precedents. To note it as a content of Law Lexicon "illatom" is the affiliation of a son-in-law in consideration of assistance in the management of the family property. An illatom son-in-law is a boy incorporated into the family with a view to give a daughter in marriage and is customarily recognized as an heir in the absence of a natural born son (vide Venkataramaiah's Law Lexicon Vol.2 page 1054). The Law Lexicon supra has taken the aid of the expressions of the Supreme Court in *P. Lakshmi Reddy Vs. L. Lakshmi Reddy*, as follows:

".... It may be mentioned that in that part of the country (Andhra) an illatom son-in-law is a boy incorporated into the family with a view to give a daughter in marriage and is customarily recognised as an heir in the absence of a natural born son."

and also the expressions of the High Court of Judicature of Andhra at Guntur in *Pathuri Venkateswarlu v. Damcharla China Raghavulu*, 1955(1) A.W.R. 39 by Hon"ble Mr. K. Subba Rao, Chief Justice, of A.P. as he then was, (former Chief Justice of India). "Illatom" is some times brought under the caption "illatom adoption" (Section 515-A of Hindu Law of Mulla 15th Edn. Page 621) and explained as the custom of affiliating a son-in-law and giving him a share which is called illatom adoption, has been in vogue in certain communities of the old Madras Presidency (now mainly States of Madras and Andhra Pradesh). The institution is purely the result of custom and judicial recognition has been given to it. In *Nalluri Kristamma v. Kamepalli Venkatasubbanna*, AIR 1990 P.C. 162 the "illatom" was styled as "adoption of son-in-law". Mr. N.R. Raghavachariar, the learned author of Hindu Law has also styled it as "illatom adoption" and has explained it as hereunder: (1987 Edn. p.148):

"..... Illatom adoption is a customary adoption of a son-in-law by his father-in-law prevalent among the Reddis, Kapus and Kammas of Madras and Andhra States, based on the necessity of having men in the family to look after the cultivation and is purely of a secular nature without any religious significance.

This relationship commences with the admission of a person into another family with a view to marry him to the daughter of the adopter."

At the same time, the learned author has called the illatom son-in-law as the illatom son while stating that the rights of an illatom son depends upon custom. In *Hanumantamma v. Rami Reddi*, 1882 (IV) ILR Mad 272 the view appears to be that "it would be unsafe to accept the opinion of the single witness as establishing an incident of the custom or to draw from it the inference that the affiliation is in any other respect analogous to Hindu adoption save in the circumstances that the illatom is regarded as a member of the family into which he is admitted". Even Mayne, the learned author of *Hindu Law and Usage*, has used the expression "illatom adoption" while explaining what is illatom as follows:

".....A custom known as that of illatom adoption prevails among the Reddi and Kamma castes in the Madras Presidency. It consists in the affiliation of a son-in-law, in consideration of assistance in the management of the family property. No religious significance appears to attach to the act. Neither the execution of any document nor the performance of any ceremony is necessary. The incidents of an illatom adoption have now become crystallized into fixed rules of law by a long course of decisions.....

An illatom adoption has to be established by clear and cogent evidence by the person who relies on it, as it is of an extraordinary character."

(vide Section 242 of *Hindu Law of Mayne*, page 432 - 13th Edn.)

Therefore, it appears that while recognizing the illatom as the affiliation of a son-in-law into the family of Hindus in particular communities of the South India particularly in Andhra Pradesh for certain reasons and for the purposes as stated above, the expressions "iliatorn son" or "illatom adoption" appear to have been mistakenly used as a synonym of the status enjoyed by the son-in-law in the family analogous to son in certain matters and not strictly as an adopted son as is known within the settled pr"uoples of an adopted son in a Hinai. family. The High Court of Madras in *Muthala v. Sankarappa Reddiar*, AIR 1935 Mad. appears co have set at rest such an illusion to make it clear that an illatom son-in-law is not an adopted son in any sense. As a hole, the iegal expression of such a custom can be safely called as "illatom affiliation" of a son-in-law into certain Hindu families. Thus, we must understand as to what plaintiff wants to establish is mat "illatom affiliation" within the meaning stated above and nothing more than that.

20. As already pointed out the custom of illatom of the plaintiff is sought to be proved to be existing in all the agricultural families irrespective of the caste from ancient times and secondly that it existed among the members belonging to Brahmin community and that it was followed in the family of Somayajulu also. That such a custom evists in agricultural families in certain parts of south India and in particular Andhra Pradesh and among certain castes, is legaliy established and that its antiquity and continuity is judicially noticed. The existence of such a

custom was found and recognized among Mothati Kapu or Reddi caste in the districts of Bellari and Kurnool beyond the period of a century as noticed in Hamiman tamma's case (15 supra). Therein, it was pleaded to be existing in early 70s of 19th century. The Privy Council judicially found it and recognized among Kammas and Reddis as back as 1906 in Nalluri Kristnamma's case (14 supra) and it is also recognized among Kammas as back as 1880 in AIR 1934 105 (Privy Council) . The existence of custom among Reddis and Kammas has been recognized by number of authoritative pronouncements of this Court including Basi Reddi v. State of Andhra Pradesh, 1978(2)An.W.R.46. Based on precedents and the judicial expressions, the learned authors Mulla, Raghavachariar and Mayne in their books supra, have noted the existence and the recognition of the same among such communities. A faint attempt is made in futility before the trial Court to demonstrate that such a custom existed and practised in other communities also like Vysyas relying upon Sankarayya v. Special Tahsildar, 1978 (2) ALT 271. As rightly noted by the learned Sub Judge in that case, the rights of a person to the property in the family of the father-in-law were not upheld on the basis of establishing "illatom affiliation", but on the basis of perfecting the right by adverse possession. Not even one instance of any illatom affiliation of a son-in-law among the families of Brahmin community either in the country or in South-India or in the district and place where the family of Somayajulu was staying, is established. Such an attempt to prove that his father was affiliated as an illatom son-in-law has totally failed. It is true that the rule of judicial notice in the law of evidence is extended to such customs also. "When a general usage has been judicially ascertained and established it becomes a part of the law merchant, which Courts of justice are bound to know and recognise." (Page 195 of Salmond on Jurisprudence supra) and that "it may be taken as certain that all of the general and immemorial customs of the realm have long since received judicial notice and application by the Courts of law, and have therefore, been transformed into case law which has its immediate source in precedent". (Page 211 of Salmond on Jurisprudence supra). Such a rule of judicial notice is also codified in Section 57 of the Evidence Act. It is true that the judicial notice to be taken by the Court on a custom, is not specifically stated in the provision. In Onkar Nath and Others Vs. The Delhi Administration, the law is settled that the list of facts mentioned in Section 57 of which the Court can take judicial notice is not exhaustive and further in Gangadhara v. Surya Rao, AIR 1941 Mad. 778 and Ujagar v. Jeo, AIR 1959 SC 104 the jurisprudential rule as above has been accepted to the effect that when a custom has been repeatedly recognised by the Courts, it passes into the law of the land and Courts can take judicial notice of it. Therefore, the fact that such a custom is prevailing or existing among Kapus, Kammas and Reddis has been judicially noticed of which the Courts can take judicial notice u/s 57 of the Indian Evidence Act. In other words, no proof is necessary for existence of such a custom in such communities in view of Section 56 of the Evidence Act which says that no fact of which the Court will take judicial notice need be proved. Since no judicial notice can be taken of the existence of such a custom of illatom affiliation among any

other community other than the ones stated above much less, among the Brahmin community or such families such a fact should be established with positive evidence by the person who plead it. But no law is settled so far that either such a custom need not or will not exist among any other communities or families of Hindus other than the ones stated above again to judicially notice the non-existence of the same. Therefore, in such a situation, such a custom can be set up and should be established like any other. A very simple logic is that although several customs like the one existed and practised among several communities, for various reasons, such instances may not always reach the Court to get judicial recognition for the purpose of "judicial notice" u/s 57 of the Evidence Act dispensing with the proof of the same by virtue of Section 56 of the Evidence Act. In conclusion, it must be judicially affirmed that there was no bar to raise such a plea and prove it.

21. In order to establish a custom of illatom affiliation, two essential requisites are to be established viz., (1) such a person to be affiliated must marry the daughter of the other and (2) there should be an agreement to give him a share and both these conditions must be satisfied. It is only thereafter, such a person acquires the status of an illatom son-in-law and a right to a share in the properties of his father-in-law. In Basi Reddy's case (18 supra) many precedents in this regard are noted with approval. The fact that the plaintiff married Annapurnamma, the daughter of Somayajulu is not in dispute. The fact that the family of Somayajulu had agricultural lands and was doing agricultural operations is also not in dispute. At the same time, even the family of the plaintiff and his brothers and father did agricultural work and acquired agricultural lands while remaining in the same place Arjunagiri, like Somayajulu. The plea of illatom affiliation of plaintiff by Somayajulu with an agreement to give him a share is totally denied by the defendants. According to the plaintiff, such a thing occurred at the time of settlement of his marriage with Annapurnamma. Admittedly, the plaintiff married Annapurnamma quite a long back and when Somayajulu, his brothers and defendant No.1 lived in a joint family cultivating their family lands, they were also doing money lending and other businesses. The learned Sub-Judge has rightly found the evidence of the plaintiff and witnesses inconsistent and unreliable in regard to the illatom affiliation or the agreement to give a share and the circumstances set up by the plaintiff for such illatom affiliation are also found to be unreal and improbable. There was no need for Somayajulu to graft any illatom son-in-law into his family to assist in agricultural operations as he was assisted by his own brothers in his agricultural operations and also in his business. By the time of the marriage, the father of the plaintiff had already settled down at Arjunagiri along with his other sons including the plaintiff and it is nobody's case muchless that of the plaintiff, that either the father of the plaintiff or any of the members of their family assisted Somayajulu and his brothers in his agricultural operations or in his business. On the other hand, it is found that they lived separately, acquired their properties separately and cultivated their properties separately by effecting partition. Since Somayajulu

being the youngest brother and still was in a joint family, it is improbable that without the knowledge or consent of other members of the joint family, he would have thought of an illatom affiliation of the plaintiff in the family. The theory of composite family of his father and his brothers along with his brothers is already found to be totally unbelievable. The documentary evidence in this regard is a total absence. The marriage of the plaintiff with the daughter of Somayajulu as an incident of illatom is found to be of no consequence since such marriages among the members of the same family were too frequent and too common. The plea that Annapurnamma was ailing and in a way disabled, and that therefore, the plaintiff was tempted with the illatom affiliation, is absent in the plaint and appears to be an afterthought and not established although there is no dispute that Annapurnamma died of kidney failure. It is nobody's case that Annapurnamma suffered the same ailment at the time of marriage and the plaintiff was induced to walk into the scheme of illatom affiliation into the family of Somayajulu. The plaintiff has failed to establish the circumstance that he was working elsewhere and he was lured into the illatom affiliation with a promise to give a share in the family properties, by Somayajulu even at the cost of his giving up his job elsewhere and agreeing to join Somayajulu's family at Arjunagiri. P.W.8 is the elder brother of P.W.I who was working in some Cooperative Society at Visakhapatnam. According to him P.W.I was working as a Clerk in the Co-operative Society of Police Officers and because he was promised 1/4th share by Somayajulu, he came away to Anantagiri. This is not supported by any documentary evidence like appointment order etc. The plaintiff has not pleaded much less deposed in his evidence, that because he was promised a share, he left the job at Visakhapatnam. The evidence clearly shows that through-out, the plaintiff, his brothers and his father lived at Arjunagiri. The fact that he worked or lived at Visakhapatnam is not at all established. The learned Sub Judge has pointed out that in 1944 Somayajulu was still in the middle-age and was in a position to have children and he has used it a circumstance against the plaintiff that since defendant No.1 was still young and the only son, Somayajulu took him in illatom affiliation to assist him in the agricultural operations. Although, such a circumstance is not very relevant, it could not have been lightly ignored by the trial Court. Regarding illatom affiliation, the evidence of P.Ws.1 to 5 and 8 is found to be inconsistent, improbable and not reliable. The learned Sub Judge has given number of reasons to draw such an inference and this Court, on going through the evidence, is fully persuaded to accept such an inference.

22. The learned Sub Judge has considered the evidence in the case in detail and has given adequate reasons as to how the illatom affiliation and agreement to give a share to the plaintiff by Somayajulu, cannot be accepted. The place where the marriage is settled i.e. at Arjunagiri or Visakhapatnam is found to be contradictory. The plaintiff and his witnesses contradicted themselves regarding the manner in which such an agreement came into existence. Firstly, regarding the extent of share as 1/4th, there is no consistency and it is also found to be

improbable. As rightly found by the learned Sub Judge, if Somayajulu has promised a share in lieu of illatom affiliation it would not have been 1/4th, but it should have been 1/3rd. Since Somayajulu and his brothers were still joint and were still acquiring the properties and the riches by doing business and were in a position to increase the number of members in the family, the promise to give a particular extent of share by him to the plaintiff, appears to be illogical and improbable. According to P.W.I, Somayajulu proclaimed in the presence of relatives and elders in the marriage pandal that he would give 1/4th share to the plaintiff. P.W.8 the brother of plaintiff also stated similarly. P.W.2 a native of Arjunagiri but a man belonging to some other caste, stated that Somayajulu promised that he will give equal share to P.W.I along with his son. It is found that P.W.2 has an impregnated bias or disliking for Somayajulu in view of several litigations between them. P.W.5 who officiated the marriage and who is the son of the family Purohit of Somayajulu, testified that Somayajulu stated that he will look into the matter later and there need not be anything in writing at that time. Similar is the case with regard to P.W.6. As against this, the evidence of D.W.I and the close relative of the parties viz., D.W.5 the brother of P.Ws. 1 and 8, is a clear denial about the illatom affiliation and the agreement to give a share to the plaintiff, by Somayajulu. Alternatively, it is found by the learned Sub Judge that even accepting the evidence of the plaintiff and his witnesses, Somayajulu might have thought of giving some thing to the plaintiff later, which is not known, and therefore, there was no certainty in such promise, to call it an agreement. The learned Advocate for the defendants has suggested that at the best or the worst, it could have been a social contract which should not be intended or could not be enforced in law and there appears to be all the force in such a contention. The theory in the evidence of the plaintiff that he lived with Somayajulu and assisted him in cultivating the lands after the illatom affiliation, is found to be not true. Even according to his own admissions and of the other witnesses, he was living separately with his wife in a house put up by him on the site given to his mother by Somayajulu and his brothers. There is no document to show that the plaintiff lived as a member of the family of Somayajulu at any time till Annapurnamma died. It is also in the evidence that the plaintiff admitted his wife Annapurnamma into the hospital at Visakhapatnam where none of the members of the family of Somayajulu including the mother-in-law of the plaintiff attended on Annapurnamma in the hospital till she died, much less showed any interest to bring the dead body to Arjunagiri. This may only probabilise that the plaintiff was attending to problems of his own and the family of Somayajulu had no special concern either for him or for his wife Annapurnamma. Yet another circumstance which is COitactly pointed out by the learned Sub Judge is mat the plaintiff did not demand or assert about his share in the properties of the family of Somayajulu and the defendants, as promised as part of illatom affiliation although the father and son divided the family properties under the partition list Ex.B-15 and acted upon the same by enjoying them separately getting the mutations effected and submitting their returns of wealth tax as per Exs.P-23 to P-25. It occurred in the yew 1969. Perhaps as a human being of normal conduct,

the plaintiff ought to have exercised that cause of action in the year 1969 if his case is true. But he never raised his little finger in that regard till he got the notice Ex.A-11 issued to the defendants in the year 1971. Such a conduct is a clear expression of the absence of such an event of illatom affiliation and agreement and also the plaintiff having no interest in such a thing much less the properties of Somayajulu. All these circumstances and the evidence in the case justifies the finding of the learned Sub Judge that neither there was any illatom affiliation of the plaintiff nor any agreement between the plaintiff and Somayajulu that a share in the family properties would be given to be plaintiff. On a detailed and careful perusal of the evidence in the case, this Court finds no reason to disagree with the findings of the learned Sub judge.

23. The learned Advocate Mr. C. Poornaiah for the plaintiff wants the Court to draw adverse inference u/s 114(g) of the Evidence Act against defendant No. 2 the wife of Somayajulu and also the defendants that by nonexamination of defendant No. 2 the evidence which could have been produced through her testimony is not produced and that would if produced, be unfavourable to the defendants who have withheld it. It is not as if the learned Sub Judge has not dealt with this aspect of the legal position. The learned Sub Judge under the facts and circumstances of the case and in view of the unsatisfactory evidence of the plaintiff and the reliable evidence of defendant No. 1 and others, has felt that no such adverse inference need be drawn. It is true that the defendants are not able to prove that defendant No. 2 is either incapable of totally moving about or she is totally disabled from giving evidence. On the other hand, a Commissioner who was appointed to go to the spot and to know the realities has reported positively that defendant No. 2 is in a fit condition to give evidence much less on commission if not in Court of law. A doubt was raised whether the appointment of a Commissioner to know the condition of an individual or witness would fit into order 26 of C.P.C. Order 26 deals with the appointment of a Commissioner to examine witnesses (R.I), to make local investigations (R.9), for scientific investigation (R.10-A), for purpose of a ministerial act (R.10-B), for the sale of movable property (R.10-C), to examine or adjust accounts (R.II) and to make partition of immovable property (R.13). Beyond this, there is no other item or the subject matter for which the Court may appoint a Commissioner under Order 26. Similarly Section 75 of C.P.C. enumerates the purposes for which the Court may issue a commission viz., (a) to examine any person (b) to make a local investigation, (c) to examine or adjust accounts, (d) to make a partition, (e) to hold a scientific, technical, or expert investigation (f) to conduct sale of property which is subject to speedy and natural decay and which is in the custody of the Court pending the determination of the suit or (g) to perform any ministerial act. If these provisions are to rule the law relating to appointment of a Commissioner by the Court, in this case, the report of the Commissioner about the condition of a human being or a witness can never fit into it and thus none of the instances of such provisions operate to make it evidence clearly put it out of the definition of "evidence" u/s 5 of the Evidence Act, because such a definition appears to be

exhaustive. To read, "evidence" means and includes

(1) all statements which the Court permits or requires to be made before it by witnesses, in relation to matters of fact under inquiry; such statements are called oral evidence;

(2) all documents produced for the inspection of the Court; such documents are called documentary evidence.

On the face of it, Section 75 or Order 26 of C.P.C. appear to be not exhaustive in relation to various circumstances and purposes for which the Court may appoint a Commissioner. In both the provisions, the word "may" is used regarding the powers of the Court to appoint a Commissioner thereby making it a discretionary exercise. In such a situation, the Court may exercise its discretion u/s 151 C.P.C. to meet the exigencies of the situation by exercising its inherent powers to meet the ends of justice. But here is a case where the Commissioner has done the job of an expert or a Doctor to know the physical and mental condition of a party or witness about her competence or capacity to move about or to depose. In the considered opinion of this Court, such a course adopted by the trial Court can never be a legal exercise of power either u/s 75 read with Order 26 much less u/s 151 of C.P.C. Therefore, fundamentally the Court could not have drawn an adverse inference against defendant No. 2 or the defendants in genera! for non-examination of defendant No. 2 before the Court.

24. As a serious question of law relating to adverse inference contemplated u/s 114(g) of the Evidence Act, such a measure appears to be not a rule much less a routine exercise of powers by the Court. An adverse inference is part of the rule of the Court presuming existence of any fact. It has no independent entity. The Court will have regard while drawing such a presumption to the common course of natural events, human conduct and public and private business in relation to facts of the particular case. In view of the words "may presume" used in Section 114 of Evidence Act, it should be mean- to be a total discretion of the Court as can be read into the definition of "may p "esume" in Section 4 of Evidence Act. That is how the Federal Court in AIR 1943 75 (Federal Court) has pointed out that the words "may presume" leave it to the Court to make or not to make the presumption according to the circumstances of the Case. Our own High Court in Agurchand Bhomraj Sowcar Vs. Deochand and Another, pronounced its dictum that the word used in the provision is "may" and not "shall" and the note to illustration (g) to Section 114 of Evidence Act shows the circumstances in which the presumption should not be drawn and it indicates that in applying the presumption regard should be had to the facts and circumstances of the case. In Srichand K. Khetwani Vs. State of Maharashtra, the law is declared that adverse inference can be drawn only if there is withholding of evidence and not merely on account of failure to produce evidence. However, as rightly contended by the learned Advocate for the plaintiff, the settled law appears to be that presumptions are necessarily be made against parties who having knowledge of facts in dispute will not subject themselves to examination when a prima facie

case is made against them and when by their own evidence, they might have answered it. In AIR 1927 230 (Privy Council) the Privy Council concluded that it is the bounden duty of a party personally knowing the whole circumstances to give evidence and to submit to cross-examination, and nonappearance as a witness would be the strongest possible circumstance to discredit the truth of his case. Therefore, the facts and circumstances of the present case should be decided whether they could be brought within the rule of adverse inference *supra*. It is true that defendant No. 2 is an elderly lady in the family of Somayajulu since the date of the suit. Admittedly, both the plaintiff and defendant No.1 were still young at the time of marriage of Annapurnamma with the plaintiff and also at the alleged time of the illa torn affiliation. Either by her own presence during such events or due to her knowledge through her husband, perhaps, she was expected to know the realities and was able to either conform it or controvert it by entering into the witness box. But it is nobody's case that either defendant No. 2 participated actively or otherwise in such an event to settle the marriage of her daughter with the plaintiff or to conclude the agreement to give a share to the plaintiff by Somayajulu. Such events admittedly occurred during more than five decades ago when the social restrictions of woman members of the family in not taking active part in such events were not uncommon. The plaintiff has not produced sufficient evidence or material to prove that defendant No. 2 had the knowledge of such an event at any time. His own evidence defeats such a thing. Defendant No.1 and his witness - D. W.3 the brother of the plaintiff himself have rejected such a theory. Therefore, entering of defendant No. 2 into the witness box would not have improved the situation and on the oilier hand, would have strengthened the case of the defendants. Therefore, it was not a fit case for the Court to exercise its discretion to draw an adverse inference as pleaded.

25. Therefore, this Court concludes the question of the illatorn affiliation and the agreement, in the negative and against the plaintiff confirming the finding of the learned Sub Judge.

26. There is no dispute that Annapurnamma was given certain jewelleries at the time of her marriage. According to the plaintiff they were the items 1 to 7 in the plaint D-schedule weighing 24 tolas of gold. According to the defendants, only 8 tolas of gold was given to Annapurnamma at the time of marriage and not 24 tolas as detailed in the plaint D-schedule. The evidence in regard to the gold jewellery of Annapurnamma is only a repetition of the assertion and the denial. It is not made beyond doubt to record a definite finding in that regard and therefore, if we go by the rule of burden of proof, the plaintiff should fail in regard to the theory of all the jewellery having been given to Annapurnamma as per D-schedule except the items which were admittedly found on the body of Annapurnamma after her death when it was brought from the hospital to Arjunagiri for cremation. According to plaintiff all the jewellery mentioned in D-schedule were on the body of Annapurnamma when she died in die hospital, and that P.W.8 removed them and handed them over to defendant No. 2 at Arjunagiri

near the house before the body was taken for cremation. According to defendants whatever jewellery were there on the dead body of the deceased, they were removed by P.W.8. The controverted theory that either the deceased had all her jewellery on her person when she died in the hospital or that she was not allowed to wear them when she was admitted into the hospital, loses its significance as she really had some of the items weighing 8 tolas as detailed in the evidence and that they were removed by P.W.8. Admittedly, P.W.8 is one of the brothers of the plaintiff and he removed whatever gold jewellery which were on the dead body of the deceased. The plaintiff has tried to produce the evidence to prove that all the jewelleries mentioned in D-schedule were on the dead body of the deceased when it was brought to Arjunagiri. In this regard not only he has spoken about it, but also his witnesses P.Ws.2 to 4, 7 and 8 have spoken about it. Among them, P.Ws.1 and 8 are the interested witnesses. The evidence of P.Ws.2 to 7 in particular shows that the whole dead body was covered with a white cloth and the improbability of their seeing the jewellery except on the face and other visible parts, cannot be ignored. It is also rightly pointed out by the learned Sub Judge while the dead body is going to be shifted from the hospital to the village, the persons concerned with it, may not be interested in watching or knowing the ornaments on the dead body, because the whole anxiety will be only to shift the dead body. Particularly, the evidence of P.W.2 who is said to have given the Petromax to shift the dead body from the Car to Cart and the evidence of P.W.7 the Taxi-driver who carried the dead body, appears to be an excessive statement of their knowledge. P.Ws.2 and 3 are found to be persons inimical to defendant No.1. The evidence of P.W.4 who officiates for the obsequies is found to be improbable. In such a situation, the learned Sub Judge has correctly appreciated the evidence in the light of the facts and circumstances of the case. As already pointed out, the plaintiff was living in a separate house and was concerned with his own affairs without much intervention or interest by the members of the family of Somayajulu. Patently, the plaintiff admitted his wife in the hospital along with the gold ornaments and brought back the dead body with the assistance of others to Arjunagiri. There is nothing to indicate that either defendant No. 1 or any other persons interested in him participated in such an admission of the lady into the hospital or bringing the dead body to Arjunagiri. P.W.8 who is found to be very much interested in the plaintiff and opposed to defendant No.1 or his brother D.W.3 for certain reasons took a very active role in removing the gold ornaments from the dead body of Annapurnamma. In such a situation, a serious question arises whether as a normal conduct P.W.8 would have handed over the jewellery to defendant No. 2 or to P.W.1 the plaintiff himself. In the first place, if at all anybody was mainly interested in the jewellery of the deceased, it was the plaintiff and secondly, the members of his family like P.W.8. Further more, there must have been other lady members in the family of the plaintiff and his brothers who could have received the jewellery from P.W.8 and there was no reason to select defendant No. 2 to receive them particularly when there is no proof of composite family or the plaintiff and his wife living with the family of Somayajulu. It is only the plaintiff who was more interested in

having the gold jewellery of his wife and no others. It is in the evidence that Somayajulu and the members of the family were never against the plaintiff till perhaps, he took another wife after the death of Annapurnamma. At no stage of the situations, it is suggested or proved that the defendants were interested in snatching the jewellery of Annapurnamma detrimental to the interests of the plaintiff who is not only the son-in-law to the family of Somayajulu, but also his sister's son. The evidence of the plaintiff in regard to the removal of the gold jewellery by P.W.8 and handing over of the same to D.W.2 (sic. D-2) is also found to be contradictory and unreliable in view of several unnatural circumstances. Thus, the learned Sub Judge with his proper appreciation of evidence in this regard has come to correct conclusion that whatever be the gold ornaments on the dead body of Annapurnamma, they were not received by defendant No. 2 and this Court after careful re-assessment of the evidence totally approves the finding of the learned Sub Judge. Here again, the learned Advocate for the plaintiff wanted the Court to draw adverse inference against the defendants for non-examination of defendant No. 2, which the learned Sub Judge did not do. For the same reasons supra, this Court finds no merit in such a plea for the plaintiff.

27. Admittedly Rs. 25,000/- belonged to Somayajulu. He deposited the amount in Co-operative Central Bank, Chodavaram. There is nothing to indicate that this amount belongs to the joint family. The members of the joint family owning personal properties and having personal cash is not uncommon. There is no presumption in law that all such properties belong to the joint family. Admittedly, Somayajulu pre-deceased Annapurnamma the wife of the plaintiff. Therefore, the plaintiff and defendants 1 to 4 as Class-I heirs under Hindu Succession Act succeeded to the right in the deposited amount equally and therefore, were entitled to 1/5th share each. In other words, Rs. 5,814-42 which is the subject matter of O.S.5 /78 was the property of Annapurnamma got by inheritance like defendants 1 to 4. From the admitted fact and the evidence in the case which is properly appreciated and accepted by the learned Sub Judge, it is brought out that 1/5th share in the said amount was set apart for Annapurnamma at the instance of defendants 1 and 2 only. It is also brought out that the plaintiff received Rs. 5,814-52 with the consent and the knowledge of the defendants and passed a receipt in that behalf as per Ex.B-19. It is attested by defendant No.1 and also D.W.6. The testimony of defendants 1 to 6 discloses that the plaintiff received the amount in their presence. The exchange of notices also confirms this. In the reply notice, Ex.B-2 issued on behalf of defendants, it is mentioned that the plaintiff withdrew 1/5th amount lying in the Bank by misrepresentation. Apart from the contradictions in the stands taken by the defendant in the reply notice, written statement and the evidence, it is found by the learned Sub Judge that the claim of the defendants to the amount received by the plaintiff is totally baseless and a counterblast after the notice issued by the plaintiff and after the suit filed by him. It is rightly pointed out that if the plaintiff had drawn such amount by mis-representations, the defendants would not have kept quite for

such a long time till the plaintiff filed the suit and till the defendants thought of filing the suit at a later stage. The learned Sub Judge has recorded a finding that such a stand taken by the defendants in addition to the conduct of D.W.I is a false plea and a false statement. Therefore, the learned Sub Judge appears to be right in holding that there was no misrepresentation on the part of the plaintiff regarding the said amount and that he was paid the amount by the Bank with the knowledge and consent of the defendants.

28. There is no controversy regarding the legal consequences of the succession to the properties of a female Hindu both in regard to her personal properties, stridhana and the inherited properties. The learned Sub Judge has rightly postulated the law in this regard which is in tune with Sections 14 to 16 of the Hindu Succession Act, 1956. The normal rule of succession to the property of a female Hindu dying intestate u/s 15(1) of the Act is that it devolves on five kinds of heirs from (a) to (e):

- (a) firstly, upon the sons and daughters (including the children of any predeceased son or daughter) and the husband;
- (b) secondly, upon the heirs of the husband;
- (c) thirdly, upon the mother and father;
- (d) fourthly, upon the heirs of the father; and
- (e) lastly, upon the heirs of the mother.

The preferential devolution of the property among such heirs is governed by Section 16 of the Act, but by virtue of Section 15(2)(a) of the Act, any property inherited by a female Hindu from her father or mother shall devolve, in the absence of any son or daughter of the deceased, not upon the other heirs referred to in sub-section (1) in the order specified therein, but upon the heirs of the father and according to sub-clause (b) any property inherited by a female Hindu from her husband or from her father-in-law shall devolve in the absence of any son or daughter of the deceased not upon the other heirs referred to in sub-section (1) in the order specified therein, but upon the heirs of the husband. With such an exception normally speaking and as rightly contended by the learned Advocate for the defendants, the plaintiff as the husband of Annapurnamma who inherited to the share of Somayajulu both in the movable and immovable properties including the cash, cannot succeed to such a share as per law. At this stage only it can be concluded that the plaintiff is not entitled to get any share in the properties which Somayajulu got under the partition with defendant No.1 and similarly as a consequence of law, he would not have been entitled to succeed to 1/5th share of Annapurnamma in the cash deposited in the Bank. But as rightly held by the learned Sub Judge, Rs. 5,814-52 were got by the plaintiff at the consent and will of the defendants and not by virtue of law or by mis-representation and therefore, defendants are estopped from claiming such an amount. They were only entitled to explain to get away from the legal

effect of Section 30 of Evidence Act by producing cogent and convincing evidence in this regard. Therefore, the learned Sub Judge was right in holding that the defendants cannot lay claim over such an amount paid to the plaintiff and retained by him.

29. Neither regarding the maintainability of the suit nor regarding the bar of limitation, no arguments were advanced at the time of hearing of the matters and therefore, the learned Sub Judge was right in holding them in the affirmative.

30. As a whole, this Court should conclude with a note of appreciation that not only the appreciation of the evidence in the case by the learned Sub Judge is satisfactory, but also the whole dealing of the matter by him is unexceptionable. Every one of the items of questions of fact and law is dealt with in the judgment with all concern and competence. None of the findings by the learned Sub Judge deserve to be altered, modified or set aside. This Court can thus, do nothing more than affirming such findings inasmuch as affirming the | final decision in the suits ending in dismissal, in addition to judicially! complimenting the Presiding Officer of the trial Court in regard to the same.

31. In the result, both the appeals deserve to be dismissed and accordingly they are dismissed. Normally speaking and as per the doctrine that costs follow the event, the respective parties were bound to pay costs to the other side in the respective suits; but having due regard to the relationship between the parties and the peculiar circumstances under which they litigated in the two suits, this Court chooses to draw an exception to such a rule and direct the parties to bear their respective costs throughout.

32. The portion of the judgment expressing appreciation and compliments to the Presiding Officer of the trial Court, shall be communicated to him by name.