

(2003) 01 AP CK 0070
In the Andhra Pradesh High Court
Case No : AS No. 660 of 1995

Gheetirala Rama Murthy

APPELLANT

Vs

Gheetirala Venugopal and Others

RESPONDENT

Date of Decision : 10-01-2003

Acts Referred:

Evidence Act, 1872 — Section 33

Citation : (2003) 2 ALD 415 : (2003) 2 ALT 668

Hon'ble Judges : T. Ch. Surya Rao, J

Bench : Single Bench

Advocate : P.V. Vidya Sagar, for the Appellant; Y. Krishna Reddy, for the Respondent

Final Decision : Dismissed

Judgement

T. Ch. Surya Rao, J.—The unsuccessful plaintiff is the appellant, who filed the appeal against the judgment and decree dated 20.12.1994 passed by the learned Subordinate Judge, Markapur in O.S.No. 93 of 1987. The suit was filed for partition and separate possession of the plaintiffs half share in the plaint A and B schedule properties and for future profits and costs.

2. The facts lie in a narrow compass: The plaintiff and the defendant are brothers and members of a Joint Hindu family. Their father by name Pullaiah died in the year 1969 leaving no ancestral properties. He had four sons. The eldest and the second son got themselves divided and left the family. The plaintiff and the defendant continued as the members of the joint family even subsequent to the death of their father and continued the Coffee Powder business. They also started Ice Fruit manufacturing business in the year 1980. The Coffee Powder business thrived well and they could make substantial profits out of their business. They acquired thus plaint A and B schedule properties, which are their joint properties. It is the case of the plaintiff that the defendant used to maintain the accounts and manipulate various transactions and vouchers to get over the income tax difficulties. He was not only the manager of the family, but had full

control over the affairs of the family and used to dictate terms and exercise undue influence over the plaintiff. The plaintiff used to obey the defendant implicitly. By exercising his dominating position, the defendant even obtained the signatures of the plaintiff on some vouchers on the ground of Income Tax difficulty. Since the attitude of the defendant caused much inconvenience to the plaintiff, he wanted to divide from the defendant and requested him to separate his half share in the plaintiff A and B schedule properties. As the defendant grew wild and refused, the plaintiff ultimately filed the suit.

3. The defendant resisted the suit by filing his written statement mentioning inter alia that the plaintiff and the defendant divided the properties both immovable and movable in the year 1986-87 and since then they have been living separately. All the properties mentioned in the plaintiff B schedule belong to the defendant and the plaintiff has no share or interest therein.

4. Item No. 1 of the plaintiff "A" schedule was purchased in the name of the defendant originally, but both the plaintiff and defendant after having applied jointly for permission to the Gram Panchayat, Giddalur spent some amount for its construction. After the division of properties, the amount spent till then was taken into account and it was allotted to the share of the defendant in the said division. Thereafter the defendant spent huge amounts and completed the construction. The accounts maintained in regard thereto were in the handwriting of the plaintiff himself and he endorsed therein that he ceased to have any right therein. Item No. 2 of the plaintiff schedule was allotted to the defendant and item No. 3 was allotted to the plaintiff. Similarly item No. 4 of the A schedule although was purchased in the name of the defendant, and construction was made with joint family funds, fell to the share of the plaintiff. Items 5 and 7 were also allotted to the plaintiff and item No. 6 fell to the share of the defendant. Item 8 of the "A" schedule was purchased jointly by the plaintiff and defendant and the same was kept joint and has to be divided yet. Evidencing the partition, a Memorandum of Partition was reduced into writing on stamp paper and both the parties signed thereon. The plaintiff took one copy. Since the defendant had to leave for Vellur for the treatment of his son urgently, his copy had to be remained in the custody of one Thummalapenta Venkata Subbaiah who was one of the mediators for partition.

5. Pursuant to the said division, the plaintiff applied to the Gram Panchayat, Giddalur on 6.7.1987 for mutation of his name in respect of item No. 4 of the plaintiff "A" schedule and the defendant gave his consent for the mutation.

6. The movable properties were also divided between the parties and in the said division, items 1 to 9, 11, 12, 17, 18, 20 to 23, 26 to 28, 30 and 31 of the plaintiff "B" schedule fell to the share of the defendant and items which were not shown in the "B" schedule which have equivalent value fell to the share of the plaintiff. Items 10, 13 to 16, 19, 24, 25, 29 and 32 of the "B" schedule were purchased by the defendant with his own funds after partition. Items 33 and 34 belong to his wife and item 35 belongs to the defendant. Without dividing, the Streedhana

articles other items were taken into account and adjusted in the partition. Evidencing the same a Chit was prepared by the sister's husband of the plaintiff and the defendant by name D.V. Subba Rao. As regards the business articles which were divided between the parties on 1-8-1987 a paper was prepared by the plaintiff himself in his own handwriting. Subsequent to the said division, the machinery was also valued and the defendant paid the value thereof to the plaintiff since it fell to his share in the said division. Item 36 of the "B" schedule had also fallen to the share of the defendant. Both of them had 1/7th share on Sri Padma Finance Corporation, Giddalur and that it fell to the share of the plaintiff. Thus the suit is frivolous and vexatious and is liable to be dismissed.

7. The defendant filed an additional written statement denying the allegation of pilferage of the funds, particularly the amount of Rs. 1,60,000/- as alleged in the plaint and further alleged that the copy of the Memorandum of Partition left with Thummalapenta Venkata Subbaiah was committed theft of by the plaintiff and that thereafter the said Venkata Subbaiah launched criminal case in C.C.No. 179 of 1988 on the file of the Judicial Magistrate of First Class, Giddalur u/s 379 of the IPC and the plaintiff was convicted and sentenced to suffer three months S.I. and to pay a fine of Rs. 500/- in the said case. The defendant claimed Rs. 1,60,000/- as his own money.

8. Basing on the above pleadings, the following issues were framed at the time of settlement of issues:

- (1) Whether the partition of the properties pleaded by the defendant in his written statement is true and valid?
- (2) What are the movable and immovable properties of the plaintiff and defendant available for partition?
- (3) Whether the plaintiff is entitled to the partition of the plaint schedule properties as prayed for?
- (4) Whether the plaintiff is entitled to the future mesne profits?
- (5) To what relief?

9. At the time of trial, three witnesses were examined and the document Ex.A1 alone was marked on the side of the plaintiff. Eight witnesses were examined and Exs.B-1 to B-34, and Exs.X-1 to X-21 were got marked on the side of the defendant.

10. After having appreciated the evidence both oral and documentary adduced on either side, the learned Subordinate Judge, Markapur ultimately dismissed the suit with costs. While, dismissing the suit, the learned Judge held on issue No. 1 that the defendant was able to establish that there had been partition of the joint properties between the plaintiff and the defendant. Since the other issues are consequential, ultimately they were held accordingly. Having been aggrieved by the said judgment and decree as aforesaid, the plaintiff has filed the present

appeal.

11. Sri P.V. Vidyasagar, learned Counsel appearing for the appellant would contend that there has been no convincing evidence in proof of the earlier partition and there has been inconsistency in the pleading and proof and that the documents Exs. B-28, B-29 and B-32 are not admissible in evidence in view of Section 33 of the Indian Evidence Act.

12. While seeking to repel the said contentions, the learned Counsel for the respondent on the other hand would contend that there has been voluminous oral and documentary evidence adduced on the side of the respondent and that the appellant and the respondent are the divided members, but not the members of a joint family.

13. Having regard to the above contentions, the points that arise for my determination in this appeal are:

(1) Whether there has been earlier division of the properties in between the appellant and the respondent?

(2) Whether Exs.B-28, B-29 and B-32 are admissible in evidence?

The relationship inter se between the parties is not in dispute. The respondent is the elder brother of the appellant. Their other two brothers admittedly left the family, after having relinquished their rights. The joint family consisting of the appellant and the respondent had no ancestral nucleus. Both of them continued the coffee powder business and acquired the properties covered by plaint "A" and "B" schedules. While it is the case of the appellant that they continued to be joint and the respondent refused to give the appellant's share; it is the case of the respondent that there had been division of the properties both movable and immovable in the years 1986 and 1987 before the elders and since then both of them have been living-separately. No document evidencing the factum of partition is coming forth in this case. The plea of the respondent in this regard was that a Memorandum of Partition evidencing the partition on stamp papers had been executed in counterparts; and that the plaintiff had taken away his copy and the copy of the defendant remained in the Custody of one Tummalapenta Venkata Subbaiah; and that later that was committed theft of by the plaintiff.

14. The respondent, therefore, seeks to rely upon circumstantial evidence both oral and documentary in proof of the earlier partition. On the side of the appellant except Ex.A-1 no other document has been produced. It is the certified copy of the Judgment in Criminal Appeal No. 75 of 1990 on the file of District Court, Ongole filed to show that the criminal case filed against the appellant ultimately ended in acquittal. The oral evidence adduced on his side is that of himself as P.W.I besides P.Ws.2 and 3 who deposed that the respondent refused to partition the properties. Both these witnesses are the residents of the same locality whereat the appellant has been residing. In the cross-examination, it has

been elicited from these two witnesses that they too are the accused along with appellant in C.C.No. 74 of 1995 by the respondent. Notwithstanding the enmity on account of the criminal cases pending between the parties inter se, the credibility of the witnesses has to be seen.

15. As against this oral evidence, as many as eight witnesses have been examined on the side of the respondent including himself as D.W. 1. D.W.2 is a carpenter and is said to have divided the wooden articles between the appellant and respondent and prepared two separate papers mentioning inter alia the articles that had fallen to the share of each one of the parties respectively. Ex.B-26 is one such document given to the respondent by him. Except the suggestion that he was giving false evidence to support D.W.1, nothing more was suggested to this witness so as to discredit his testimony. Evidence of this witness has not been shaken in any way in the cross-examination. D.W.3 is yet another witness, who is said to have partitioned some of the movable properties like household articles and then gold and silver ornaments. This witness is said to have been, present at the time when D.W.2 divided the wooden articles. The evidence of this witness further shows about the execution of memorandum of partition in between the parties in the presence of one Diggirala Veeranna, the scribe and other attestors and Tummalapenta Venkata Subbaiah, The testimony of this witness bears out the evidence of D.W.2. D.W.3 is no other than the own brother of the appellant and respondent who walked out of the joint family having relinquished his interest earlier. There is nothing to discredit the testimony of this witness. D.W.6 is yet another witness who is said to have written Ex.B-27- chit dated 01.08.1987 wherein the amounts that had fallen to the shares of the appellant and respondent were mentioned and the parties were referred to with their initials as "CR" and "CB". Admittedly, he is the tenant in one of the plaint "A" schedule items paying rent to the defendant. Having regard to the other surrounding circumstances his evidence too cannot be doubted. D.W.8 is the own brother-in-law of the appellant and respondent who is said to have partitioned the movable properties like gold and silver items. He is the scribe of Ex.B-19- chit showing the gold and silver taken by the respondent. According to the evidence of this witness another chit like Ex.B-19- chit was prepared and taken by the appellant. The evidence of this witness has not been shaken in any way in the cross-examination and there is nothing to discredit the testimony of this witness. Thus, the respondent seeks to place reliance upon the oral testimony of D.W.2- the carpenter coupled with Ex.B.26-list prepared by him, D.W.3; D.W 6 coupled with Ex.B.27- chit; and D.W.8 coupled with Ex.B-19- chit in proof of the division of the movable properties in between the appellant and respondent. Besides this evidence, the respondent also seeks to place reliance upon the evidence of D.Ws.4 and 5- Bank officers to show that the appellant and the respondent had respective accounts and deposits made therein. There is no reason as to why their evidence shall not be believed. The documentary evidence in Exs.X.1 to X.14 supports their oral testimony. D.W.7 is the E.O. of the Giddaluru Gram Panchayat who deposed that the house bearing

No. 7-15-5 stands in the name of the respondent. He proved Exs.B.15 and B.16 under which mutation of the properties was requested in the Gram Panchayat records besides Exs.X.15 to X.21. Nothing could be attributed to him so as to speak falsehood as against the appellant. His evidence is not shaken in the cross-examination and cannot therefore be discredited

16. Although the Memorandum of Partition was not produced, in proof of the plea that the appellant had taken away his copy and even committed theft of the copy meant to be given to the respondent and left with Venkata Subbaiah from his custody; and that Venkata Subbaiah later filed a criminal case against the appellant alleging theft of the said copy whereunder the appellant was convicted by the trial Court; the respondent seeks to place reliance upon Exs.B3, B.28, B.29 and B.32. Ex.B3 the certified copy of the judgment in C.C.No. 179 of 1988 is of no relevance in view of Ex.A.I appellate Court judgment. Even otherwise the findings of the Criminal Court are not binding on the Civil Court. The Civil Court has to arrive at its own conclusions basing on the evidence adduced in that regard independently notwithstanding the findings of the Criminal Court. Exs.B.28, B.29 and B.32 are the certified copies of the depositions of the attestors of the Memorandum of Partition and that of Venkata Subbaiah given in C.C. No. 179 of 1988. Since all the three persons died certified copies of their depositions are now sought to be relied upon in proof of execution of the memorandum of partition. The learned Counsel appearing for the appellant seeks to assail these documents as /not admissible per se in view of Section 33 of the Indian Evidence Act. Section 33 of the Indian Evidence Act is apt here to be considered and it reads as under:

"Section 33. Relevancy of certain evidence for proving, in subsequent proceeding, the truth of facts therein stated: --Evidence given by a witness in a judicial proceeding or before any person authorised by law to take it, is relevant for the purpose of proving, in a subsequent judicial proceeding, or in a later stage of the same judicial proceeding, the truth of the facts which it states, when the witness is dead or cannot be found, or is incapable of giving evidence, or is kept out of the way by the adverse party, or if his presence cannot be obtained without an amount of delay or expense which, under the circumstances of the case, the Court considers unreasonable:

Provided--

that the proceeding was between the same parties or their representatives in interest;

that the adverse party in the first proceeding had the right and opportunity to cross-examine;

that the questions in issue were substantially the same in the first as in the second proceeding.

Explanation :-A criminal trial or inquiry shall be deemed to be a proceeding

between the prosecutor and the accused within the meaning of this section."

17. A perusal of the said Section shows that the following conditions must be fulfilled so as to make the previous deposition of a witness admissible in a subsequent judicial proceeding in proof of the facts stated therein;

(1) that the first proceeding was between the same parties as the second proceeding or between the representatives in interest of parties to the second proceeding; in other words, the party to the first proceeding should have been a representative in interest of the party to the second proceeding and the identity of the parties in the two proceedings must be substantial and not nominal;

(2) that the party against whom the deposition is tendered had the full opportunity to cross-examine the deponent when the deposition was taken;

(3) that the issues involved in both proceedings are the same or substantially the same; and

(4) that the witness cannot be called at the subsequent proceeding since he is dead, or cannot be found, or is incapable of giving evidence, or is kept out of the way by the other side, or his presence cannot be obtained without unreasonable amount of delay or expense.

In the instant case, Exs.B.28, B.29 and B.32 are the certified copies of the depositions of the witnesses who deposed in C.C.No. 179 of 1988 on the file of the Judicial Magistrate of First Class, Giddalur. The appellant herein was admittedly the accused in the said case. Undisputedly, he exercised his right of cross-examination and, therefore, had full opportunity to cross-examine the witnesses whose depositions are now sought to be introduced. Therefore, the appellant cannot now complain that he had no opportunity.

18. Although the criminal proceeding was launched against the appellant alleging that he committed theft of the copy of Memorandum of Partition which was with Venkata Subbaiah having been kept by the respondent with him, the factum of committing theft of copy of the memorandum of partition executed by the appellant and respondent in counterparts was also equally in issue that had fallen for consideration in that case. A perusal of Exs.B.28, B.29 and B.32 would show that a partition was affected in between the appellant and the respondent in a panchayat held before one Mr. Srinivasulu, Advocate by profession of Giddalur Bar and Mr. T. Venkata Subbaiah; and that a partition deed was prepared in counterparts in their presence; and that the appellant took one copy of the deed whereas the respondent left the other copy in the custody of Venkata Subbaiah; and that copy was committed theft of by the appellant while it was in the custody of Venkata Subbaiah and, therefore, Venkata Subbaiah launched the criminal prosecution against the appellant for theft. Obviously, the facts stated by the witnesses in those depositions relate to the factum of partition effected between the appellant and the respondent and about the memorandum of partition executed in counter parts in between the parties inter se. Under such

circumstances, as discussed hereinabove, although the main issue in the criminal case apparently pertains as to whether a copy of the memorandum of partition which was in the custody of T.Venkata Subbaiah was committed theft of by the appellant or not, the very factum of partition and execution of memorandum of partition in counterparts before the elders was also substantially in issue. What is required as per the third proviso u/s 33 of the Indian Evidence Act is that the questions in issue in the second proceeding were substantially the same in the first proceeding. It is not necessary that all the questions in issue in the two proceedings should be substantially the same. Vide, AIR 1933 202 (Privy Council) To elucidate the expression "Substantially the same" it is expedient to extract some of the passages from the Sarkar's Evidence Act, an accredited book on the subject hereunder thus; "Whether the questions at issue are substantially the same, depends upon whether the same evidence is applicable, although different consequences may follow from the same act. By "the questions in issue", referred to in Section 33, being required to be substantially the same it is not intended that in a case where the person injured dies subsequently to the inquiry before the Magistrate, his evidence is not to be used in the Session Court because in consequence of his death, other charges are framed against the accused". "The principle involved in requiring identity of the matter in issue, is to secure that in the former proceeding the parties were not without the opportunity of examining and cross-examining to the very point upon which their evidence is adduced in the subsequent proceeding. And though separate proceedings may involve issues, of which some only are common to both, the evidence to these common issues given in the former proceeding, may be given in the subsequent proceeding"..... "In a prosecution for criminal trespass and assault, the deposition of the complainant, in support of those charges, was admitted in evidence in a subsequent civil suit u/s 9 of the Specific Relief Act, between the same panics to prove the question of possession, he having died before the civil suit". Vide Sarkar on Evidence, Fourteenth Edition, Vol.1, Pages 661 and 662. It may be mentioned here that the respondent was also examined as one of the witnesses (P.W.6) in the criminal case as against the appellant. Having regard to the above facts, it is obvious that the conditions enjoined under the provisos 2 and 3 are very much satisfied in this case.

19. Turning to the first proviso, which is a sine qua non, it requires that the proceeding was between the same parties or their representatives in interest. Obviously, the criminal prosecution was conducted by the State through its Public Prosecutor. The State was the de jure complainant. But the fact remains that Venkata Subbaiah who gave the report against the appellant was the de facto complainant. The explanation appended under the three provisos of Section 33 of the Indian Evidence Act is apt here to be considered. It seeks to elucidate that a criminal trial or an enquiry shall be deemed to be a proceeding between the Prosecutor and Accused for the purpose of Section 33 of the Evidence Act. Who is the Prosecutor of the criminal case becomes relevant to be considered next. Theoretically, all prosecutions are conducted in the name and on behalf of the

Crown but in practice this duty is left in the hands of the person, namely, aggrieved by the offence who pro hac vice represents the Crown. The effect of the explanation seems to be under such circumstances that the deposition taken in a criminal trial may be used in civil suit and conversely provided that the other conditions enjoined in the Section are fulfilled. Vide the commentary under the Sarkar on Evidence Act, 14th Edition at page 662, under the caption "Explanation". Therefore, merely because the criminal case wherein the appellant was the accused was prosecuted on behalf of the State by the Assistant Public Prosecutor, it cannot be considered that he is the Prosecutor. In realistic sense, the de facto complainant becomes the Prosecutor. It shall be remembered that the very principle upon which Section 33 is based is the rule that the best evidence available must always be produced. For the above reasons, the criminal case becomes the first proceeding wherein the appellant was a party and T. Venkata Subbaiah was also a party.

20. This then takes us to consider whether T.Venkaia Subbaiah could be considered as representative in interest of the respondent. The condition requisite under the first proviso must be that the evidence which was originally given must have been between the same parties or between the persons who are representatives in interest of the parties to the second proceeding, i.e., the present suit. Therefore, the party to the first proceeding must have represented the interest of the party to the second proceeding. The expression "representative in interest" thus gains significance. It not only covers a privity in estate and succession of title but also cases where both the following conditions exist, viz., (1) the interest of the relevant party to the second proceeding in the subject matter of the first proceeding is consistent with and not antagonistic to the interest therein of the relevant party to the first proceeding, and (2) the interest of both in the answer to be given to the particular question in issue in the first proceeding is substantially the same. There may be other cases covered by first proviso but if both the above conditions are fulfilled the relevant party in the first proceeding must be described as representative in interest of the party to the second proceeding. Whether the party to the first proceeding was a representative in interest of a party to the second proceeding within the meaning of the expression enjoined under the first proviso always depends upon the circumstances of each case. I am reinforced in my above view by an authoritative pronouncement of the Privy Council in Krishnayya Surya Rao v. Rajah of Pittapur, AIR 1933 PC 202. The observations of the Privy Council may be extracted profitably hereunder thus:

"The person who is called by Prov. (1) a "representative in interest" of another is a person who was a party to the first proceeding. Whatever may have been the intention of those who framed the section, the first proviso exactly inverts the requirements of the English law, which requires that the parties to the second proceeding, should legally represent the parties to the first proceeding, or be their privies in estate. The first proviso requires that the party to the first proceeding should have represented in interest the party to the second

proceeding in relation to the question in issue in the first proceeding to which "the facts which the evidence states"" were relevant. It covers not only cases of privity in estate and succession of title, but also cases where both the following conditions exist, viz. (1) the interest of the relevant party to the second proceeding in the subject-matter of the first proceeding is consistent with and not antagonistic to the interest therein of the relevant party to the first proceeding, and (2) the interest of both in the answer to be given to the particular question in issue in the first proceeding is identical. There may be other cases covered by the first proviso; but if both the above conditions are fulfilled, the relevant party to the first proceeding in fact represent in the first proceeding the relevant party to the second proceeding in regard to his interest in relation to the particular question in issue in the first proceeding, and may grammatically and truthfully be described as a representative in interest of the party to the second proceeding".

21. This authoritative pronouncement of the Privy Council was relied upon by a Division Bench of this Court in Subrahmanya Sastry v. Lakshminarasamma AIR 1958 AP 22. That was a case where the plaintiff in O.S.No. 65 of 1949 who was the widow of one Pathuri Bala Krishna Sastry filed a suit for possession of certain agricultural lands belonging to her husband from the defendant who claimed to be the adopted son of the said Bala Krishna Sastry. Earlier to that suit, the daughter's son of the plaintiff filed the suit O.S.No. 25 of 1944 against the same defendant for declaration that he was adopted son of the said Bala Krishna Sastry and the defendant in the latter suit was not the adopted son. One Avvari Subbarao was examined in the first suit O.S.No. 25 of 1944 to prove that he officiated the function wherein the defendant therein was adopted by Bala Krishna Sastry, Therefore, the adoption of the grandson of the plaintiff and also the adoption of the defendant were very much in issue in the first suit in O.S.No. 25 of 1944. In the suit filed by the plaintiff in O.S.No. 65 of 1949 for possession, the plea of the defendant was that he was adopted son of late Bala Krishna Sastry. Inasmuch as at the time of the trial in the second suit O.S.No. 65 of 1949, the said Avvari Subbarao was no more, his deposition was sought to be introduced as Ex.B.28. Under such circumstances, the Bench of this Court held that although the plaintiff in the suit O.S.No. 65 of 1949 was not a party to the earlier suit O.S.No. 25 of 1944 inasmuch as the same question of adoption of the defendant in O.S.No. 65 of 1949 was also involved in the earlier suit, both the plaintiff in the former and the plaintiff in the latter suit had some interest in the answer to be given to the issue of factum of adoption and, therefore, the plaintiff in the former suit was the representative in interest of the plaintiff in the later suit. Of course, on an appreciation of the evidence, the deposition of Avvari Subbarao was not considered on different considerations. Having regard to the same and for the reasons hereinabove discussed, Exs.B.28, B.29 and B.32 depositions more particularly, Ex.B.28 being the deposition of T.Venkata Subbaiah, can be received in evidence u/s 33 of the Indian Evidence Act.

22. The oral evidence on the point has been already appreciated hereinabove. As

regards the documentary evidence Ex.B.2-entry in Ex.B.1 obviously constitutes the admission on the part of the appellant. Ex.B.2- entry has been admitted by him; as having been made in Ex.B.1 account book the entries whereof have been confessedly made by him. Of course, it was explained that he made the entries to the dictation of the respondent. It is nothing but the ipse dixit of the appellant. Whatever it may be, account book shows the cost incurred for the construction of the house; and that till the date of Ex.B.2 endorsement, the parties settled the accounts; and that there had been no debts whatsoever between the appellant and the respondent in regard thereto. Had it been a joint property, such endorsement could not have been made. Of course, there can be no gainsaying that the account should have been maintained by the parties even while in the joint status. But there could not have been any settlement of accounts in the case of a joint family property unless the parties wanted to divide. The evidence of D.W.7 coupled with Exs.B.15 and B.16, and Exs.X.15 to X.21 amply show that there was a partition in between the appellant and the respondent in which the house situate in 7th Ward of Giddaluru Gram Panchayat having door No. 7-15-5A fell to the share of the appellant and, therefore, the parties requested for mutation in the Gram Panchayat records. The evidence of D.Ws.4 and 5 coupled with Exs. X.1 to X.14 shows that the appellant and the respondent have been maintaining separate accounts and making investments in the Banks separately. Further the evidence of D.Ws.2, 3, 6 and 8 coupled with Exs.B.26, B.27 and B.19 shows the partition of movable properties. Exs.B.28, B.29 and B.32 lend any amount of support to the above evidence. Thus, there has been overwhelming oral and documentary evidence adduced on the side of the respondent which amply shows that there was an earlier partition wherein the movable and immovable properties were partitioned although not at one and the same time but on different occasions in between the appellant and the respondent. Having regard to the same, the oral evidence of P.Ws.2 and 3 cannot be trusted. I see no inconsistency in the pleading and proof as contended by the learned Counsel for the appellant and, therefore, it merits no consideration.

23. For the foregoing reasons, I see no reason to interfere with the judgment and decree passed by the Trial Court.

24. In the result, the appeal fails and the appeal is dismissed. But, having regard to the propinquity of relationship between the appellant and the respondent inter se, there shall be no order as to costs.