

(2005) 07 AP CK 0043

In the Andhra Pradesh High Court

Case No : First Appeal No. 1907 of 1995

J. Kubera Mandadi and Others

APPELLANT

Vs

K. Doraswamy Mandadi and Others

RESPONDENT

Date of Decision : 14-07-2005

Acts Referred:

Citation : (2005) 4 ALT 728

Hon'ble Judges : P.S. Narayana, J

Bench : Single Bench

Advocate : V. Jagapathi, for the Appellant; K.S. Gopalakrishna, for K. Bathi Reddy, for the Respondent

Judgement

P.S. Narayana, J.—Defendants 1 to 3 in O.S. No. 35/90 on the file of Subordinate Judge, Puttur, had preferred this appeal. Respondents-plaintiffs in the aforesaid suit prayed for the relief of partition of plaint schedule properties into 4 equal shares with reference to good and bad qualities by metes and bounds and to allot 2 such shares to the plaintiffs. The suit O.S. No. 273/83 filed on the file of Principal District Munsiff, Puttur, which was numbered as O.S. No. 37/85 on the file of Subordinate Judge, Tirupati, and again, renumbered as O.S. No. 45/90 on the file of Subordinate Judge, Puttur, and, O.S. No. 83/83 on the file of Principal District Munsiff, Puttur, which was numbered as O.S. No. 35/85 on the file of Subordinate Judge, Tirupati, and renumbered as O.S. No. 44/90 on the file of Subordinate Judge, Puttur, which had been carried by way of appeals and transferred to this Court as Tr. A.S. No. 3829/2004 and 3830/2004 were not pressed by a memo and the same were dismissed by this Court as not pressed by order, dated 4-7-2005. The suit O.S. No. 287/84 on the file of Subordinate Judge, Tirupati, was numbered as O.S. No. 35/90 on the file of Subordinate Judge, Puttur, and aggrieved by the Judgment and Decree made therein, the present Appeal was preferred.

2. The 1st plaintiff in the suit died and plaintiffs 2 to 9 were added as legal representatives of the deceased 1st plaintiff, as per orders in I.A. No. 639/91,

dated 7-10-1991. As already referred to supra, defendants 1 to 3 in the said suit are the appellants. All the aforesaid suits were disposed of by a common Judgment passing a preliminary decree for partition granting half share to plaintiffs 2 to 9 in O.S. No. 35/90 of the entire joint family properties, covered by the plaint schedules in the aforesaid suits. Since the subject-matter being virtually the same and several of the parties being the same, the other 2 suits which were prior suits to O.S. No. 35/90 and the appeals arising there from had been not pressed before this Court by memo, which had been dismissed as withdrawn, as referred to supra.

3. The learned Subordinate Judge, Puttur, recorded the evidence of P.Ws. 1 to 3 and D.Ws. 1 to 4 and also marked Exs. B-1 to B-34 and ultimately passed a preliminary decree, as specified above. Hence, the present appeal.

4. Sri Jagapathi, the learned Counsel representing the appellants had explained in detail about the suits which had been filed and also would maintain that the present appeal was numbered as A.S. No. 11/93, which was returned for want of pecuniary jurisdiction and the same was re-presented and numbered here as A.S. No. 1907/95. The learned Counsel also would maintain that Venkatesa Mandadi had 2 wives and only one daughter through 1st wife, and son and daughter through 2nd wife. The learned Counsel also explained the Settlement Deed by Venkatesa Mandadi in favors of the daughter through 1st wife. The learned Counsel also would maintain that one Markondaiah, s/o. Govindamma, filed O.S. No. 143/83 on the file of District Munsiff, Puttur, based on a forged Will said to have been executed by Venkatesa Mandadi, which was dismissed for want of instructions. The learned Counsel made elaborate submissions relating to the oral and documentary evidence available on record and had taken this Court through the contents of the Relinquishment Deed-Ex. B-3, dated 22-3-1984. The learned Counsel also had drawn the attention of this Court to the letter-Ex. B-5, the undertaking to withdraw the suits. The learned Counsel would maintain that the execution of the documents is not in serious dispute but the only question is whether they relate to movable properties or to all the properties of Venkatesa Mandadi. The learned Counsel also explained about the other documentary evidence available on record and would contend that the execution of the document Ex. B-3 having been admitted, the same need not be proved even otherwise the same had been proved. The Counsel also had brought to the notice of the Court that the conduct of the Judicial Officer had been found fault by this Court in yet another matter. The purchase made by Govindamma under Ex. B-4 also had been pointed out. The Counsel also commented about the conduct of the parties, especially, in the context of Ex. B-5. The learned Counsel also would comment that Ex. B-5 was, in fact, suppressed. The learned Counsel also pointed out to the portions of the pleadings of the parties and also would comment that for the first time the validity of the 2nd marriage of Venkatesa Mandadi and the legal status of these parties, these questions are being raised and in fact, the parties are taken by surprise. There was no plea or there was no issue in this regard and hence, such contentions cannot be permitted to be raised.

5. On the contrary, Sri K.S. Gopalakrishna, the learned Counsel representing the respondents had pointed out to the evidence available on record and would comment that in the light of the clear admissions made that these branches were living separately, the question of executing the Relinquishment Deed would not arise and even otherwise, it would be an invalid and unenforceable document. The learned Counsel also pointed out that these properties are the ancestral properties of Venkatesa Mandadi. The learned Counsel also would maintain that on admitted facts when a clear question of law is to be answered, especially in a First Appeal, the parties are to be permitted to raise such questions and such questions are to be answered in the light of the evidence available on record. The learned Counsel also would comment that the nature of the properties is not in serious dispute. The fact that the 3rd defendant was 2nd wife and 4th defendant was the 1st wife also is not in serious controversy. The plaintiff is the daughter of the 1st wife, and D-1 and D-2 are the son and daughter through the 2nd wife also is not in serious controversy. The death of the original owner Venkatesa Mandadi on 12-11-1982 also is not in serious dispute. The learned Counsel also pointed out that the sales effected under Exs. B-32, B-33 and B-34 are the properties covered by Ex. B-26-Settlement Deed. The Counsel also would maintain that the fact that Govindamma purchased the property under Ex. B-4 would not alter the situation, in any way. The learned Counsel also made an attempt that inasmuch as the status of the children through 2nd wife and the legitimacy itself being in question, this would definitely alter the shares and hence, the same have to be gone into. The learned Counsel placed strong reliance on certain decisions and also pointed out to the provisions of the Hindu Marriage Act, 1955. The learned Counsel also would maintain that though no specific plea of fraud had been raised, the circumstances surrounding Exs. B-3 and B-5 throw lot of suspicion and in that view of the matter, there is something fishy in Ex. B-3 transaction and in view of the same, the suit was decreed.

6. Heard the Counsel and also perused the oral and documentary evidence available on record.

7. One Govindamma filed the suit O.S. No. 35/90, who died and plaintiffs 2 to 9 were brought on record as her legal representatives. This is a suit for partition of plaint schedule properties into 4 equal shares. It was pleaded in the plaint that the plaint schedule properties are the absolute properties of one Judagiri Venkatesa Mandadi, who died interstate on 12-11-1982 at Adivikothuru village. It was also pleaded that the deceased 4th defendant is the legally wedded wife of the said Venkatesa Mandadi and the deceased 1 st plaintiff is his daughter through the 1 st wife. The 3rd defendant is his kept-mistress and defendants 1 and 2 are his children through 3rd defendant, and thus, the plaintiffs and defendants 1, 2 and 4 constitute a Hindu Joint Family and they succeeded to the estate of the said Venkatesa Mandadi and have been in joint possession and enjoyment of the suit properties. The 4th defendant filed O.S. No. 83/83 (O.S. No. 44/90 of this Court) in P.D.M. Court, Puttur, and O.S. No. 273/83 of P.D.M. Court, Puttur (O.S. No. 45/90 of this Court), for partition and they are pending.

In respect of certain moveable properties of joint family i.e. gold jewellery of 35 sovereigns, debts due to J. Venkatesa Mandadi, leister Engine pumpset, bullock cart, bulls, cows and buffaloes, stock of paddy and groundnuts, fifty trees of diresana, ragi neredu, kanuga which were subsequently sold away by 1 st defendant and agricultural implements and utensils etc., movable properties worth about Rs. 1,00,000/- which were in the custody of D-1 being the manager of the joint family, at the instance of D-4, there was a settlement between D-4 and the plaintiff on one hand and the defendant No. 1 and defendant No. 3 on the other hand and in pursuance of the said settlement, a relinquishment deed dated 22-3-84 came into existence among them for the said properties. The said relinquishment deed dated 22-3-84 do not relate to suit property, and the defendants have been evading for partition inspite of demands in April, 1983 and June, 1984. The defendants since second week of September, 1984, have been trying to alienate the suit properties in order to deprive the plaintiff's to have their due share in the suit properties. Since the 3rd defendant is only a proforma defendant, no relief is claimed at the instance. Since the 1st plaintiff died intestate on 22-7-1990 and the 4th defendant died on 17-7-1988, plaintiffs 2 to 9 are added as their Legal Representatives, and they are entitled to half-share in the suit properties.

8. The 1 st appellant herein-1 st defendant filed the written statement, which was adopted by defendants 2 and 3 denying the allegations. It was pleaded that there is no joint family relationship between the plaintiffs and defendants and there are no joint family properties, as such. The 1st defendant and his mother-the 3rd defendant are the absolute owners of the plaint schedule properties. It was also pleaded that his father sold some of the plaint schedule properties during his life time and out of his own funds, he acquired Ac. 0.91 cents in Sy. No. 44/9. It was also pleaded that the 3rd defendant is the legally wedded wife of his father and the said marriage having been celebrated 42 years ago and defendants 1 and 2 are their children. The plaintiffs and 4th defendant are not entitled to any share in the plaint schedule properties. On 11-8-73 the said Venkatesa Mandadi executed a registered Settlement Deed in favour of 4th defendant in respect of some of the properties and also gave cash of Rs. 5,000/-, 50 Nos. sheep worth Rs. 5,000/-, gold jewellery of 13 sovereigns worth Rs. 10,000/- in 1975, and earlier to that he purchased a house in her name. The 4th defendant's son Markondeya has filed O.S. No. 143/83 in P.D.M. Court, Puttur, on a forged Will alleged to have been executed by J. Venkatesa Mandadi and the said suit was dismissed on 17-12-1983. This suit is not maintainable in view of the pendency of O.S. No. 44/90 and O.S. No. 45/90 of this Court. It is further stated in the written statement that there was a mediation by elders consisting of D. Venkatachalapathi Raju, C. Veeraswami Reddy, G. Vadivelu Reddy, A. Madhava Reddy, K. Jagannatham, R. Chiranjeevi Raju and K. Sambasiva Reddy to compromise the dispute between plaintiff No. 1 and 4th defendant on one hand, and the defendants 1 and 3 on the other hand, in or about January, 1984. Under the said compromise, defendants 1 and 3 paid Rs. 19,000/- to the 1st

plaintiff and 4th defendant and the 1st plaintiff and 4th defendant have executed a registered relinquishment deed, dated 22-3-84, in favour of defendants 1 and 3 for all the properties including the suit properties and also agreed to withdraw the suit pending in the Court. Hence, the 1st plaintiff and the 4th defendant are estopped from claiming any right in the suit properties. The 1st plaintiff and the 4th defendant have also executed a letter dated 22-3-84 agreeing to withdraw the suits O.S. No. 44/90 and O.S. No. 45/90 of this Court. But, instead of withdrawing the said suits, the 1st plaintiff has filed the present suit at the instigation of enemies of this defendant. There were no demands for partition by the 1st plaintiff.

9. The 4th defendant filed the written statement virtually supporting the case of the 1st plaintiff.

10. On the strength of the pleadings, the following Issues were settled:-

(1) Is plaintiff entitled for partition and separate possession of 1/4th share in plaint schedule properties?

(2) Is Sy. No. 44/9 of plaint schedule, the self-acquired property of 1st defendant?

(3) Does the relinquishment deed dt. 22-3-84 executed by plaintiff and 4th defendant in favour of defendants 1 and 3 not relate to the suit property?

An additional Issue was also settled on 10-3-92, as hereunder:-

"Whether plaintiffs 2 to 9 are entitled for half share in the suit property?"

11. In the light of the respective pleadings of the parties, the Issues settled and the submissions made at length, the following points arise for consideration in this appeal:-

(1) Whether the respondents herein the plaintiffs in the suit are entitled to the shares, as decreed by the Trial Court, despite Ex. B-3?

(2) Whether Ex. B-3 relates to only movable properties or it is relinquishment of the immovable properties as well?

(3) Whether Ex. B-3 is an unenforceable document in the light of the evidence available on record?

(4) Whether the plaintiffs and the defendants would be entitled to changed shares in relation to certain of the properties in the light of their legal status representing the branches of the 1st wife and the 2nd wife of late Venkatesa Mandadi and whether all the plaint schedule properties are the joint family properties or certain of the properties are separate self-acquisitions of the 1st defendant?

(5) If so, to what relief the parties are entitled to?

Points 1 to 4:-

12. The respective pleadings of the parties and the Issues settled and the relief granted by the Trial Court already had been referred to supra. The main controversy is in relation to Ex. B-3, dated 22-3-84, the registered Relinquishment Deed, executed by Akkayamma and Govindamma in favour of Kubera Mandadi and Venkatamma. Incidentally, strong reliance was placed on Ex. B-4, the registration copy of the Sale Deed executed by Kubera Mandadi in favour of Govindamma, dated 22-3-84 and also letter executed by Akkayamma and Govindamma in favour of Kubera Mandadi and Venkatamma, dated 22-3-1984. Submissions at length were made relating to the validity of Ex. B-3 on the ground that, that document relates to the relinquishment of only movable properties and also in the alternative, the said document cannot be enforced at all inasmuch as it is an invalid document.

13. It was pleaded in paras 8 and 9 of the plaint, as hereunder:-

(8) The plaintiff submits that in respect of certain moveable properties of joint family i.e. gold jewellery of 35 sovereigns, debts due to J. Venkatesa Mandadi, lister Engine pump set, bullock cart, bulls, cows and buffaloes, stock of paddy and groundnuts, fifty trees of diresana, ragi, neredu, kanuga which were subsequently sold away by first defendant and agricultural implements and utensils etc., moveable properties worth about Rs. 1,00,000/- which were in the custody of defendant No. 1 being the manager of the joint family, at the instance of defendant No. 4, there was a settlement between defendant No. 4 and the plaintiff on one hand and the defendant No. 1 and defendant No. 3 on the other hand and in pursuance of the said settlement, a relinquishment deed dated 22-3-84 came into existence among them for the said properties. The said relinquishment deed dated 22-3-84 do not relate to suit property.

(9) It is submitted that taking advantage of the said relinquishment deed also the defendant Nos. 1 to 3 have been evading for partition and separate possession of the plaintiff's 1/4th share in the suit properties. It is further submitted that the 4th defendant also joined hands with defendants 1 to 3 in that regard.

The 1 st defendant pleaded in paras 12 and 13 of his written statement, as hereunder:-

(12) This defendant submits that there was a mediation by elders consisting of D.Venkatachalapathi Raju, C. Veeraswami Reddy, G. Vadivelu Reddy, A. Madhava Reddy, K. Jagannatham, R. Chiranjeevi Raju and K. Sambasiva Reddy to compromise the matter between the parties consisting of plaintiff and 4th defendant on one side and D-1 and D-3 on the other side in or about January, 1984. As per the terms of the said compromise though plaintiff and D-4 have no right in the properties to avoid future complications and litigation, the defendants 1 and 3 should pay Rs. 19,000/- in total to the plaintiff and 4th defendant within two months, thereupon the plaintiff and 4th defendant should execute a Regd.

Relinquishment Deed in favour of defendants 1 and 3 for all the properties including the suit properties and withdraw the suits pending in Court. Both the parties have agreed for the said mediation.

(13) In pursuance of the said mediation the defendants 1 and 3 paid the said sum of Rs. 19,000/- to the plaintiff and 4th defendant on 22-3-84 before the Sub Registrar and they in turn executed a Regd. Relinquishment Deed on 22-3-84 in favour of the defendants 1 and 3 giving up all the rights in the joint family. This defendant and 3rd defendant are the absolute owners of all the plaint schedule properties. The plaintiff and 4th defendant have no manner of right, title and interest whatsoever in the suit properties. The plaintiff and 4th defendant are estopped from claiming any right in the suit properties. The plaintiffs and D-4 deposited the said amount paid by the defendants 1 and 3 in the bank also.

14. It is true that the plea of fraud or any other ground vitiating Ex. B-3 transaction had not been specifically pleaded in the plaint. It may be appropriate to have a look at the contents of Ex. B-3.

It had been recited that all rights in relation to all joint family properties had beenrelinquished. In M. Krishna Rao and Another Vs. M.L. Narasikha Rao and Others, on the aspect of release deed, it was held as hereunder:-

"Ex. B-1 shows that Plot No. 84 was purchased for Rs. 1,500/-. As per Ex. B-10. relied on by defendants 1 and 2, Plot No. 85 was purchased for Rs. 1,400/-. Total of both comes to Rs. 2,900/-. The ancestral properties of the parties were sold, for Rs. 4,000/-under Exs. A-2 and A-3. So, the sale proceeds from the ancestral properties of the joint family of the parties were more than adequate for acquisition of both Plots 84 and 85. Therefore, it cannot be said that the joint family of the parties had no sufficient nucleus to acquire Plots 84 and 85, which form the plaint schedule property minus the house therein. The case of the plaintiffs is that the house on the plaint schedule property was constructed with the joint family funds, and also the contributions made by the defendants. Admittedly all the defendants were employed even by the date of construction of the house in the plaint schedule property. So, their making contributions for construction of the house in the plaint schedule property cannot be doubted. Plaintiff's case is that they, being minors, did not make any contribution for construction of the house in the plaint schedule property. If the house in the plaint schedule property was constructed with the contributions made by the defendants, it automatically forms part of the joint family property, because in Y. Venkata Raju case it is held that no formality is necessary to impress the self-acquisitions as joint family property and intention of the party to do so is only relevant.

The use of the word "release" in Ex.A-1 has lot of significance. "Release" of a right in a property is not the same thing as creating a right, for the first time, in a property by one person to another. "Release" implies the "releasee" having a pre-existing right in the released property. If the release has no right in the

released property, there can be no question of "release" of his right by the "releasor" in favour of the "releasee". If a right is to be created for the first time in a property, it can only be done by way of a sale or gift or exchange, but not by way of "release". The fact that first defendant "released" his right in the plaint schedule property in favour of first plaintiff and fourth defendant, shows and implies that first defendant knew the first plaintiff and fourth defendant also have a right in the plaint scheduled property and for that reason only he "released" his right" in the property in their favour. Since first defendant "released" his right in the plaint schedule property in favour of first plaintiff also, who never claimed that he made a contribution in acquiring the plaint schedule property, it means and shows that first defendant acknowledged the fact that the plaint schedule is the joint family property of the parties. As held in Chella Subbanna and Another Vs. Chella Balasubbareddi and Others,] by a Full Bench of Madras High Court, renouncement of coparcenary right in favour of one or more coparceners would enure to the benefit of all the other coparceners but not merely the coparcener or coparceners in whose favour the renouncement or release was made. So, the release made by the first defendant in favour of first plaintiff and fourth defendant under Ex. A-1 enures to the benefit of all the other coparceners also, but not merely to first plaintiff and fourth defendant."

15. P.W. 1 -the 2nd plaintiff in the suit and the husband of the 1 st plaintiff deposed that the other plaintiffs are his children and after the death of the 1 st plaintiff, they were added as legal representatives and these properties originally belonged to Venkatesa Mandadi and his deceased wife is the daughter of Venkatesa Mandadi and the deceased 4th defendant is the wife of Venkatesa Mandadi and D-3-Venkatamma is the kept-mistress of Venkatesa Mandadi. This witness also deposed about the enjoyment of usufruct and when defendants 1 to 3 were removing the trees in scheduled property, his wife and mother-in-law objected and then defendants 1 to 3 paid some amounts and a Relinquishment Deed was executed. This witness also deposed that his wife and mother-in-law demanded for partition, the defendants 1 to 3 did not co-operate for the same. As such, they are entitled for half-share in the plaint scheduled properties. This witness also deposed that D-4 is his mother-in-law and about 30 years ago his marriage took place and about 10 years ago, his father-in-law died. This witness was cross-examined on 15-10-1992. This witness also deposed about the filing of O.S. No. 143/83 and it was not known whether the suit was dismissed on 17-12-1983 or not. This witness in cross-examination deposed that the signature shown to him in the original Relinquishment Deed is not his signature and he cannot identify the signature of his wife, so also his son's signature. But, however, this witness admitted that it is true that on 22-3-84 his wife and his mother-in-law executed a registered document in favour of D-1 and D-3 and the witness adds that it is not a Relinquishment Deed and by the time of the said registration of deed, he was also present so also his sons-plaintiffs 6 and 7. The 1st plaintiff and his mother-in-law also signed in the said document in his presence. He did not sign the document as attest or. This witness also admitted

that it is true that an amount of Rs. 19,000/- was paid by D-1 to his wife and Akkayamma before the Sub-Registrar. By the date of execution of the document, dated 22-3-84, the suits O.S. No. 44/90 and O.S. No. 45/90 were pending before the District Munsiff Court, Puttur. This witness also deposed that it is not true to suggest that plaintiff No. 1 and his mother-in-law executed a letter in favour of D-1 and D-3 that they are going to withdraw the suits in view of the registered document. All other suggestions were denied. P.W. 2 deposed about the relationship of the parties and D-3 is the concubine of Venkatesa Mandadi, and D-1 and D-2 are children of Venkatesa Mandadi and D-3, and when D-1 cut the trees in suit property, the 1st plaintiff objected and this witness and 5 others tried to mediate in the matter and they gave verdict that D-1 has to pay Rs. 19,000/- to the deceased 1st plaintiff towards cutting of the trees and accordingly D-1 paid Rs. 19,000/- to plaintiff No. 1. The 1st defendant did not agree for division of the suit properties. This witness deposed that P.W. 1 is his own elder brother and he was not summoned by the Court. This witness was cross-examined about certain of the details of the family affairs and from the nature of evidence, he had knowledge about certain aspects and he had no knowledge about certain aspects. The evidence of P.W. 3 is general in nature. He deposed that the properties belonged to Venkatesa Mandadi and at present D-1 is enjoying the properties. The 1st appellant herein-1st defendant was examined as D.W. 1, who deposed about the relationship. D.W. 1 deposed that Rajeswari is his younger sister and Venkatamma is his mother and Akkayamma is the 1st wife of his father and he doesn't know when the marriage of Govindamma had taken place and he is in possession of an extent of Ac. 11.00 including Acs. 7.00 mango garden and the rest of the land is agricultural land. This witness also deposed that out of Acs. 11.00, some properties were purchased by him. In the year 1982 his father died and his mother is the 2nd wife to his father and to his knowledge Govindamma and Akkayamma never lived as joint family members and he himself is paying cist to Acs. 11.00 of land and, Govindamma and Akkayamma have no right and enjoyment over the plaint schedule properties. This witness deposed about Markondaiah filing O.S. No. 143/83 and the dismissal of the suit. Ex. B-1 is the certified copy of the plaint in O.S. No. 143/83. Ex. B-2 is the certified copy of the Judgment in O.S. No. 143/83. This witness also deposed that both Govindamma and Akkayamma filed O.S. No. 83/83 which was re-numbered as O.S. No. 44/90. Akkayamma also filed separate suit O.S. No. 273/83 which was renumbered as O.S. No. 45/90. Govindamma also filed a separate suit for partition O.S. No. 274/84 on the file of Principal Subordinate Judge, Tirupati, the present suit. This witness deposed about the mediation and in the mediation, after receiving Rs. 19,000/- Govindamma and Akkayamma executed a Regd. Relinquishment Deed, Ex. B-3. The said amount under Ex. B-3 was deposited in Indian Bank. Ex. B-3 was written at Sub-Registrar's Office, Nagari. Markondaiah, s/o. Govindamma was present and he signed as attester. Another son of Govindamma, by name Purushotham, was also present and attested Ex. B-3. Besides these attestors, others were also present and attested it. The contents of Ex. B-3 were read over to the parties and thereafter, the

executants executed the document. Ex. B-3 was accepted and acted upon. After execution of Ex. B-3, Govindamma purchased house site from him under registered sale deed, under the original of Ex. B-4. In that connection, Govindamma and Akkayamma executed a letter dated 22-3-1984 in his favour stating that they will withdraw the suits O.S. No. 273/83 and O.S. No. 83/83, which is Ex. B-5. Govindamma put her signature and Akkayamma affixed her thumb impression and some of the attestors of Ex. B-3 also attested Ex. B-5. Govindamma and Akkayamma did not withdraw the suits. D.W. 1 deposed that he was given Ryotwari Pass Book in respect of suit properties. Ex. B-6 is the said Pass Book. Exs. B-7 to B-9 and Exs. B-11 to B-25 are the land revenue receipts in the name of his father and this witness and Ex. B-10 is the Voters Enumeration List. This witness also deposed about Ex. B-26, which is the registration copy of the Settlement Deed, dated 11-8-1975, executed by his father in favour of Govindamma. Exs. B-27 to B-29 are the registered sale deeds under which he had purchased some of the suit properties. His father had purchased some of the properties under Ex. B-30. This witness also deposed about Exs. B-31, B-32, B-33 and B-34. In cross-examination, this witness admitted that the plaint schedule properties belonged to his father and he is aged 33 years and he also deposed that in his written statement he had stated that he has been managing the plaint schedule properties. This witness was cross-examined at length in relation to Ex. B-6. This witness also was cross-examined about the value of the properties and also the agricultural income. This witness was cross-examined at length regarding Ex. B-3 and he was also cross-examined at length relating to the other documents and this witness admitted that he did not give any notice to Akkayamma and Govindamma to withdraw the suits filed by them and he filed petitions to withdraw the suits basing on Exs. B-3 and B-5. Both Exs. B-3 and B-5 were scribed by the same person. He does not know the name of the scribe but he is a native of Kakaveedu. Both Govindamma and Akkayamma are not literates, but Govindamma alone can sign. This witness also deposed in detail about how Ex. B-3 was written and how the document was read over to Akkayamma and Govindamma and how they had signed and all other details. This witness also specifically deposed that by the time of Ex. B-3, their family was divided and they were living separately and Akkayamma and Govindamma were not the joint family members by the time of Ex. B-3. This is a clear admission made by D.W. 1. D.W. 2, a resident of Gundrajukuppam, was examined, who deposed about mediation and the details of mediation and the execution of Ex. B-3 and the execution of Ex. B-5. This witness was cross-examined at length. D.W. 3 was examined who deposed about Akkayamma and Govindamma executing settlement deed and relinquishment deed in favour of Kubera Mandadi. This witness also deposed that besides the above documents, they also executed a letter stating that they are going to withdraw the pending suits. Ex. B-5 is the said letter and he is the first attestor of the said letter. This witness also deposed that it is not true to suggest that Ex. B-5 was obtained by force. This witness is cross-examined. In the cross-examination, this witness deposed that Akkayamma and Govindamma executed Ex. B-5-letter in favour of

D.W. 1 in the presence of the mediators. D.W. 4 is the identifying witness in relation to Ex. B-3, who deposed that both Govindamma and Akkayamma voluntarily executed Ex. B-3 and this witness also deposed that it is not true to suggest that Ex. B-3 was obtained by fraud. This witness was cross-examined at length.

16. On a careful analysis of the evidence available on record, the specific stand taken by the appellants-defendants 1 to 3 is that these branches have been living separately even by the date of Ex. B-3, and D.W. 1 has been managing the joint family and he has been managing the family properties and further certain acquisitions are separate self-acquisitions of D.W. 1-1st defendant in the suit.

17. Strong reliance was placed on *Ram Kristo Mandal and Another Vs. Dhankisto Mandal*, wherein a new plea as to invalidity of exchange of raiyati had been raised at the stage of arguments in Second Appeal, it was held that the High Court was bound to take notice of it and was not justified in refusing to entertain it. Reliance was also placed on *Divisional Level Committee and Another Vs. Harswarup Drug Udyog*, . AIR 1948 123 (Nagpur) . *Goppulal Vs. Thakurji Shriji Shriji Dwarakadheeshji and Another*, . and *A.C. Jose Vs. Sivan Pillai and Others*, .Strong reliance was also placed on *Athiappa Gounder and Anr. v. A. Mohan and 3 others II* (1995) *Divorce & Matrimonial Cases* 340 (D.B.).wherein the Division Bench of the Madras High Court while dealing with the legitimacy of the children and claim of property, children born of void marriage the right is restricted to succeed to properties of parents only and no share in any other property i.e., co-parcenary property or joint property. It was also submitted that in the light of this legal position, the appellants defendants 1 to 3 would be entitled to the lesser share. Reliance was placed on *Sobana Bai v. S. Eppsi and Ors.* AIR 1985 SC 315 . Reliance also was placed on *Smt. Kamla Bai and Anr. v. Arjan Singh and Ors.* AIR 1991 M.P. wherein it was held that relating to illegal contract though there was no pleading to the said effect, still the Court can take judicial notice of it.

18. The death of Venkatesa Mandadi is not in serious dispute.2002attempt was made to show that Venkatesa Mandadi died testate, the litigation was not pursued to its logical end. Hence, it can be taken that Venkatesa Mandadi died intestate. Apart from this aspect of the matter, though some evidence is available on record relating to separate living of these branches, there is no clear evidence relating to the division of the properties. It is true that during the lifetime of Venkatesa Mandadi, some property was given to Govindamma by settlement deed. It is also true that the 1 st defendant had taken a stand that certain of the properties are his self-acquired properties. The evidence is not clear on the aspect what were the original properties left by Venkatesa Mandadi and what are the subsequent acquisitions and what are the respective extents in relation thereto. Though no specific plea was taken on the aspect of the invalidity of the 2nd marriage and the legal status of such children, on admitted facts the said question is raised before this Court and submissions at length were made. The

dates of the 1st marriage and the 2nd marriage and the legal position at the relevant point of time, may be an aspect, which may have to be gone into. In the backdrop of the same, the other relevant aspects relating to Exs. B-3, B-5 also may have to be gone into apart from Ex. B-4. It is no doubt true that normally in the absence of a plea and in the absence of clear evidence, a new plea of such nature is not to be permitted, but however, specific stand was taken by P.W. 1 that the alleged 2nd wife is only the kept-mistress of Venkatesa Mandadi but however the evidence on record goes to show that Venkatesa Mandadi left behind him two wives. In a suit of this nature, when a relief of partition is prayed for, all the questions may have to be gone into while deciding the respective shares of the parties and also the items in which the parties would be entitled to the shares, if so, what would be the shares to which the parties may be entitled to. Hence, in the light of the peculiar facts and circumstances of the case, on a careful; scrutiny of the evidence available on record, especially in the light of certain questions, which had been raised at the appellate stage, this Court is of the considered opinion that the Judgment and Decree of the Trial Court as such may have to be set aside and the matter to be remanded to the Trial Court, for the purpose of affording opportunity to both the parties to let-in further evidence on all the aspects referred to supra and decide the matter afresh. It is true that the litigation is an old one, but however in the light of the facts, referred to supra, it became inevitable for this Court and accordingly, this Court is satisfied that this is a fit matter to make an order of remand.

Point No. 3:-

19. In the light of the findings recorded supra, the Judgment and Decree of the learned Subordinate Judge, Puttur in O.S. No. 35/90 are hereby set aside and the matter is remanded to the Trial Court to afford opportunities to both the parties to let in evidence on all the aspects referred to supra and decide the matter afresh in accordance with law, at the earliest point of time, preferably within a period of six months. It is brought to the notice of this Court that by virtue of non-compliance on certain interim orders, possession was taken by the respondents from the appellants during the pendency of the appeal. It is needless to say that the appellants are at liberty to move appropriate applications before the original Court in this regard, if they are so advised. No order as to costs.