
(2016) 04 AP CK 0064

In the Andhra Pradesh High Court

Case No : Appeal Suit Nos. 2424, 2476 of 1996 and 238 of 1998

K.V. Janaradhanam Chetty

APPELLANT

Vs

K.V. Jaya Kumar

RESPONDENT

Date of Decision : 27-04-2016

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 6 Rule 4

Citation : (2016) 5 ALT 609 : (2017) 2 AndhLD 387

Hon'ble Judges : Sri M. Satyanarayana Murthy, J.

Bench : Single Bench

Advocate : Mr. C. Subba Rao, Counsel, for the Petitioner; Mr. K.S. Gopalakrishnan, Counsel, for the Respondent

Final Decision : Dismissed

Judgement

Sri M. Satyanarayana Murthy, J.—Aggrieved by the decrees and common judgment dated 07.08.1996 passed in Original Suit No.208 of 1992, on the file of the Court of Additional Subordinate Judge, Tirupati, Chittoor district (for short, "the trial Court"), 1st defendant therein preferred Appeal Suit Nos.2424 of 1996 and the unsuccessful plaintiff therein preferred Appeal Suit No.238 of 1998 and the 1st defendant in O.S. No.102 of 1985, preferred Appeal Suit No.2476 of 1996.

2. For convenience of reference, the ranks given to the parties before the trial Court will be adopted throughout this common judgment.

3. The appellant in A.S. Nos. 238 of 1998 is the plaintiff in O.S. No.208 of 1992 and, the appellant in A.S. No.2424 of 1996, the 1st defendant in O.S. No.208 of 1992 is supporting the plaintiff therein claiming respective share in partition of the schedule property; whereas, the appellant in A.S. No.2476 of 1996, 1st defendant in O.S. No.102 of 1985, was directed to deliver vacant possession of II and III floors of the schedule property within a month from the date of decree to the plaintiffs therein, who are his father and brother respectively. The property in O.S. No.102 of 1985 is one of the items of schedule property shown in O.S.

No.208 of 1992. The appellants in A.S. No.238 of 1998 and A.S. No.2476 of 1996 is one and the same. Therefore, the trial Court by common judgment decided both the suits declining to grant a decree in favour of the plaintiff in O.S. No.208 of 1992, while granting a decree for recovery of possession in O.S. No.102 of 1985 in favour of K.V. Jaya Kumar.

4. As the issues between the parties in both the Appeals are common, I find that it is expedient to decide all these Appeals by way of common judgment.

5. The 1st plaintiff, K.C.R. Viswanatham Chetty, filed Original Suit No.102 of 1985 for recovery of possession and damages claiming that K.C.R. Viswanatham Chetty and his four sons constituted as Hindu Joint Family up to 1974. Though Viswanatham Chetty had his own self acquired immovable property, agreed for partitioning the same along with the joint family property and as such executed a registered partition deed dated 30.12.1974; wherein, two buildings at Puttur were allotted to the defendants share and they sold one building to their elder brother. The plaint schedule building was allotted to the 1st plaintiff's share, who after partition demolished the same and constructed a new building with three floors and one room on the fourth floor. The defendants have no right or interest in the same. The plaintiff had let out a portion on the ground floor to one Shoukath Ali and he is in actual possession of the side lane portion of ground and entire first floor and second floor till 20.11.1977. When the 1st plaintiff was hospitalized in S.V.R.R. Hospital, Tirupati in October, 1977 the 1st defendant and his wife offered to attend on him by staying in the second floor of the plaint schedule property. The 1st plaintiff permitted them to stay in the second floor so also to use the room and terrace on the top floor. It is further stated that after discharge of 1st plaintiff from the hospital, defendants assistance was no more needed, the 1st defendant was asked to quit and deliver possession of the premises occupied by them but they did not vacate the same, the 1st plaintiff got issued a notice but the 1st defendant did not vacate the said premises and, hence, liable to pay damages at the rate of Rs.400/- per month from 01.01.1978 onwards.

6. During pendency of the suit in O.S. No.102 of 1985, K.C.R. Viswanatham Chetty died testate executing the will dated 06.06.1985 bequeathing his property to his son, 2nd plaintiff, as legatee under the will, who claimed exclusive right over the property of his father, 1st plaintiff.

7. The 1st defendant filed his written statement denying the material allegations made in the plaint inter-alia contending that the family owns only ancestral property and no self acquired property of the 1st plaintiff is available. The document purporting to be a partition deed dated 13.12.1974 was brought into existence by the 1st plaintiff with his other sons, which was never acted upon. The allotment of plaint schedule property to the 1st plaintiff is only a make believe affair. The 1st defendant made the constructions and is in possession and enjoyment of the premises in his own right, as member of the joint family. Hence, he cannot be described as a trespasser and not liable to pay any

damages. It is further averred that the 1st defendant supervised the whole construction and is in possession of the premises for over a statutory period and hence, he cannot be evicted as he perfected title by adverse possession. There are misunderstandings between his wife and his mother and he supported his wife, the plaintiff, instigated by his wife, got filed the suit without properly valuing the suit and paid Court fees.

8. The 1st defendant filed additional written statement contending that Viswanatham Chetty did not execute any will much less the will dated 06.06.1985. The deceased plaintiff left behind him the 2nd plaintiff, 1st defendant and K.V. Kannaiah Chetty and a widow Manoranjithamma and each of them acquired 1/4th share in the suit property. Further, it is averred that an agreement dated 07.01.1989 was executed among their family members. Hence, the 2nd plaintiff is not entitled to evict the 1st defendant and the suit is liable to be dismissed.

9. The 2nd defendant filed a separate written statement alleging that the partition deed dated 30.12.1974 was brought into existence in collusion with his other sons and it was never acted upon. The 1st defendant is residing in a house as co-sharer and the 2nd defendant is equally entitled to an undivided 1/4th share in the schedule property. Subsequent agreement among the parties dated 07.01.1989 falsifies the claim of the plaintiff and prayed to dismiss the suit.

10. On the basis of above pleadings, the trial Court framed the following issues and additional issues in O.S. No.102 of 1985:

- 1) Whether the plaintiff is entitled for possession of 2nd and 3rd floors claimed?
- 2) Whether the defendant perfected his title by adverse possession?
- 3) Whether the suit is properly valued and court fee paid is sufficient?
- 4) Whether the plaintiff is entitled to claim damages as claimed?
- 5) To what relief?

Additional issues:

1. Whether the will dated 06.06.1985 of late Viswanatham Chetty is true, valid and binding?
2. Whether the agreement dated 07.01.1989 pleaded in Additional written statement is true, valid and binding?

11. The plaintiff in O.S. No.208 of 1992, K.V. Janardhanam, filed the suit for partition of the schedule property into five equal shares, allot one such share and put him in separate possession contending that himself and defendants 1 to 3 are the brothers and sons of K.C.R. Viswanatham Chetty, who died on 30.12.1988, leaving behind the plaintiff, defendants 1 to 3 and his wife 4th defendant to succeed his share in the joint family estate, since they constituted as members of Hindu Undivided Joint Family. Since they constituted as members

of Hindu Undivided Joint Family, plaint A and B schedule property was acquired with the hard labour of their joint family business; plaint C schedule is movables; thus, plaint A and B schedule property belongs to all the members of the joint family.

12. The defendants 1 to 4 and late K.C.R. Viswanatham Chetty are entitled to one share each i.e., 4th share in the plaint schedule property. The other properties, managed by K.C.R. Viswanatham Chetty and other family members, were not included in the schedule. As there was no partition by metes and bounds or even division in status, the properties are deemed to be the Joint Hindu Family Properties. Consequently, the plaintiff and defendants 1 to 3 and K.C.R. Viswanatham Chetty are entitled to one share each and after death of K.C.R. Viswanatham Chetty, the legal heirs i.e., defendants 1 to 3 and his wife succeeded his share in the joint family estate. Thereafter, as there were misunderstandings between the plaintiff and K.C.R. Viswanatham Chetty during his life time, the plaintiff demanded for partition and separate possession of his share; thereupon, the 4th defendant, wife of K.C.R. Viswanatham Chetty, gave a false complaint against the plaintiff, which is registered as a case in Crime No.6 of 1978 of Puttur police station but the same was referred as false. Subsequently, K.C.R. Viswanatham Chetty, due to force and by exerting undue influence, obtained relinquishment deed from the plaintiff relinquishing his share in favour of the 1st defendant, as if the plaintiff received Rs.35,000/- consideration for relinquishing his right in the family property. The said document is not enforceable and it was obtained by playing fraud. As the said relinquishment deed is not binding and enforceable under law, the plaintiff is entitled to claim share in the property and demanded K.C.R. Viswanatham Chetty for partition, during his life time, but he did not co-operate for partition. After the death of K.C.R. Viswanatham Chetty during the performance of customary ceremonies, the plaintiff demanded the defendants 1 to 3 for partition of the schedule property. However, the elders suggested the plaintiff and defendants 1 to 3 for partition of the schedule property after completion of customary ceremonies of their father and the same was reduced into writing on 07.01.1989; a copy of the same was supplied to plaintiff and defendants 1 to 3. As per the terms of agreement, the partition should be completed by 31.01.1989 after performance of customary ceremonies. Consequent upon the death of K.C.R. Viswanatham Chetty, the plaintiff demanded for actual partition of the property but the defendants did not co-operate for partition and, hence, the suit for partition.

13. The 1st defendant, K.V. Kannaiah Chetty, filed his written statement admitting the relationship between the parties and reported no objection for partition of the schedule property and to allot one such share to the plaintiff and one share to him while contending that the K.C.R. Viswanatham Chetty died intestate on 30.12.1988 and that the alleged relinquishment deed is fraudulent etc., thus, the 1st defendant is a supporting defendant to the plaintiff in all respects.

14. The 1st defendant further specifically contended that defendants 2 to 4 are not entitled to 7th share in B to D schedule property and, even as per the recitals of agreement, there was no proper division by metes and bounds and some of the items were not included in the agreement dated 30.12.1974 and that the relinquishment deed was never in respect of half share in 2nd item of A schedule property annexed to the written statement and that no consideration was passed under the document.

15. The alleged family settlement dated 07.01.1989 signed by the parties to the document is not a partition of all the family properties; the business of Puttur Commercial Finance Corporation and Financiers, mango garden, rent derived from the house bearing Door No.51, Gandhi Road, Tirupati, lorry load of iron and two lorry loads of teakwood, totally worth Rs.7,00,000/- is described in D schedule annexed to the written statement were not included in the partition agreement. It is specifically contended that A schedule property was allotted to K.C.R. Viswanatham Chetty under partition deed dated 20.09.1954 among his brothers and that he was one of the partners in the business by name M/s. Vasavi Company, Tirupati. K.C.R. Viswanatham Chetty also purchased a house bearing Door No.51, Gandhi Road, Tirupati, which is Item 5 of B schedule property annexed to the written statement, from his brothers with his joint family funds and, later, demolished the same and constructed a house with the joint family funds. After division from his brothers on 12.01.1959 later K.C.R. Viswanatham Chetty started a new business under the name and style of M/s. Manorama and Company along with him in the year 1960-61. Later, the plaintiff joined with them in the year 1964. K.C.R. Viswanatham Chetty and the plaintiffs were only partners in the said business; defendants 2 and 3 have nothing to do with it. The 1st defendant acquired Item 1 of B schedule property for his residential purpose; Item 2 of A schedule for his business purpose in the year 1977. Since then, he was running the business and earning separately. The partition deed dated 30.12.1974 was only for the purpose of avoiding surrender of land under the Urban Land (Ceiling and Regulation) Act, 1976 and for income tax purpose. Therefore, it is only a sham and nominal document and never acted upon by the family members at any time. As such the defendants 1 to 3, plaintiff and K.C.R. Viswanatham Chetty were entitled to 7th share in plaintiff A schedule property and the 1st defendant, plaintiff and late K.C.R. Viswanatham Chetty are entitled to 7th share in plaintiff B, C, and D schedule property and after death of K.C.R. Viswanatham Chetty, this defendant is entitled to 7th share out of share of K.C.R. Viswanatham Chetty, prayed to pass a decree accordingly.

16. The 2nd defendant, K.V. Krishna Murthy, filed separate written statement, supporting the plaintiff but contended that none of the items are self acquired properties of any member of joint family; the property, if any, purchased by any individual member of the family was only at the desire of K.C.R. Viswanatham Chetty and it is part and parcel of Hindu Undivided Joint Family. The 2nd defendant further contended that he is not worldly wise and when the plaintiff filed the suit against the defendants, including himself, he approached the 3rd

defendant and handed over the copy of plaint and other papers; thereupon, the 3rd defendant represented that he will engage an advocate for both of them and obtained his signatures on vakalath and got filed a memo adopting the written statement filed by the 3rd defendant, though he intended to file a separate written statement, thus, the 3rd defendant played fraud. Having come to know about the same, he sought permission of the Court to file separate written statement and filed the same specifically expressing that he is always ready and willing for amicable partition and virtually had no objection for partition of the schedule property as per the family arrangement deed dated 07.01.1989.

17. 3rd defendant, K.V. Jayakumar, filed a separate written statement denying very existence of the Hindu Joint Family while contending that Items 5 and 6 of plaint A schedule property were the self acquired property of 4th defendant and she has been in possession and enjoyment of the same from 11.10.1969. Thus, items 5 and 6 of plaint A schedule are not liable for partition.

18. Late K. Ramaiah Chetty and his 3 sons namely Viswanatham Chetty, Sundaraja Chetty, Purushothama Chetty originally constituted as Hindu Joint Family. Ramaiah Chetty and his sons divided their joint family property by registered partition deed dated 20.09.1954. In the said partition, Items 1 to 3 of plaint A schedule herein were allotted to the share of K.C.R. Viswanatham Chetty. The plaint B schedule mango garden and various other items were allotted to K.C.R. Viswanatham Chetty. Likewise, the other two sons of late Ramaiah Chetty were allotted different properties in the said partition and since then they became exclusive owners of the property allotted to them under the partition.

19. During life time of Ramaiah Chetty, he executed a registered will dated 26.09.1974 in sound disposing state of mind bequeathing the mango garden, which fell to his share, to Viswanatham Chetty and Purushotham Chetty jointly. After his demise in 1975, Viswanatham Chetty became entitled to half share in the mango garden, described in plaint B schedule, being a legatee under the will and not liable for partition. Viswanatham Chetty and his two brothers purchased Item 8 of plaint A schedule property for their partnership business M/s. Vasavi and Company; two brothers of Viswanatham Chetty sold their respective share to him vide registered sale deed dated 12.01.1959, since then he became absolute owner of Item 8 of plaint A schedule property; thus, Viswanatham Chetty acquired items 1 to 3 and 4 and 7 of A schedule property. Thereafter, Viswanatham Chetty and his sons constituted as Hindu Joint Family, performed marriages of plaintiff herein, defendants 1 to 3 during 1965-71 and thereafter began to live separately.

20. Prior to 1974, immovable properties were partitioned under a registered partition deed dated 30.12.1974. In the said partition, the plaintiff was allotted half share in Items 3 and 7 of plaint A schedule towards his share; 1st defendant was allotted half share in Items 3 and 4 of plaint schedule; 2nd defendant was allotted half share in Item 2 of plaint A schedule and the 3rd defendant was

allotted half share in Item 1 of plaintiff A schedule. Since the date of partition, they are enjoying their respective shares separately; as such there was no joint family, thereafter.

21. The plaintiff relinquished his right, as per the relinquishment deed dated 29.10.1977, in Item 3 of plaintiff A schedule in favour of 1st defendant after receiving cash consideration of Rs.35,000/-; the other item which is Item 7 of plaintiff A schedule, got under the registered partition deed dated 30.12.1974, is being exclusively enjoyed by the plaintiff letting out the same initially to Land Mortgage Bank and, later, to Maharshi Vidya Mandir. Therefore, the plaintiff is not entitled to claim partition of the property. As the properties were already divided, the plaintiff was a partner in M/s. Janardhanam and Company, taking advantage of it set up a claim over Item 8 of plaintiff A schedule which was allotted to Viswanatham Chetty and filed O.S. No.150 of 1978 on the file of the Court of Additional District Munsif, Tirupati for permanent injunction and obtained an ex parte interim injunction which got vacated on 19.09.1979. Moreover, the suit was also dismissed and attained finality. Since the plaintiff was in unlawful possession and enjoyment of the property of 2nd and 3rd floors, Viswanatham Chetty filed a suit in O.S. No.102 of 1985 before the trial Court for eviction and damages, obtained attachment of item 7 of plaintiff A schedule before judgment and the said attachment was made absolute.

22. Being unsuccessful in the attempt to continue in possession of 2nd and 3rd floors in Item 8 of plaintiff A schedule property, the plaintiff got filed a suit in O.S. No.13 of 1988 through his minor son before the Principal Subordinate Judge, Tirupati for partition of the same property without any basis.

23. It is specifically contended that Viswanatham Chetty, during his life time in sound disposing state of mind, executed a will dated 06.06.1985 which came to the notice of 1st defendant only on 09.02.1989 and immediately he applied for copy of the sealed will (deposited with the Sub-Registrar) then only it was opened. After obtaining copy of the will it came to the knowledge of the 3rd defendant that late Viswanatham Chetty bequeathed his entire property to the 3rd defendant as such he became absolute owner of the property of Viswanatham Chetty as a legatee under the registered will dated 06.06.1985, got impleaded as 2nd plaintiff in O.S. No.102 of 1985 which was pending by then. As such he is the absolute owner of B schedule property and other property of Viswanatham Chetty. Therefore, there is nothing to be divided among the members of Hindu Joint Family. In view of the facts stated above, including the agreement dated 07.01.1989, the plaintiff got appointed an advocate commissioner after the registered will came to his notice to conduct inventory of movables and the commissioner filed his report. However, in the absence of existence of any Hindu Joint Family, the plaintiff or defendants 1 and 2 are not entitled to claim any share in the property and prayed for dismissal of the suit.

24. The plaintiff filed rejoinder contending that D schedule property annexed to the written statement filed by the 1st defendant is not within the knowledge of

the plaintiff and he wanted to take steps to include D schedule property in the plaint schedule for equitable partition.

25. The 3rd defendant on 20.12.1985 filed another written statement and the same was adopted by the 4th defendant contending that the house bearing No.4/86 in Puttur town exclusively belongs to 4th defendant. Items 1 and 2 shown in the D schedule are not in existence; Item 3 of D schedule was exclusively allotted to Viswanatham Chetty and that he was receiving rent from the tenants of the ground and first floors till his death; thereafter, the 3rd defendant being a legatee under the will executed by Viswanatham Chetty collected rent. Item 4 of D schedule property is a partnership business in the name and style of Puttur Commercial Finance Corporation in which Viswanatham Chetty was one of the partners. Viswanatham Chetty bequeathed a share in the partnership business under the will referred above; on 09.01.1989, the 3rd defendant was added as a partner to the said business. Therefore, the plaintiff and defendants 1 and 2 are not entitled to claim any share in Item 4 of D schedule property.

26. On the basis of above pleadings, the trial Court framed the following issues in O.S. No.208 of 1992:

1. Whether the agreement executed by all the defendants on 07.01.1989 is true, valid and binding on the defendants?
2. Whether the defendants evaded to agree for partition as per the agreement dated 07.01.1989?
3. Whether the plaintiff is entitled to a decree for partition and separate possession of ?th share in the plaint schedule properties?
4. Whether the earlier partition pleaded dated 30.12.1974 is true?
5. Whether the relinquishment deed dated 29.10.1977 alleged to have been executed by 1st defendant is true?
6. To what relief?

27. During course of trial, both the suits were clubbed together and evidence was recorded in O.S. No.102 of 1985. On behalf of the plaintiffs in O.S. No.102 of 1985, PWs.1 and 2 were examined and Exs.A-1 to A-12 were marked. On behalf of the 1st defendant therein, DWs.1 to 5 were examined and Exs.B-1 to B-14 were marked.

28. Upon hearing argument of both the counsel, the trial Court dismissed the suit in O.S. No.208 of 1992 filed, by K.V. Janardhanam, for partition, holding that the joint family was not in existence since the partition had already taken place, decreed the suit in O.S. No.102 of 1985 directing K.V. Janardhanam, plaintiff in O.S. No.208 of 1992, to evict the premises granting one month time; aggrieved thereby, the instant Appeals.

29. Since the grounds in all the Appeals are identical, to avoid repetition of the grounds, common references of grounds are made hereunder:

a) The trial Court did not consider Ex.A-2, registered copy of partition deed dated 30.12.1974, Ex.A-9, registered will dated 06.06.1985; Ex.B-1, agreement dated 07.01.1989, Ex.B-5, family arrangement dated 07.01.1989 and Ex.B-12, agreement dated 29.10.1977 though the dispute centred those documents;

b) the trial Court ought to have concluded that Ex.A-2 was not acted upon and it was intended only to facilitate enjoyment of the property, separately, and no division took place by metes and bounds and the other strong circumstances is that if the document Ex.A-2 was properly appreciated with reference to evidence, the finding of the trial Court on Ex.A-2 is erroneous;

c) The trial Court failed to consider the finance business of the joint family in the name and style of Puttur Financers and Sri Rajeswari Finance Corporation and that there was no independent source of earning to any one of the members but the trial Court, on erroneous appreciation, concluded that those properties are separate and requested this Court to reappraise the same;

d) The business in the name and style of M/s. Janardhan and Company belongs to all brothers who lived jointly till 1978 and it throws light on the contentions of the plaintiffs to prove that there existed a joint family where all the brothers have a joint share;

e) The will allegedly executed in favour of the 1st defendant had not seen the light of the day till issuance of legal notice and for the first time the will was brought to the notice of the plaintiff in the legal notice and that apart the trial Court did not consider the circumstances under the alleged will, if any, came into existence and health condition of the testator at the time of execution of alleged will dated 06.06.1985, marked as Ex.A-9;

f) The trial Court also committed a serious error in placing reliance on Ex.B-1 dated 07.01.1989 and, erroneously, dismissed the suit in O.S. No.208 of 1992. The trial Court also erred in granting decree against the 1st defendant who is the plaintiff in O.S. No.208 of 1992.

Finally, the plaintiffs in O.S. No.208 of 1992 and the 1st defendants in O.S. Nos.102 of 1985 and 208 of 1992 requested this Court to reappraise the entire evidence to come to an independent conclusion and pass a decree in their favour dismissing the suit in O.S. No.102 of 1985.

30. During course of argument, besides raising several contentions regarding validity of will and partition deed etc., learned counsel on either side filed written submissions for perusal of this Court.

31. The specific contentions urged in the written briefs are nothing but reiteration of entire contentions raised in the grounds of Appeals so also pleas in the complaints and drawn the attention of this Court to the cross-examination of

DWs.1 to 5. Similarly, learned counsel for the plaintiffs also drawn the attention of this Court to certain sentences in the depositions of PWs.1 and 2 which directly throw light on the case of the plaintiffs in O.S. No.208 of 1992; more particularly, the facts elicited in the examination-in-chief and cross-examination of PWs.1 and 2, regarding nature of property and their continuation as members of the joint family. Therefore, it is un-necessary to advert to each and every sentence of the written briefs but they will be taken into consideration at appropriate stage.

32. Per contra, learned counsel for the plaintiffs in O.S. No.102 of 1985 totally argued in support of the judgment and decrees under challenge refuting the specific pleas raised by the learned counsel for the 1st defendants in both the suits.

33. Learned counsel has drawn the attention of this Court to various documents particularly Ex.A-2 equivalent to Ex.B-3 dated 30.12.1974 allegedly executed for the income tax purpose, also drawn the attention of this Court to Ex.B-3 partition deed and division of A to E schedule allotting specific shares to the members of the family and, on the strength of the same, it is contended that since the partition had already effected by metes and bounds, in view of the previous partition, the question of again dividing the property does not arise again unless it is proved that there is reunion by adducing satisfactory evidence. It is further contended that the relinquishment deed executed by the 1st plaintiff in favour of the 2nd plaintiff was not challenged during the entire trial and, therefore, the 1st defendants in both the suits are not entitled to claim any share in the property.

34. Learned counsel for the plaintiffs in O.S. No.102 of 1985 drawn the attention of this Court to Para 12 of Ex.A-4 which attained finality and on the strength of the same it is contended that the firm is totally different and it has a separate legal entity. Similarly, Ex.B-12 and other documents disproved the findings recorded by the trial Court in all respects and, finally, prayed to dismiss the Appeals confirming the decrees and common judgment.

35. Taking into consideration the specific contentions raised by learned counsel for the plaintiffs-respondents and the 1st defendants in O.S. No.102 of 1985 and 208 of 1992 and a perusal of decree and common judgment under challenge the points that arise for consideration are:

1) Whether the plaintiffs in O.S. Nos.102 of 1985 and the plaintiff in O.S. No.208 of 1992 are members of Hindu Undivided Coparcenary as on the date of filing suits?

2) Whether the partition dated 30.12.1974 and the agreement dated 07.01.1989 are true, valid and binding on the parties?

3) Whether the relinquishment deed dated 29.10.1977 executed by the plaintiff in O.S. No.208 of 1992 in favour of the 1st defendant therein is true and valid? If not, the plaintiff is entitled to claim ?th share in the schedule property and

separate possession?

4) Whether the 2nd plaintiff in O.S. No.102 of 1985 became the owner of property by virtue will Ex.A-6? If so, is he entitled to recover possession of the 2nd floor of the schedule property in O.S. No.102 of 1985?

5) Whether the defendants in O.S. No.102 of 1985 and O.S. No.208 of 1992 perfected their title by adverse possession?

6) Whether Items 5 and 6 are the separate properties of 4th defendant in O.S. No.208 of 1992?

36. Point No.1: The first and foremost contention is that the plaintiffs in O.S. No.102 of 1985 and the defendants in O.S. No.208 of 1992 constituted as members of Hindu Joint Family and they are continuing as members of the joint family as on the date of filing the suits and sought for partition of the schedule property. Whereas, the 1st defendant in O.S. No.102 of 1985 denied the very existence of Hindu Undivided Coparcenary raising several contentions, setting up a will allegedly executed by his father in his favour bequeathing his separate property and the property allotted to him in the partition among the coparceners. It is the case of the plaintiffs at every stage in the plaint that the plaintiffs and defendants are the members of Hindu Undivided Joint Family but not Hindu Undivided Coparcenary; whereas the contention of the defendants is that the coparcenary property was already partitioned and no other item was acquired with the aid of joint family, after partition. Therefore, the question of their constituting as members of Joint Hindu Undivided Family does not arise, on the sole ground that the plaintiffs are dis entitled to claim any share in the property by way of partition. When this Court raised an objection about the nature of property i.e., whether it is a Hindu Undivided Coparcenary property or Hindu Undivided Joint Family property, learned counsel for the plaintiffs contended that the mofussil pleadings have to be construed liberally and that when both the parties went on trial on the premise that the plaintiffs and defendants were members of Hindu Undivided Coparcenary and no such issue was framed and decided by the trial Court, there is no justification at this stage to contend that there was no subsisting Hindu Undivided Joint Family to deny the partition and drawn the attention of this Court to a decision of Delhi High Court reported in *Kanahaya Lal v. Smt. Jumna Devi and others*, AIR 1973 Delhi 160 (V 60 C 49), wherein the Delhi High Court considered the concept of Hindu Joint Family with reference to Section 6 of Hindu Succession Act, 1956 and held in Para 8 that the property of the deceased would, therefore, be coparcenary property and ordinarily it would have been inherited by the members by survivor-ship but the Hindu Succession Act has been made an inroad on this rule of ancient Hindu law and created a clause of statutory heirs but the question involved in the facts of the above decision was not directly on the issue as to how the pleadings have to be considered but the question was with regard to nature of acquisition. Therefore, the above decision has no direct application to the present facts of the case as to how pleadings have to be considered. However, the Apex Court in

Smt. Manjushri Raha and others v. B.L. Gupta and others, AIR 1977 SC 1158, held that the pleadings have to be interpreted not with formalistic rigour but with latitude or awareness of low legal literacy. In view of the same, the pleadings of mofussil Courts have to be construed liberally and pedantic approach cannot be adopted while considering said pleas to grant such reliefs claimed therein, if law permits.

37. No doubt, both the parties to the suit went on trial on the premise that the claim of the plaintiffs was based on Hindu Coparcenary but not as members of Hindu Undivided Joint Family; the trial Court also did not frame any issue to decide whether the property is Hindu Undivided Joint Family property or Hindu Undivided Coparcenary. There is a lot of distinction between Hindu Undivided Joint Family and Hindu Undivided Coparcenary. A Hindu Undivided Joint Family is wider than Hindu Undivided Coparcenary since the coparcenary consists of lineal male descendants earlier, now both lineal male and female descendants after the A.P. amendment to Section 29-A, B and Central Amendment but Section 6 of Hindu Succession Act subject to certain limitations contained therein; whereas, in the Hindu Undivided Joint Family, even female who came into the family by virtue of their marriage can become members of Hindu Undivided Joint Family. In any view of the matter, it is not the case of the defendants that the claim of the plaintiff was not based on Hindu Undivided Coparcenary and no plea was raised in the entire written statement about the nature of property. In such circumstances, it is wholly un-necessary to decide the nature of acquisition of suit schedule property, if any in existence, as both the parties did not raise any specific contention on this in their pleadings. In those circumstances, it is better to proceed as if the claim of the plaintiffs is based on Hindu Undivided Coparcenary not as members of Hindu Undivided Joint Family liberally construing the pleadings with latitude or awareness of low legal literacy and the defendants' plea in the written statement.

38. When similar question came up before the Apex Court in Hardeo Rai v. Sakuntala Devi and Others, AIR 2008 SC 2489, it was held as follows:

"17. There exists a distinction between a Mitakashra Coparcenary property and Joint Family property. A Mitakashra Coparcenary carries a definite concept. It is a body of individuals having been created by law unlike a joint family which can be constituted by agreement of the parties. A Mitakashra Coparcenary is a creature of law. It is, thus, necessary to determine the status of the appellant and his brothers.

18. We may at the outset notice the characteristics of a Mitakakashra Coparcenary from the decision of this Court whereupon Mr. Rai has placed strong reliance in State Bank of India v. Ghamandi Ram (Dead) through Gurbax Rai, [1969] 3 SCR 681. Therein this Court was concerned with a notification issued by the Government of Pakistan in terms of Section 45 of the Pakistan (Administration of Evacuee Property) Ordinance, 1949. We may, however, notice the dicta laid down therein:

7. According to the Mitakshara School of Hindu Law all the property of a Hindu joint family is held in collective ownership by all the coparceners in a quasi-corporate capacity. The textual authority of the Mitakshara lays down in express terms that the joint family property is held in trust for the joint family members then living and thereafter to be born (See Mitakshara, Chapter I. 1-27). The incidents of co-parcenership under the Mitakshara law are: first, the lineal male descendants of a person up to the third generation, acquire on birth ownership in the ancestral properties of such person; secondly that such descendants can at any time work out their rights by asking for partition; thirdly, that till partition each member has got ownership extending over the entire property conjointly with the rest; fourthly, that as a result of such co-ownership the possession and enjoyment of the properties is common; fifthly, that no alienation of the property is possible unless it be for necessity, without the concurrence of the coparceners, and sixthly, that the interest of a deceased member lapses on his death to the survivors. A coparcenary under the Mitakshara School is a creature of law and cannot arise by act of parties except in so far that on adoption the adopted son becomes a co-parcener with his adoptive father as regards the ancestral properties of the latter."

39. In another decision of the Apex Court in *Satrughan Isser v. Smt. Subujpari and Others*, AIR 1967 SC 272, it was held as follows:

"5. A Hindu coparcenary under the Mitakshara school consists of males alone : it includes only those members who acquire by birth or adoption interest in the coparcenary property. The essence of coparcenary property is unity of ownership which is vested in the whole body of coparceners. While it remains joint, no individual member can predicate of the undivided property that he has a definite share therein. The interest of each coparcener is fluctuating, capable of being enlarged by deaths, and liable to be diminished by the birth of sons to coparceners : it is only on partition that the coparcener can claim that he has become entitled to a definite share. The two principal incidents of coparcenary property are : that the interest of coparceners devolves by survivorship and not by inheritance; and that the male issue of a coparcener acquires an interest in the coparcenary property by birth, not as representing his father but in his own independent right acquired by birth."

40. In *Pushpalatha N.V. v. V. Padma*, AIR 2010 Karnataka 124, when similar question came up before the Karnataka High Court, it was held as follows:

"The joint undivided family is a normal condition of a Hindu society. Joint Hindu Family consists of all persons lineal descended from a common ancestors and includes all wives and unmarried daughters. Undivided Hindu family is originally joint not only in estate but also in food and worship. The existence of joint estate is not an essential requisite to constitute joint family and family which does not own any property, may nevertheless be joint. Hindu Joint Family is by birth and joint family property is only adjunct of the joint family. Joint or Undivided Hindu Family may consists of single male member and widows of deceased male

members. The property of a joint family does not cease to be a joint family property belonging to any other family merely because the family is represented by a single male member. It may consist of a male Hindu and his wife. It may even consist of two joint members. However, there must be at least two members to constitute joint family. The general principle is that a Hindu Family is presumed to be joint unless the contrary is proved. A daughter ceases to be a member of her father's family, on marriage and becomes member of her husband's family."

41. The normal rule is that the pleadings in rural areas have to be construed liberally; merely because the pleadings are inartistic they cannot be thrown away as held by the Apex Court in *Smt. Manjushri Raha*.

42. By applying the principle laid down in the above decision, the entire contents of the pleadings have to be taken into consideration though the pleadings are inartistic. Strangely, in the present case, both the parties before the trial Court went on trial as if the contentions of plaintiffs were that the property was Hindu Undivided Coparcenary property but not Hindu Joint Family property; no issue was also framed by the trial Court to decide the nature of the property. Even the defendants also contended that the property was only Hindu Undivided Coparcenary and it was partitioned in the year 1974 as per the registered partition deed dated 30.12.1974, among the K.C.R. Viswanatham Chetty and his sons. Thus, the understanding of the parties to the suit is that the property was only Hindu Undivided Coparcenary but not Joint Hindu Undivided Family.

43. Sri K.S. Gopalakrishnan, learned counsel, contended that the pleadings are important in a civil litigation and, in the absence of any pleadings, it is difficult to decide the case before the Court and placed reliance on a decision of the Apex Court in *The National Textile Corporation Limited v. Nareshkumar Badrikumar Jagad and others*, AIR 2012 SC 264, wherein the Apex Court held that pleadings are more of help to the Court in narrowing a controversy involved and to inform the parties concerned to the question in issue, so that the parties may adduce appropriate evidence on the said issue. It is a settled legal proposition that "as a rule relief not founded on the pleadings should not be granted".

44. There is no quarrel about the law declared by the Apex Court but on the contrary learned counsel for the plaintiff in O.S. No.208 of 1992 contended that the pleadings in the mofussil Courts are often found to be deficient and so are to be construed liberally. A minor lapse in the notice in its wording cannot be so construed so as to deprive the real intention incorporated therein.

45. He also relied on another decision of Patna High Court in *Bharosi Sao v. Manik Chand Gupta and others*, AIR 1986 Patna 24 but the principle laid down therein is pertaining to Order 8, Rule 5 (1) of C.P.C. regarding specific denial of pleading in the written statement but this is not of much assistance.

46. In *Kanahyal Lal*, the Delhi High Court while deciding the nature of the property that fell to the share of a son held as follows:

"..... but as further clarified in paragraph 220 of the same treatise of Hindu law the term joint family property is synonymous with co-parcenary property and it would therefore not make any difference in the construction and effect of Section 6 of the Act that the widow and daughters of the deceased are members of the joint Hindu family and not of the co-parcenary.

8. The property of the deceased would, therefore, be co-parcenary property and ordinarily it would have been inherited by the members by survivor-ship but the Act has made an inroad on this rule of ancient Hindu law and created a class of statutory heirs."

47. This decision is of little assistance to treat the property succeeded by the legal heirs of deceased male member as Joint Hindu Undivided Family on par with coparcenary property but based on treatise of Hindu Law the Court concluded that there is no lot of distinction between the Joint Hindu Family and coparcenary.

48. In *S.B. Noronah v. Prem Kumari Khanna*, AIR 1980 SC 193, the Apex Court in Para 6 held as follows:

"6. Pleadings are not statues and legalism is not verbalism. Common sense should not be kept in cold storage when pleadings are construed. It is too plain for words that the petition for eviction referred to the lease between the parties which undoubtedly was in writing. The application, read as a whole, did imply that and we are clear that law should not be stultified by courts by sanctifying little omissions as fatal flaws. The application for vacant possession suffered from no verbal lacunae and there was no need to amend at all. Parties win or lose on substantial questions, not "technical tortures" and courts cannot be "abettors".

49. In *Devasahayam (dead) by L.Rs v. P. Savithramma and others*, 2005 (7) SCC 653, the Apex Court held that the pleadings must be construed reasonably. The contention of the parties in their pleadings must be culled out from reading the same as a whole. Different considerations on construction of pleadings may arrive between pleadings in mofussil Courts and pleadings in original side of the High Courts. Based on the law laid down by the Apex Court and other Courts in various decisions, it can safely be concluded that the intention of the parties in describing the property as joint family property is clear that it was only a coparcenary property not a joint family property. Though there is lot of distinction between Joint Hindu Undivided Family and coparcenary property, since the parties went on trial on the premise that the property is coparcenary and the trial Court also decided the issue before it as if it is a coparcenary property, even before this Court no such distinction was drawn till this Court made an attempt to ascertain whether the property is coparcenary property or joint family property, this controversy would not have arisen. Virtually no such contention was raised before the trial Court or before this Court by drawing distinction between Hindu Joint Family and Co-parcenary property. Since both the parties went on trial before the trial Court, this Court has no other go except to conclude that the plea

of the plaintiff in O.S. No.208 of 1992 that the schedule property is a coparcenary and claimed partition.

50. The partition is by way of registered document. Ex.A-2 is the original of Ex.B-3 produced by the plaintiff in O.S. No.208 of 1992 and the defendants in 102 of 1985 but the sole contention to overcome the document is that it was executed only for income-tax purpose. The said fact is supported by the evidence of DW.3, G. Ramachandraiah, the clerk who worked under K.C. Kannaiah Chetty but no evidence was brought on record as to how the K.C.R. Viswanatham Chetty and other defendants benefited in income-tax on account of execution of partition deed by K.C.R. Viswanatham Chetty and his sons; testimony of DW.3 is also silent on this aspect as to how K.C.R. Viswanatham Chetty was benefited on account of execution of Ex.B-3. In those circumstances, it is difficult to accept the contention that Ex.B-3 was executed only for income-tax purpose or to get remissions under the Income-Tax Act. Based on a bald allegation made in the plaint and evidence of DWs.1 and 3, in the absence of any evidence to establish that Ex.B-3 was not intended to act upon and it was executed only for the purpose of getting the remissions under the Income-Tax Act, 1961 by adducing cogent and satisfactory evidence, it is difficult for me to believe that Ex.B-3 was executed only for claiming the remissions under the Income-Tax Act. In fact, I find absolutely no evidence to substantiate the plea of the plaintiff in O.S. No.208 of 1992 that Ex.B-3 was executed to claim remissions under the Income-Tax Act and it was not acted upon. When a partition deed was executed and registered, the Court can draw a presumption that it was intended to act upon.

51. Sri K.S. Gopala Krishnan, learned counsel for the 3rd defendant in O.S. No.208 of 1992 and the 2nd plaintiff in O.S. No.102 of 1985 relied on the decision of Madras High Court in T. Bali Ammal v. T. Sampath, 2011 Law Suit (Madras) 4672, to contend that when a document was executed, a presumption is to be drawn that it was intended to act upon. In the facts of the above decision, the 2nd plaintiff in O.S. No.102 of 1985 contended that he is not bound by the registered partition deed as he had not signed; however, it is still valid as it has been registered by a competent authority for registration, as contemplated under Section 114 of Indian Evidence Act, 1872 and it can be presumed that the said partition deed is in existence and, probably, it may be voidable insofar as the plaint is concerned. In such case, the remedy of the 2nd plaintiff is to file a suit for declaration that he is not bound by the registered partition.

52. Facts of the present case are identical to the facts of the above decision for the reason that the plaintiff in O.S. No.208 of 1992 admittedly executed a partition deed marked as Ex.B-3 and he himself produced and marked before the trial Court when Ex.B-3 was not intended to act upon and executed to get remissions under the Income-Tax Act, it is for him to seek appropriate relief under Section 31 of the Specific Relief Act to cancel the document Ex.B-3 but instead of seeking relief of annulment of Ex.B-3 under Section 31, the plaintiff in O.S. No.208 of 1992 filed the suit for partition.

53. Sri K.S. Gopala Krishnan, learned counsel for the plaintiff in O.S. No.102 of 1985 and 3rd defendant in O.S. No.208 of 1992, while contending that when Ex.B-3 document is voidable, his remedy is to seek the relief to set-aside or annul the document and, till it is set-aside or annulled, Ex.B-3 is valid and binding on the parties to the document, placed reliance on the decisions of the Apex Court in *Suhrid Singh @ Sardool Singh v. Randhir Singh and others*, AIR 2010 SC 2807 and *Abdul Rahim and others v. Sk. Abdul Zabbar and others*, AIR 2010 SC 211, wherein it was held that when a document was executed and executant wanted to avoid the same, he has to file a suit for cancellation under Section 31 of the Specific Relief Act; till it is cancelled, it is binding on the executants of the document. Yet, the law is well settled that there is no invalidity on the forehead of any document and, till it is set-aside, though it is invalid, it is binding on the parties to the document as held by the Apex Court in *Board of Trustees of Port of Kandla v. Hargovind Jasraj and another*, 2013 (3) SCC 182, *P.K. Palanisamy v. N. Arumugham and another*, 2009 (9) SCC 173 and *Sultan Sadik v. Sanjay Raj Subba and others*, 2004 (2) SCC 377.

54. In view of the law laid down by the Apex Court in various decisions, it is clear that till a document is set-aside, though it is invalid, it is operative on the parties to the document and the parties thereto are entitled to enforce the terms there under. Curiously, in the present case, the parties to the partition sold their part of properties allotted to them under Ex.B-3 subsequent to its execution. Thus, it is clear that they dealt with the property as their own subsequent to Ex.B- 3, which itself indicates that the partition was acted upon and not intended to claim remissions under the Income-Tax Act circumventing the law.

55. Learned counsel for the plaintiff in O.S. No.208 of 1992 contended that when the partition deed was executed to avoid tax liability under the Income-Tax Act, the same is not binding on the parties as it was executed for illegal purpose and contended that when there is no actual division of properties the partition cannot be accepted, placed reliance on a decision of Privy Council in *Alluri Venkatapathi Raju and another v. Dantuluri Venkatanarasimha Raju and others*, AIR 1936 PC 264, wherein it was held that the manager (father) of a joint family has the power to divide the family at any time during his life without the consent of his sons, and, if he makes a division, it has the effect of separating, not only the father from the sons, but also the sons inter se. When one member of a joint family separates from the other members, his separation operates as a separation of all the members of the family from one another. It was further held that it sometimes happens that persons make statements which serve their purpose or proceed upon ignorance of the true position; and it is not their statements, but their relations with the estate, which should be taken into consideration in determining the issue. When there has been a division of their right to or severance of their interest in the estate, members of the joint family must be held to be separate in status, though there has been no physical division of the property, and though there may be no separation in food and dwelling. If on the other there has been no such division of right or severance of interest,

they continue to be joint in estate, and mere cessation of commonality would not make them separate in estate, as a member may become separate in food or residence for his convenience. A division of right or a severance of the joint status may result, not only from an agreement between the parties, but from any act or transaction which has the effect of defining their shares in the estate, though it may not partition the estate. If a document clearly shows a division of right, its legal construction and effect cannot be controlled or altered by evidence of the subsequent conduct of the parties.

56. In the present case, there is lot of evidence on record to establish that the partition was real and acted upon by sale of the property both K.C.R. Viswanatham Chetty and the plaintiff in O.S. No.208 of 1992; so also execution of relinquishment deed mutating their names in the municipal records by the respective share holders for the property allotted to them and payment of property tax. Exs.A-7 and 8 are the municipal tax receipts and demand notice respectively produced by the 2nd plaintiff in O.S. No.102 of 1985 would go to establish that the property allotted to him was mutated in the municipal records and enjoying the property in his own right independently.

57. The legal notices marked as Exs.B-8 and 9 would clinchingly establish that the partition covered by Ex.B-4 is true, valid, genuine and acted upon; that apart, the plaintiff in O.S. No.208 of 1992 failed to establish that taking advantage of Ex.B-3, partition deed, K.C.R. Viswanatham Chetty claimed any remissions from the Income-Tax Department; in the absence of any evidence to establish the same, the contention of the plaintiff in O.S. No.208 of 1992 cannot be upheld. Even on reappraisal of entire evidence on record, the plaintiff in O.S. No.208 of 1992 was not able to establish the plea that Ex.B-3 was executed only for the purpose of claiming remission under the Income-Tax Act but not intended to act upon.

58. The law is well settled that an old partition can be inferred basing on the surrounding circumstances like mutation of property, shares of individuals in the revenue records and municipal records, transactions of sale subsequent to the partition would form the basis to infer that the partition was real and acted upon.

59. Even if the partition is not reduced into writing, the same can be proved by conduct of the parties and surrounding circumstances like treatment of the property by the members of the coparcenary after its division. Long separate enjoyment by paying land revenue is another strong circumstance to believe previous partition as held by the Apex Court in Digambar Adhar Patil v. Devram Girdhar Patil (died) and another, 1989 (3) ALT 365, wherein it was held as follows in Para 5:

"Under Hindu Law, it is not necessary that the partition should be effected by a registered partition deed. Even a family arrangement is enough to effectuate the partition between coparceners and to confer right to a separate share and enjoyment thereof."

60. In the instant cases, the oral evidence of 2nd plaintiff in O.S. No.102 of 1985 and other witness examined on his behalf clinchingly establish execution of Ex.B-3. On the other hand, sale of the property by K.C.R. Viswanatham Chetty as admitted by K.V. Jayakumar in his evidence and non-inclusion of the same, demolition of the same by purchaser Satyanarayana Shetty and construction of a new building. Similarly, sale of agricultural land of an extent of Ac.2.08 cents by K.C.R. Viswanatham Chetty to a third party directly proved that the partition was acted upon. Therefore, sale of part of the property by K.C.R. Viswanatham Chetty to Satyanarayana Shetty and payment of tax by him under Exs.A-4 and A-8 are suffice to accept the plea of the plaintiff in O.S. No.102 of 1985 and 3rd defendant in O.S. No.208 of 1992

61. In Smt. P.N. Wankudre v. C.S. Wankudre and others, AIR 2002 Bombay 129, the Bombay High Court held as follows:

"When all the members divided the properties by family arrangement and were put in possession and enjoyment of piece of property and all members of the family were signatories to said arrangement and the partition was acted upon by the parties, but no objection was raised for number of years. In such circumstances even assuming that documents were required to be registered, conduct of members would operate as an estoppel preventing them from resiling from said arrangements. One member cannot seek injunction or restraint order in respect of property partitioned and mutated in favour of another member."

62. In Pitambar Kar v. Trilochan Kar and others, AIR 2003 Orissa 104, the Orissa High Court held as follows:

"When a previous partition by metes and bounds is proved by long separate possession of lands and separate living among co-sharers and inter-se between two co-sharers was taken place and its evidence of severance of joint status among the members."

63. In view of the law declared by the Apex Court, persuaded by the decisions of other High Courts, long separate living both in mess and business treating the property of individual members of the family as separate property, dealing with the property by alienation to 3rd parties etc., are suffice to conclude that the partition covered by Ex.B-3 is real and acted upon though the plaintiff in O.S. No.208 of 1992 raised several contentions and made a vain attempt to establish that Ex.B-3 was not intended to act upon by examining the clerk who worked under K.C.R. Viswanatham Chetty, without disclosing any details or benefits claimed under the Income-Tax Act, led me to conclude that the partition was real and acted upon.

64. Learned counsel for the plaintiff in O.S. No.208 of 1992 would contend that the parties went on trial with a specific understanding of pleading; the appellate Court need not embark on deciding the source of acquisition of property more particularly when the defendants did not deny the existence of coparcenary property. At the same time, while arguing the matter, both the counsel went on

arguing the matter as if the property is Hindu Undivided Coparcenary property. Therefore, by applying the principles laid down in the decisions referred supra, it is clear that the parties went on trial only on the premise that the property was Hindu Undivided Coparcenary property. Therefore, this controversy needs no further examination and for the purpose of deciding the lis before this Court, I am of the considered view that the property was only a Hindu Coparcenary Property not Joint Hindu Undivided Family in favour of 2nd plaintiff in O.S. No.102 of 1985 and 3rd defendant in O.S. No.208 of 1992, holding that they are not the members of Hindu Coparcenary as on the date of filing suits.

65. On over all consideration of entire material, I find no substance in the plea of the plaintiff in O.S. No.208 of 1992; consequently, I am unable to accept his contention. Thus, the plaintiff in O.S. No.208 of 1992 miserably failed to establish his independent case by producing cogent and satisfactory evidence and the trial Court rightly believed the partition covered by Ex.B-3 and declined to pass a decree in favour of the plaintiff in O.S. No.208 of 1992. Therefore, I find that the finding of the trial Court is free from any infirmities warranting interference of this Court. Accordingly, the point is answered in favour of 2nd plaintiff in O.S. No.102 of 1985 and 3rd defendant in O.S. No.208 of 1992, holding that they are not the members of Hindu Undivided Coparcenary as on the date of suits.

66. Point No.2: The basis of the claim of the plaintiff in O.S. No.208 of 1992 is that the registered partition deed dated 30.12.1974 and the agreement dated 07.01.1989 were executed only for the purpose of income tax remissions and not intended to act upon by the parties thereto. Whereas, the contention of 3rd defendant in O.S. No.208 of 1992 is that the property was actually partitioned and it was acted upon but not executed for the purpose of income-tax remissions and that the registered partition dated 30.12.1974 is true, valid and binding on the plaintiff in O.S. No.208 of 1992. The trial Court believed the partition pleaded by the 3rd defendant in O.S. No.208 of 1992 and concluded that it is genuine and acted upon by the parties therein, declining to grant the relief of partition on the ground that the property was already partitioned and the plaintiff in O.S. No.208 of 1992 relinquished his right by executing a registered relinquished deed; therefore, no decree was passed in favour of the plaintiff in O.S. No.208 of 1992. The said finding is assailed in the Appeal Suit No.238 of 1998 mainly contending that the evidence of witnesses examined on behalf of the 3rd defendant in O.S. No.208 of 1992 goes against 3rd defendant's case, the evidentiary admissions of defendant's witnesses are suffice to strengthen his contention that the documents referred above were executed only for income-tax purpose and not intended to act upon but the trial Court did not consider the same in proper perspective, committed an error.

67. During course of argument learned counsel for the plaintiff in O.S. No.208 of 1992 reiterated the same while the learned counsel for the 3rd defendant therein refuted the same. In view of the rival submissions, it is the duty of this Court to

reappraise the entire evidence on record with reference to the specific pleas raised by the plaintiff, 3rd defendant and with reference to the settled law, I would like to re-examine the issue, afresh, un-influenced by the findings recorded by the trial Court.

68. When the plaintiff in O.S. No.208 of 1992 pleaded that the partition deed dated 30.12.1974, marked as Ex.A-2 is nominal not intended to act upon, the onus is always upon him to establish that the document was executed only for the income-tax purpose and not intended to act upon. Ex.A-2 is the partition deed dated 30.12.1974, which was executed by K.C.R. Viswanatham Chetty and his sons effecting partition of the Hindu Undivided Coparcenary property. In the said partition, different properties were allotted to the shares of K.C.R. Viswanatham Chetty and his sons, separately. If the original of Ex.B-3 is accepted, there is division of Hindu Undivided Coparcenary property by metes and bounds.

69. The plaintiff in O.S. No.208 of 1992, denied execution of Ex.B-3 registered partition deed dividing the coparcenary property among the K.C.R. Viswanatham Chetty and his sons i.e., the plaintiff and defendants 1 to 3 in O.S. No.208 of 1992, the question of denial of execution of Ex.B-3 dividing the property by metes and bounds does not arise. When the plaintiff is a party to the said partition deed, he would have disclosed about the execution of the same and avoided the transaction covered by Ex.B-3 assigning reasons but, strangely, the plaintiff is totally silent about execution of partition deed Ex.B-3. In the written statement the defendants 1 and 2 supported the plaintiff's case in all respects; only 3rd defendant denied the plaintiff's case specifically raising a plea in Para 4 that Item 3 of D schedule building bearing Door No.51, Gandhi Road, Tirupati was allotted to the share of K.C.R. Viswanatham Chetty under registered partition deed dated 30.12.1974 and the same has been affirmed in the decree and judgment in O.S. No.150 of 1978 on the file of I Additional District Munsif, Tirupati filed by K.V. Janardhanam against N.S. Shoukath Ali. Though, the partition covered by Ex.B-3 was pleaded by the 3rd defendant, the plaintiff did not file any rejoinder denying the validity of alleged partition covered by Ex.B-3 or at least admitted the same while contending that it was not intended to act upon. In the absence of any pleading by way of rejoinder, the plaintiff in O.S. No.208 of 1992 is not entitled to adduce any evidence to prove that Ex.B-3 was executed only for income-tax purpose and not intended to act upon. As the plaintiff did not dispute execution of Ex.B-3, the evidence whatever adduced by him and the circumstances in which the original of Ex.A-2 was executed cannot be looked into. In the examination-in-chief of DW.1, he testified that Ex.A-2 was not executed with the consent of all joint family members and they did not accept it and acted upon and that it was prepared for the income-tax remissions and admitted that the property is not self acquired property of K.C.R. Viswanatham Chetty and it is ancestral property. Thus, the evidence of DW.1 with regard to the purpose for which it was executed can be looked into. In the cross-examination of DW.1 by the learned counsel for the 3rd defendant, DW.1

admitted that there were some misunderstandings between him and his wife and there were exchange of notices between them; he expressed his inability in which year his father obtained his signature in the partition deed for the purpose of income tax assessment. He categorically admitted that the original of Ex.A-2 is consisting of 15 pages and in the handwriting of DW.1 himself and that he signed on all sheets of original of Ex.A-2 and his mother is the 4th attester on the original of Ex.A-2. Thus, the unequivocal evidentiary admissions of DW.1 support that the original of Ex.A-2 was executed by the plaintiff, defendants 1 to 3 and their father, K.C.R. Viswanatham Chetty. Yet, another strong circumstance relied upon by learned counsel for the 3rd defendant is execution of relinquishment deed dated 29.10.1977 whereby the plaintiff in O.S. No.208 of 1992 relinquished his right in part of the property; added to that, voluminous documentary evidence produced before the Court like affirmation of partition in the suit in O.S. No.150 of 1978 by the plaintiff K.V. Janardhanam against N.S. Shoukath Ali and marking of the same before the trial Court for consideration. Even in the cross-examination of DW.1, no suggestion was put to him that the partition covered by Ex.B-3 was affirmed in O.S. No.150 of 1978. In the cross-examination, DW.1 admitted that he filed O.S. No.150 of 1978 claiming the property covered by the instant suit and the same was dismissed. Aggrieved by the same, he preferred an Appeal and the Appeal was dismissed. A copy of the decree and judgment in O.S. No.150 of 1978 was produced before the trial Court and acceptance of the partition covered by Ex.B-3 in O.S. No.150 of 1978 was not disputed by the plaintiff and adduced any evidence in support of such contention. Therefore, acceptance of partition covered by Ex.B-3 in O.S. No.150 of 1978 is a strong circumstance to disbelieve the contention of the plaintiff that Ex.B-3 was executed nominally for the purpose of income-tax and not intended to act upon.

70. Ex.A-5 is the registered lease deed dated 09.06.1984 executed by K.C.R. Viswanatham Chetty in favour of T.A. Ziauddin Ahamad and others letting out the property allotted to him. This piece of evidence is also helpful to prove the partition among K.C.R. Viswanatham Chetty and his sons. Ex.A-7 is a bunch of municipal tax receipts which relates to the period prior to the partition under Ex.B-3. Moreover, Ex.A-8 is the demand notice subsequent to partition. All these documents clinchingly show that there was partition of property among K.C.R. Viswanatham Chetty and his sons. If really, there was no partition, the question of letting out the property by executing registered lease deed and rejecting the claim by the Court in O.S. No.150 of 1978, where one of the items of the property allotted to the share of K.C.R. Viswanatham was in dispute, does not arise. In general, when partition was affected by registered document and the same was affirmed in O.S. No.150 of 1978, the Court can presume that there was a partition till it is disproved by any evidence. In the present case, the contention of the plaintiff in O.S. No.208 of 1992, from the beginning, is that it was executed for the purpose of income-tax and such plea was not raised before the Court in the earlier litigation. Curiously, in the suit in O.S. No.150 of 1978 filed by K.V. Janardhanam, he sought permanent injunction restraining N.S.

Shoukath Ali, contending that the schedule property is the joint family property and he is carrying on business of sale of Eveready Batteries and other products of the Union Carbide India Limited under the name and style of Janardhanam and Company and that the defendant therein is trying to interfere with his possession and enjoyment of the property but the defendant therein contested the same raising a specific plea that the building consists of ground floor and two floors and it belongs to K.C.R. Viswanatham Chetty, who is no other than father of the plaintiff therein, in view of the allotment to the share of K.C.R. Viswanatham Chetty under Ex.B-3 dated 30.12.1974. The trial Court framed 2nd issue therein relating to tenancy right of the defendant by virtue of lease deed dated 27.03.1978. In the said suit, a lease deed and partition deed were marked as Exs.B-1 and B-2 and finally concluded that the defendant therein was a tenant under K.C.R. Viswanatham Chetty and that the property was allotted to the share of K.C.R. Viswanatham Chetty. In the suit in O.S. No.208 of 1992, Ex.B-3 clearly disclosed various items of the property allotted to K.C.R. Viswanatham Chetty and the defendants 1 to 3. When a incidental finding was recorded in O.S. No.150 of 1978, marked as Ex.A-4, it is difficult to accept the contention of the plaintiff in O.S. No.208 of 1992; apart from that, in the earlier suit in O.S. No.150 of 1978, the plaintiff did not challenge the partition covered by Ex.B-3 on the ground that it was not intended to act upon and that it was executed only for income-tax purpose but, as an after thought, invented a story that the document was executed for income-tax purpose and filed the suit.

71. When I adverted to the evidence of DW.1 in the examination-in-chief, he asserted that the partition took place under the original of Ex.B-3 was not acted upon and it was prepared for the purpose of income-tax remissions and not intended to act upon and did not act upon. In the cross-examination dated 22.03.1995, he reiterated that the joint family property was not partitioned and that on 30.12.1974 a document was executed by the family members for the purpose of income-tax but in the cross-examination dated 06.04.1995, he admitted that, at the request of his father, he wrote the original of Ex.A- 2 for the purpose of income tax and put his signature on it; the attestors did not put their signatures on the original of Ex.A-2 in his presence but he executed a relinquishment deed dated 29.10.1977 giving up his right in the property. The admission regarding scribing the original of Ex.A-2 by DW.1 himself is sufficient to conclude that DW. 1 with full knowledge about the intention in execution of Ex.B-3 scribed the same. He also examined one G. Ramachandraiah as DW.3 to establish that the original of Ex.A-2 was executed for income tax purpose. DW.3 was a clerk under the 1st defendant in O.S. No.208 of 1992 and his continuing in the same possession since 1952 and testified that K.C.R. Viswanatham Chetty and his sons entered into some documents for division of property for income-tax purpose but Kannaiah Chetty and Janardhanam were looking after the welfare of K.C.R. Viswanatham Chetty. Thus, the purpose of examination of DW.3 is to prove the purpose of execution of Ex.B-3. In the cross-examination by learned counsel for 2nd defendant dated 12.12.1995, DW.3 admitted that in the year

1974 K.C.R. Viswanatham Chetty made division amongst his sons and himself for the purpose of income-tax and he prepared some documents in evidence of such division and in the said division a house bearing Door No.6-144, Eswaragudi street, Puttur fell to the share of K.V. Kannaiah Chetty. In the further cross-examination, he testified that Ex.B-1 was executed for division of all movables after death of K.C.R. Viswanatham Chetty and the plaintiff agreed for division in terms of Ex.B-1. Therefore, execution of Ex.B-1 is not in dispute; when Ex.B-1 was executed only for division of movables of K.C.R. Viswanatham Chetty, the partition of immovable property under Ex.B-3 is to be accepted. If really, the immovable property was not partitioned as per Ex.B-3 that would have been entered into the list of properties agreed to be partitioned in Ex.B-1. Execution of Ex.B-1 itself is sufficient to accept the partition covered by Ex.B-3.

72. K.V. Krishnamoorthy, 1st defendant in O.S. No.208 of 1992 was examined as DW.5 to support the case of the plaintiff, as he is sailing with him; according to his evidence, Ex.B-3 was executed only for income-tax purpose. In the cross-examination by 3rd defendant, DW.5 admitted that he is paying the property tax to the house bearing Door No.9/3, Tirupati Road, Puttur in which he is residing. The said house was mutated in his name in the year 1978 in the panchayat records and paying property tax since 1975; earlier, the house was in the name of his father. Thus, payment of property tax to the panchayat for the house bearing Door No.9/37 which was allotted to him initially is another strong circumstance to believe that house bearing Door No.9/37 was allotted to his share. He further admitted that his father own other buildings in Puttur, adjacent to A.V. Choultry, which was allotted to his share under the original of Ex.A-2, he sold the same to K.M. Satyanarayana Chetty, who in turn demolished the said building, constructed a new one in its place as his father sold away the said house the same is not included in the schedule. He also admitted that his father sold some of the items to 3rd parties but they were not included in the schedule. Yet, he admitted that his father got Ac.2.80 cents in Satyanarayanapuram village under the original of Ex.A-2, which he sold to third parties and that the said land was not included in the suit property. These admissions regarding allotment of various items of the property to K.C.R. Viswanatham Chetty and dealing with the property allotted to K.C.R. Viswanatham Chetty by sale etc., clinchingly establish that the partition was actually effected and acted upon; otherwise, the properties sold to third parties would have been included in the schedule. Therefore, on the strength of those evidentiary admissions, the trial Court concluded that the original of Ex.A-2 was acted upon and it was not intended for income-tax remissions. He further admitted that as per Ex.B-1, the children of K.C.R. Viswanatham Chetty agreed to divide their movable properties belonging to the joint family property prior to 1977 which are in possession of all brothers. This is another strong reason to disbelieve the contention of the plaintiff that Ex.B-3 was not executed for the purpose of income-tax remissions. DW.5, K.V. Krishnamoorthy, also admitted about execution of Ex.B-1 dated 07.01.1989 for partition of movables. In the cross-examination, he reiterated that only movables

are agreed to be divided under the original of Ex.B-1 dated 07.01.1989. Therefore, the cumulative effect of oral evidence, conduct of the parties from the date of execution of Ex.B-3 i.e., sale of various items of the property by K.C.R. Viswanatham Chetty, demolition of building by the purchaser K.M. Satyanarayana Chetty, construction of new building in its place. Likewise, sale of Ac.2.80 cents allotted to K.C.R. Viswanatham Chetty under the original of Ex.A-2, payment of property tax by K.V. Kannaiah Chetty for the property allotted to him i.e., the house bearing Door No.9/37 is sufficient to conclude that the partition of immovable property was already effected and Ex.B-3 was not intended to claim remission under the Income-Tax Act. The plaintiffs in O.S. No.102 of 1985 did not dispute the agreement dated 07.01.1989 but it was executed prior to noticing the deposit of will. Therefore, execution of the partition deed dated 30.12.1974, marked as Ex.B-3, and agreement dated 07.01.1989 are admitted by the plaintiffs in O.S. No.102 of 1985 but in view of the will executed by K.C.R. Viswanatham Chetty and agreement dated 07.01.1989, the 2nd plaintiff in O.S. No.102 of 1985 became entitled to all the properties of K.C.R. Viswanatham Chetty. Therefore, on the strength of the agreement dated 07.01.1989, the plaintiffs in O.S. No.208 of 1992 are not entitled to claim any right enforcing the same. Hence, I hold that Ex.B-3 is true, valid and binding and the agreement dated 07.01.1989 is not enforceable. Accordingly, the point is held in favour of the 2nd plaintiff in O.S. No.102 of 1985 and the 3rd defendant in O.S. No.208 of 1992.

73. Point No.3: The plaintiff in O.S. No.208 of 1992 did not specifically contend the relinquishment deed dated 29.10.1977 was not intended to act upon and it was only obtained for Income-Tax purpose. However, the 3rd defendant denied the said contention while contending that the plaintiff in O.S. No.208 of 1992 having received Rs.35,000/- relinquished his share in part of the property allotted to him i.e., building. Therefore, the relinquishment deed is binding on the plaintiff in O.S. No.208 of 1992. It is further contended that the police complaint given by the 4th defendant in O.S. No.208 of 1992 was registered as Crime No.6 of 1978 of Puttoor police station but the same was referred as false but the relinquishment deed was allegedly obtained by playing fraud and undue influence is false; when the relinquishment deed dated 29.10.1977 is allegedly obtained by force or undue influence, the plaintiff must disclose the particulars of such use of force or undue influence in obtaining the relinquishment deed. The relinquishment deed was not produced by either of the parties before the Court even to find out the circumstances from recitals of the document. When the plaintiff in O.S. No.208 of 1992 wanted to avoid relinquishment deed dated 29.10.1977 on the ground that it was obtained by using force or by undue influence, he must disclose all particulars of such exerting force on him in obtaining document or undue influence as required under Order 6, Rule 4 of C.P.C. which contemplates that in all cases in which the party pleading relies on any misrepresentation, fraud, breach of trust, wilful default, or undue influence, and in all other cases in which particulars may be necessary beyond such as are

exemplified in the forms aforesaid, particulars (with dates and items if necessary) shall be stated in the pleadings.

74. In *Bishundeo Narain and another v. Seogeni Rai and Jagernath*, AIR 1951 SC 280 and *Afsar Sheikh and another v. Soleman Bibi and others*, AIR 1976 SC 163, the Apex Court had an occasion to decide the requirements or particulars of undue influence and coercion and held a plea that a transaction is vitiated because of undue influence of the other party thereto, gives notice merely that one or more of a variety of insidious forms of influence were brought to bear upon the party pleading undue influence, and by exercising such influence, an unfair advantage was obtained over him by the other.

75. The allegations of undue influence and coercion when not separately pleaded that they may overlap in part in some cases but they are separate and separable categories in law and must be separately pleaded. It was also observed that no proper particulars have been furnished. Now, if there is one rule which is better established than any other, it is that in cases of fraud, undue influence and coercion, the parties pleading it must set forth full particulars and the case can only be decided on the particulars as laid. There can be no departure from them in evidence. General allegations are insufficient even to amount to an averment of fraud of which any Court ought to take notice, however strong the language in which they are couched may be, and the same applies to undue influence and coercion.

76. A pleading as required under Order 6, Rule 4 read with Order 6, Rule 2 of C.P.C. must be pleaded, separately, as undue influence and coercion or force are distinct by their nature. By applying the principles laid down in the above decisions to the present facts of the case, I find absolutely no particulars as required under Order 6, Rule 4 of C.P.C.

77. When the plaintiff in O.S. No.208 of 1992 raised a specific plea to avoid the relinquishment deed, the burden heavily lies upon him and the degree of proof is higher than any ordinary plea since such exercising of undue influence would result in penal consequences. Plaintiff in O.S. No.208 of 1992 in the examination-in-chief as DW.1 in O.S. No.102 of 1985 did state nothing as to how force or undue influence was used in obtaining relinquishment deed much less no particulars or details were disclosed in the entire evidence. In the absence of pleading as required under Order 6, Rule 4 of C.P.C. and proof thereto, it is difficult for him to conclude that the relinquishment deed was obtained by using force or undue influence. However, he admitted that there is a partition list for movables dated 03.08.1977 signed by DW.1 and his brothers, wherein two silver glasses and two silver light stands were allotted to the share of plaintiff in O.S. No.208 of 1992 and the list was duly signed by him. It was further stated that his brothers did not take the movables allotted to his share. He categorically made an admission that in the partition list of movables dated 03.08.1977, there was a reference about the execution of relinquishment deed, after receiving a sum of Rs.35,000/- from his brother Kannaiah Chetty but he volunteers that he

did not receive Rs.35,000/- but executed registered relinquishment deed in favour of his brother followed by a suggestion that partition list of movables dated 03.08.1977 was acted upon and actually movables were partitioned. In Ex.A-12, there is a reference about the division of immovable property. Thus, DW.1 admitted about execution of relinquishment deed but wanted to avoid it on the ground that it was obtained by force or undue influence but failed to establish the same producing satisfactory and cogent evidence in support of the specific plea of force and undue influence.

78. K.V. Kannaiah Chetty, 1st defendant in O.S. No.208 of 1992, was examined as DW.4 in O.S. No.102 of 1985, denied execution of relinquishment deed in favour of Janardhanam Chetty, the plaintiff in O.S. No.208 of 1992 receiving a sum of Rs.35,000/- but there is little inconsistency in the evidence. Further, that would not go to the root of the case, more particularly about plea of execution of relinquishment deed. Since the alleged force and undue influence were not established in obtaining the relinquishment deed by the parties. PW.1 K.V. Jayakumar, 2nd plaintiff in O.S. No.102 of 1985 and 3rd defendant in O.S. No.208 of 1992 did not speak anything about the relinquishment deed since initial onus of proof is on the plaintiff in O.S. No.208 of 1992. It is for him to establish the alleged force and undue influence in obtaining the relinquishment deed but failed to plead and prove that all particulars as required under Order 6, Rule 4 of C.P.C. and failed to establish the same by adducing cogent and satisfactory evidence. In the absence of any evidence, the particulars and evidence in support of the plea of execution of relinquishment deed by force and undue influence cannot be accepted. The trial Court rightly disbelieved the said plea and concluded that the relinquishment deed was executed and acted upon with free volition. Even after reappraisal of entire evidence, I find no infirmity in the finding recorded by the trial Court warranting interference of this Court. Accordingly, the point is held against the plaintiff in O.S. No.208 of 1992 and in favour of defendants 3 and 4 therein.

79. Point Nos.4 & 5: One of the contentions of the 2nd plaintiff in O.S. No.102 of 1985 is that his father executed a will in his favour marked as Ex.A-9, bequeathing all his property, deposited the same with the Registrar of Assurances, as per Rules, and it came to the notice of 2nd plaintiff only when he was verifying the almirahs in the house; as he found a receipt issued by the Registrar, immediately he approached the Registrar concerned and obtained a certified copy; thus, by virtue of Ex.A-9-will, the 2nd plaintiff in O.S. No.102 of 1985 became absolute owner of the property that was allotted to his father in the partition under Ex.B-3. Thus, the other children the 1st plaintiff in O.S. No.102 of 1985 are not entitled to claim any right in the property that was allotted to the share of K.C.R. Viswanatham Chetty.

80. The plaintiff in O.S. No.208 of 1992 pleaded ignorance about execution of will marked as Ex.A-9 while contending that it was brought into existence in collusion with the attestors and denied the right of the 2nd plaintiff in O.S. No.102 of 1985

while contending that the property is still continuing as coparcenary property thereby he is not entitled to claim share in the property. I have already recorded a finding on Point No.2 that the partition covered by Ex.B-3 is true, valid and genuine and in the said partition, the properties were allotted to the share of K.C.R. Viswanatham Chetty and his sons.

81. Thereafter, K.C.R. Viswanatham Chetty sold a building and part of agricultural land to third parties i.e., Satyanarayana Chetty; the building was sold to Satyanarayana Chetty but he demolished the same and raised a new construction; similarly, Ac.3.02 cents agricultural land was sold to 3rd parties, who are in occupation and enjoyment of the property. Thus, the partition deed was acted upon. Apart from that there are clear admissions in the evidence of witnesses more particularly the plaintiff in O.S. No.208 of 1992 and the defendants 1 and 2 therein that they are living separately but carrying on their business independently. When there is lot of evidence on record to substantiate the plea of previous partition, this Court believed the partition under the original of Ex.B-3, when the property was partitioned that the share allotted to K.C.R. Viswanatham Chetty became his separate property, he was entitled to deal with the same in his individual capacity being the absolute owner of the same. While dealing with the share of property allotted to K.C.R. Viswanatham Chetty under the original of Ex.B-3, he executed sale deed in respect of house and agricultural land referred in Point No.1 and executed a will marked as Ex.A-9 in favour of the 2nd plaintiff in O.S. No.102 of 1985 and 3rd defendant in O.S. No.208 of 1992 bequeathing his entire estate in his favour. Thereby, the 2nd plaintiff in O.S. No.102 of 1985, being a legatee, succeeded the estate of deceased K.C.R. Viswanatham Chetty and came on record in O.S. No.102 of 1985 filed by his father claiming to be his legal heir, when the 2nd plaintiff in O.S. No.102 of 1985 set-up his claim based on the will with regard to his share of property allotted to his father. Thus, onus of proof is upon him to establish the genuineness of the will at least by examining one of the attesters as required under Section 68 of the Indian Evidence Act, 1872 and under Section 63 of Indian Succession Act, 1925.

82. To substantiate his contentions, the 2nd plaintiff in O.S. No.102 of 1985 was examined as PW.1 therein to testify as to how the will came to his notice, more particularly, finding of the receipt in the almirah after execution of Ex.B-1 agreement. Immediately, he applied for certified copy of the will and obtained the same. There is no dispute regarding signatures appearing on the will and deposit of the will with the Sub-Registrar Office as per Rules 42 to 48 of the Indian Registration Act, 1908 but the contention of the plaintiff in O.S. No.208 of 1992 is that it was brought into existence with the collusion of plaintiffs in O.S. No.102 of 1985 and the scribe and attesters therein. In the entire cross-examination of S.S. Mani, who was examined as PW.2 in O.S. No.102 of 1985, nothing could be elicited to disprove execution of Ex.A-9 will by K.C.R. Viswanatham Chetty bequeathing the property in favour of 2nd plaintiff in O.S. No.102 of 1985.

83. No suspicious circumstances were put to the witness, PW.1 in O.S. No.102 of 1985 in execution of the will. In the cross-examination dated 09.03.1994, PW.1 asserted that his father executed a will dated 06.06.1985; he came to know about it after opening the sealed cover which was kept with the District Registrar, Chittoor but, he does not know about execution of the will during pendency of the suit O.S. No.102 of 1985, before he came on record, and he could find the receipt only when he was searching in almirah. No suggestion was put to PW.1 in O.S. No.102 of 1985 denying execution of the will dated 06.06.1985 by K.C.R. Viswanatham Chetty and its deposit with the Registrar. PW.1 in O.S. No.102 of 1985 clearly asserted that he had no personal knowledge about the contents of original of Ex.A-6 as he was not present at the time of execution but he had gone through the contents of Ex.A-6 only after obtaining copy of the same. One T.V. Narayana Reddy is the scribe and PW.2 is one of the attestors of Ex.A- 6 in O.S. No.102 of 1985.

84. In the absence of denying execution of original of Ex.A-6 and depositing the same with the District Registrar, Chittoor by K.C.R. Viswanatham Chetty, it is difficult to accept the contention of the plaintiff in O.S. No.208 of 1992 and 1st defendant in O.S. No.102 of 1985 that the will is brought into existence collusively. One of the contentions of learned counsel for the plaintiff in O.S. No.208 of 1992 is that the 2nd plaintiff in O.S. No.102 of 1985 and 3rd defendant in O.S. No.208 of 1992 having executed the agreement dated 07.01.1989, set up independent claim based on the will and the same cannot be accepted, more particularly, when the plaintiff in O.S. No.102 of 1985 admitted about execution of the agreement dated 07.01.1989 for partition of the movable property and even, in the notice prior to filing of the suit, he did not disclose about execution of the will. Therefore, it is contended that the will might have been brought into existence only with the collusion of S.S. Mani, examined as PW.2 in O.S. No.102 of 1985 and T.V. Narayana Reddy, the attestors of original of Ex.A-6. The explanation offered by the 2nd plaintiff in O.S. No.102 of 1985 is that by the date of execution of agreement dated 07.01.1989 the will deposited with the District Registrar, Chittoor was not within his knowledge but he came to know about the will while he was searching the almirah; then a receipt evidencing deposit of the will executed by the K.C.R. Viswanatham Chetty with the District Registrar, Chittoor was found. Therefore, by the date of execution of agreement dated 07.01.1989, registered correspondence, the will deposited with the District Registrar was not within his knowledge. Therefore, it is not a ground to disbelieve the will.

85. The plaintiff in O.S. No.208 of 1992 also examined one S.S. Mani as PW.2 to satisfy the requirement under Section 68 of the Indian Evidence Act. S.S. Mani, PW.2 in O.S. No.102 of 1985 testified that he is one of the attestors of the said partition agreement and testified that the deceased K.C.R. Viswanatham Chetty executed the will marked as Ex.A-9, dated 06.06.1985, on which he signed as one of the attestors and another attester of the will on Ex.A-9 is one Kondanda Ram who is now at Kuwait; the said K.C.R. Viswanatham Chetty signed on

Ex.A-9, kept the same in a sealed cover, handed over the same to the District Registrar as deposit. On the body of the sealed cover, PW.2 and scribe of Ex.A-9 put their signatures as identifying witnesses. Ex.A-10 is the cover in which K.C.R. Viswanatham Chetty kept Ex.A-9. The sealed cover was opened at the request of 2nd plaintiff in O.S. No.102 of 1985 in the presence of PW.2 and T.V. Satyanarayana Reddy; T.V. Satyanarayana Reddy and PW.2 put their signatures on the reverse side of Ex.A-9; Ex.A-11 is the endorsement made by the Sub-Registrar on the reverse of Ex.A-9, and put his signatures. In the cross-examination of PW.1 in O.S. No.102 of 1985, he pleaded ignorance about pending litigation between K.C.R. Viswanatham Chetty and his sons by the date of execution of Ex.A-9. However, he admitted that he had acquaintance with T.V. Narayana Reddy for the last 25 to 30 years and that Ex.A-9 was scribed at Chittoor on 06.06.1985, submitted to the Registrar on the same day itself. He further admitted that till the cover was opened, he did not tell anything about execution of the will to the 2nd plaintiff in O.S. No.102 of 1985 and that PW.1 came to know about the will only during search and took PW.2 to the District Registrar, Chittoor. Thus, the consistent evidence on record established that K.C.R. Viswanatham Chetty executed Ex.A-9 will, kept the same in Ex.A-10 sealed cover with the District Registrar, Chittoor and it was opened only subsequent to his death in the presence of T.V. Narayana Reddy and PWs.1 and 2 in O.S. No.102 of 1985; Sub-Registrar made an endorsement on the reverse of Ex.A-9, which is marked as Ex.A-11. In the entire cross-examination of PW.2, nothing has been elicited to disprove the execution of Ex.A-9 will, depositing the same with the District Registrar by K.C.R. Viswanatham Chetty. However, a bald suggestion was put to PW.2 that Ex.A-9 was brought into existence by PWs.1 and 2 in collusion with T.V. Narayana Reddy to defeat the claim of the plaintiff in O.S. No.208 of 1992, got denial of the same. It is also suggested that K.C.R. Viswanatham Chetty had no right to execute the will during pendency of O.S. No.102 of 1985 but this contention cannot be accepted for the reason that, in case, K.C.R. Viswanatham Chetty succeeds in the suit, the legatee under the will is entitled to claim the property under testamentary dispossession covered under Ex.A-9, executed by K.C.R. Viswanatham Chetty. There is no bar against execution of the will during pendency of any litigation. Therefore, this contention of the plaintiff in O.S. No.208 of 1992 is without any substance.

86. Learned counsel for the plaintiff in O.S. No.208 of 1992 would contend that there is a discrepancy regarding name of the attester on Ex.A-9; according to PW.1, T.V. Narayana Reddy is one of the attesters of Ex.A-9 whereas according to PW.2, PW.2 himself and his driver Kondanda Ram attested Ex.A-9. As seen from the material available on record T.V. Narayana Reddy was the attester of Ex.A-11 endorsement made by Sub-Registrar on the reverse of Ex.A-9 but not the attester of Ex.A-9. This discrepancy is only due to confusion and the inability to distinguish the attestation of Exs.A-9 and 11. Therefore, the discrepancy pointed by the learned counsel for the plaintiff in O.S. No.208 of 1992 is insignificant and the same can be discarded as a minor discrepancy. The trial Court believing the

evidence of PWs.1 and 2 in O.S. No.102 of 1985 accepted the will marked as Ex.A-9 but before this Court only basing on the discrepancy which I have mentioned in the earlier paragraphs disputed the execution of the will. In fact, it was not the case of the plaintiff in O.S. No.208 of 1992 that the will was forged or surrounded by any suspicious circumstances. A perusal of entire evidence on record, there is absolutely no evidence pointing out the suspicious circumstances in execution of Ex.A-9 will by K.C.R. Viswanatham Chetty.

87. Coming to the evidence of DW.1 in O.S. No.102 of 1985, the plaintiff in O.S. No.208 of 1992, except contending that the will Ex.A-9 was brought into existence in collusion with PW.2 and T.V. Narayana Reddy, nothing has been stated about the surrounding suspicious circumstances in execution of Ex.A-9. On the other hand, in the cross-examination dated 18.04.1995, DW.1 stated that he cannot identify the signature of his father and that he does not know whether Ex.A-9 was executed by his father on 06.06.1985 and kept in a sealed cover, Ex.A- 10, deposited with the District Registrar, Chittoor during pendency of suit in O.S. No.102 of 1985. More curiously, DW.1 pleaded ignorance about impleadment of 2nd plaintiff K.V. Jaya Kumar as a legatee under the will in O.S. No.102 of 1985 also. When DW.1 is prosecuting suit, he is supposed to know the impleadment of the 2nd plaintiff to O.S. No.102 of 1985; his entire evidence at best goes to show that he is unaware of execution of Ex.A-9 by his father K.C.R. Viswanatham Chetty, which does not mean that his father never executed any will; added to that, there was impending litigation between DW.1 and K.C.R. Viswanatham Chetty in O.S. No.102 of 1985 by the date of execution of Ex.A-9 and that they are fighting for rights in immovable property by filing one suit or the other; certainly K.C.R. Viswanatham Chetty would have developed some animosity against DW.1 and not supposed to execute any will in his favour. All the more, PW.1 is one of the sons supporting K.C.R. Viswanatham Chetty in all his businesses and out of love and affection, K.C.R. Viswanatham Chetty might have executed the will. Similarly, the other sons are not amicable with K.C.R. Viswanatham Chetty for one reason or the other. In such case, exclusion of other sons from inheriting the property allotted to the share of K.C.R. Viswanatham Chetty by testamentary dispossession marked as Ex.A-9 is not an improbable circumstance. On the other hand, it is a natural circumstance to accept execution of will as the 2nd plaintiff in O.S. No.102 of 1985 alone was amicable with K.C.R. Viswanatham Chetty and the other sons are ill disposed off and fighting for their rights in the property allotted to the share of K.C.R. Viswanathma Chetty for one reason or the other. Hence, execution of Ex.A-9 in favour of PW.1 is bound to be accepted. Of course, the other brothers, who are ill disposed of against plaintiffs 1 and 2 in O.S. No.102 of 1985 denied execution of will without pointing out any suspicious circumstances. In those circumstances, the trial Court rightly believed execution of Ex.A-9 by K.C.R. Viswanatham Chetty, 1st plaintiff in O.S. No.102 of 1985 in favour of K.V. Jaya Kumar, 2nd plaintiff in O.S. No.102 of 1985.

88. It is not the case of any of the parties to the suits that the signatures of executants on Ex.A-9 are not that of K.C.R. Viswanatham Chetty and that they

are forged. In the absence of any such plea, Ex.A- 9 will, is to be accepted when no suspicious circumstances are pointed out in its execution and as such the trial Court accepted Ex.A-9 will. It is settled law that the propounder of the will has to not only examine one of the attestors as witnesses before the Court but also to prove execution of the will to dispel all the suspicious circumstances, if any, pointed out by the other party by adducing cogent and satisfactory evidence, as held by the Apex Court in *Gorantla Thataiah v. Thotakura Venkata Subbaiah and others*, AIR 1968 SC 1332, wherein it was held as follows:

"6. It is well established that in a case in which a will is prepared under circumstances which raise the suspicion of the court that it does not express the mind of the testator it is for those who propound the will to remove that suspicion. What are suspicious circumstances must be judged in the facts and circumstances of each particular case. If, however, the propounder takes a prominent part in the execution of the will which confers substantial benefits on him that itself is a suspicious circumstance attending the execution of the will and in appreciating the evidence in such a case, the Court should proceed in a vigilant and cautious manner."

89. In *Surendra Pal and others v. Dr. (Mrs.) Saraswati Arora and another*, AIR 1974 SC 1999, the Apex Court reiterated the general principle as to how a will is to be proved and held as follows in Para 7:

"7. The propounder has to show that the will was signed by the testator: that he was at the relevant time in a sound disposing state of mind, that he understood the nature and effect of the dispositions, that he put his signature to the testament of his own free will and that he has signed it in the presence of the two witnesses who attested it in his presence and in the presence of each other. Once these elements are established, the onus which rests on the propounder is discharged. But there may be cases in which the execution of the will itself is surrounded by suspicious circumstances, such as, where the signature is doubtful, the testator is of feeble mind or is overawed by powerful minds interested in getting his property, or where in the light of the relevant circumstances the dispositions appear to be unnatural, improbable and unfair, or where there are other reasons for doubting that the dispositions of the will are not the result of the testator's free will and mind. In all such cases where there may be legitimate suspicious circumstances those must be reviewed and satisfactorily explained before the will is accepted. Again in cases where the propounder has himself taken a prominent part in the execution of the will which confers on him substantial benefit that is itself one of the suspicious circumstances which he must remove by clear and satisfactory evidence. After all, ultimately it is the conscience of the Court that has to be satisfied, as such the nature and quality of proof must be commensurate with the need to satisfy that conscience and remove any suspicion which a reasonable man may, in the relevant circumstances of the case, entertain. See *H. Venkatachala Tyengar v. B.N. Thimmajamma and Others*, [1959] Supp 1 SCR 426 ; (1) and *Rani Purnima*

Debi and Another v. Kumar Kbagendra Narayan Dev and Another, [1962] 3 SCR 195. In the latter case this Court, after referring to the principles stated in the former case emphasised that where there are suspicious circumstances the onus will be on the propounder to explain them to the satisfaction of the Court before the will could be accepted as genuine; and where the caveator alleges undue influence, fraud and coercion the onus is on him to prove the same."

90. In *Bharpur Singh and others v. Shamsheer Singh*, (2009) 3 SCC 687, the Apex Court observed that when a Will is surrounded by suspicion, it would not be treated as last testamentary dispossession of the testator and held as follows:

"When a will is shrouded in suspicion, its proof ceases to be simple lis between the plaintiff and defendant. An adversarial proceeding in such cases becomes a matter of Court's conscience and propounder of the will has to remove all suspicious circumstances to satisfy that the will was duly executed by the testator where for cogent and convincing explanation of suspicious circumstances shrouding the making of a will must be offered.

91. It was further held that when propounder took interest in execution of the will is one of the factors which should be taken into consideration for determination of due execution of the will. The propounder of the will must prove : (i) that the will was signed by the testator in a sound and disposing state of mind duly understanding the nature and effect of disposition and he put his signature on the document of his own free will, and (ii) when the evidence adduced in support of the will is disinterested, satisfactory and sufficient to prove the sound and disposing state of the testator's mind and his signature as required by law, Courts would be justified in making a finding in favour of propounder.

92. In *Yumnam Ongbi Tampha Ibema Devi v. Yumnam Joykumar Singh and others*, (2009) 4 SCC 780, the Apex Court while reiterating the requirements of Will relied on its earlier judgment in *Daulat Ram v. Sodha*, (2005) 1 SCC 40, wherein it was held as follows at Para 10:

"10. Will being a document has to be proved by primary evidence except where the court permits a document to be proved by leading secondary evidence. Since it is required to be attested, as provided in Section 68 of the Evidence Act, 1872, it cannot be used as evidence until one of the attesting witnesses at least has been called for the purpose of proving its execution, if there be an attesting witness alive, and subject to the process of the court and capable of giving evidence. In addition, it has to satisfy the requirements of Section 63 of the Succession Act, 1925. In order to assess as to whether the will has been validly executed and is a genuine document, the propounder has to show that the will was signed by the testator and that he had put his signatures to the testament of his own free will; that he was at the relevant time in a sound disposing state of mind and understood the nature and effect of the dispositions and that the testator had signed it in the presence of two witnesses who attested it in his

presence and in the presence of each other. Once these elements are established, the onus which rests on the propounder is discharged. But where there are suspicious circumstances, the onus is on the propounder to remove the suspicion by leading appropriate evidence. The burden to prove that the will was forged or that it was obtained under undue influence or coercion or by playing a fraud is on the person who alleges it to be so."

93. In *M.B. Ramesh (Dead) By Legal Representatives v. K.M. Veeraje Urs (Dead) By Legal Representatives*, (2013) 7 SCC 490, the Apex Court held that a Will has to be proved in the manner required by Section 63 of the Succession Act. As per Section 68 of the Evidence Act, a will is to be proved by examining at least one attesting witness. However, it does not absolve the obligation of said party from proving valid execution of will by not examining available and alive witnesses.

94. In view of the law laid down by Apex Court, I find absolutely no suspicious circumstances in execution of Ex.A-9 and as such PW.1 proved that K.C.R. Viswanatham Chetty executed the will in sound disposing state of mind, deposited with the District Registrar, Chittoor in a sealed cover, Ex.A-10, and it was opened only after his death in the presence of PW.2 and T.V. Narayana Reddy, attested by the Sub-Registrar, under Ex.A-11. Strangely, in the instant cases, in view of the evidence adduced by the defendants, the burden of proof on the plaintiff is lighter than in any ordinary circumstances for the reason that no suspicious circumstances were pointed out in execution of Ex.A-9. Hence, the trial Court did commit no error in accepting Ex.A-9 will.

95. The trial Court accepted execution of Ex.A-9, 2nd plaintiff in O.S. No.102 of 1985 became absolute owner of the estate of deceased K.C.R. Viswanatham Chetty and thereby he is entitled to recover possession of the schedule property in O.S. No.102 of 1985 as legatee under the will since the possession of plaintiff in O.S. No.208 of 1992 is un-authorised.

96. One of the grounds urged by the 1st defendant in his written statement in O.S. No.102 of 1985 is that he perfected his title to the property by adverse possession. No doubt, a bare allegation is made in the written statement filed in O.S. No.102 of 1985 that he perfected his title by adverse possession and in the plaint in O.S. No.208 of 1992 he claimed that he is one of the joint owners of the property covered by schedule in O.S. No.102 of 1985; when he is pleading that he is a coowner or joint owner of the schedule property in O.S. No.102 of 1985, he is not entitled to set-up the plea of adverse possession unless the other co-sharers or joint owners are ousted from enjoying the property for over a period of 12 years after setting up hostile title against them. The trial Court, based on various decisions, concluded that the plea in the written statements in O.S. No.102 of 1985 and the plea in O.S. No.208 of 1992 are self contradictory and neither of them can be accepted. Even otherwise, when the 1st defendant in O.S. No.102 of 1985 set-up a plea of adverse possession, he must not only plead but also prove the three requirements as held by the Privy Council in *Secretary of State for India v. Debendra Lal Khan*, AIR 1934 PC 23, wherein it was observed

that the ordinary classical requirement of adverse possession is that it should be "nec vi, nec clam, nec precario" and the possession required must be adequate in continuity, in publicity and in extent to show that possession is adverse to the competitor.

97. In *S.M. Karim v. Bibi Sakina*, AIR 1964 SC 1254, the Apex Court observed as under:

"Adverse possession must be adequate in continuity, in publicity and extent and a plea is required at the least to show when possession becomes adverse so that the starting point of limitation against the party affected can be found. There is no evidence here when possession became adverse, if it at all did and a mere suggestion in the relief clause that there was an uninterrupted possession for "several 12 years" or that the plaintiff had acquired "an absolute title was not enough to raise such a plea. Long possession is not necessarily adverse possession and the prayer clause is not a substitute for a plea."

98. In *Hemaji Waghaji Jat v. Bhikhabhai Khengarbhai Harijan and others*, 2008 (6) ALD 121 (SC), the Apex Court in Para 23 held as follows:

"23. There is another aspect of the matter, which needs to be carefully comprehended. According to *Revamma's* case, the right of property is now considered to be not only a constitutional or statutory right but also a human right. In the said case, this Court observed that "Human rights have been historically considered in the realm of individual rights such as, right to health, right to livelihood, right to shelter and employment, etc. but now human rights are gaining a multifaceted dimension. Right to property is also considered very much a part of the new dimension. Therefore, even claim of adverse possession has to be read in that context. The activist approach of the English Courts is quite visible from the judgments of *Beaulane Properties Limited v. Palmer*, (2005) 3 WLR 554 and *JA Pye (Oxford) Limited v. United Kingdom*, (2005) 49 ERG 90. The Court herein tried to read the human rights position in the context of adverse possession. But what is commendable is that the dimensions of human rights have widened so much that now property dispute issues are also being raised within the contours of human rights."

99. The Apex Court in *Mandal Revenue Officer v. Goundal Venkaiah and another*, 2010 (2) ALD 115 (SC), relying on its earlier judgment in *Anakili v. A. Vedanayagam*, 2007 (14) SCC 308 held as follows:

"Claim by adverse possession has two elements: (1) the possession of the defendant should become adverse to the plaintiff; and (2) the defendant must continue to remain in possession for a period of 12 years thereafter. Animus possidendi as is well known is a requisite ingredient of adverse possession. It is now a well-settled principle of law that mere possession of the land would not ripen into possessory title for the said purpose. Possessor must have animus possidendi and hold the land adverse to the title of the true owner. For the said purpose, not only animus possidendi must be shown to exist, but the same must

be shown to exist at the commencement of the possession. He must continue in the said capacity for the period prescribed under the Limitation Act. Mere long possession, it is trite, for a period of more than 12 years without anything more does not ripen into a title."

100. The Apex Court in *P.T. Munichikkana Reddy v. Revamma*, 2007 (6) SCC 59 considered various facets of the law of adverse possession and laid down various propositions including the following:

"Adverse possession in one sense is based on the theory or presumption that the owner has abandoned the property to the adverse possessor on the acquiescence of the owner to the hostile acts and claims of the person in possession. It follows that sound qualities of a typical adverse possession lie in it being open, continuous and hostile. To assess a claim of adverse possession, two-prolonged enquiry is required: 1. Application of limitation provision thereby jurisprudentially "wilful neglect" element on part of the owner established. Successful application in this regard distances the title of the land from the paper-owner. 2. Specific positive intention to dispossess on the part of the adverse possessor effectively shifts the title already distanced from the paperowner, to the adverse possessor. Right thereby accrues in favour of adverse possessor as intent to dispossess is an express statement of urgency and intention in the upkeep of the property."

101. The Apex Court in *T. Anjappa and others v. Somalingappa and another*, 2006 (7) SCC 570, held as follows:

"The concept of adverse possession contemplates a hostile possession i.e. a possession which is expressly or impliedly in denial of the title of the true owner. Possession to be adverse must be possession by a person who does not acknowledge the other's rights but denies them. A person who bases his title on adverse possession must show by clear and unequivocal evidence that his property claimed. For deciding whether the alleged acts of a person constituted adverse possession, the animus of the person doing those acts is the most crucial factor. Adverse possession is commenced in wrong and is aimed against right. A person is said to hold the property adversely to the real owner when that person in denial of the owner's right excluded him from the enjoyment of his property. Adverse possession is that form of possession or occupancy of land which is inconsistent with the title of the rightful owner and tends to extinguish that person's title. Possession is not held to be adverse if it can be referred to a lawful title. An occupation of reality is inconsistent with the right of the true owner. Where a person possesses property in a manner in which he is not entitled to possess it, and without anything to show that he possesses it otherwise than an owner (that is, with the intention of excluding all persons from it, including the rightful owner), he is in adverse possession of it. It is the basic principle of law of adverse possession that (a) it is the temporary and abnormal separation of the property from the title of it when an man holds property innocently against all the world but wrongfully against the true owner; (b) it is possession inconsistent with the title of the true owner."

102. In view of the law declared by the Apex Court and other High Courts, in the decisions referred supra, in the instant cases, there is absolutely no plea as to when the 1st defendant set-up hostile title against K.C.R Viswanatham Chetty and his son K.V. Jaya Kumar, plaintiffs 1 and 2 in O.S. No.102 of 1985, and in continuous possession thereafter for a period of 12 years without any obstruction from any 3rd parties. Therefore, the 1st defendant in O.S. No.102 of 1985 and plaintiff in O.S. No.208 of 1992 miserably failed to prove the requirements to claim right based on adverse possession. The trial Court rightly declined to accept the contention of the defendants in O.S. No.102 of 1985.

103. When the 1st defendant in O.S. No.102 of 1985 is admittedly in unauthorized possession of the property, he is bound to vacate and deliver vacant possession of the property. The plaintiffs in O.S. No.102 of 1985 claimed right in the property based on the partition deed and its allotment to the share of K.C.R .Viswanatham Chetty; thereafter, bequeathed to the 2nd plaintiff under Ex.A-9. Therefore, the 2nd plaintiff became an absolute owner of the property as a legatee under the will Ex.A-9 and entitled to recover possession of the property under Section 5 of the Specific Relief Act. Therefore, the trial Court rightly granted a decree in favour of the 2nd plaintiff in O.S. No.102 of 1985 directing the 1st defendant to deliver vacant possession of the schedule property to the 2nd plaintiff and I find no illegality in the findings recorded by the trial Court in passing the decree in O.S. No.102 of 1985. Therefore, I have no option except to uphold the finding recorded by the trial Court. Accordingly, the findings of the trial Court are upheld holding these points in favour of the 2nd plaintiff in O.S. No.102 of 1985 and against the defendants therein.

104. Point No.6: The plaintiff in O.S. No.208 of 1992 claimed share in Items 5 and 6 of A schedule property as if those properties were acquired in the name of 4th defendant, wife of K.C.R. Viswanatham Chetty by himself and she had no source of independent income to acquire the property but the contention of the 3rd defendant in O.S. No.208 of 1992, 2nd plaintiff in O.S. No.102 of 1985 and 4th defendant in O.S. No.208 of 1992 is that those two items are separate properties of 4th defendant and she acquired those two items with the sale proceeds of the property given to her as "stridhana".

105. As the plaintiff in O.S. Nos.208 of 1992 claimed Items 5 and 6 of A schedule are the joint family properties, it is for him to establish that the coparcenary possess sufficient source of income to acquire those 2 items; then only the burden will shift on to the defendants 3 and 4 in O.S. No.208 of 1992 to establish that those items are separate property of 4th defendant. Here, undisputedly, the original coparcenary possessed sufficient means to acquire Items 5 and 6 of A schedule property. Therefore, the burden is upon the 3rd and 4th defendants to establish that those 2 items were purchased with the sale proceeds of the property given to 4th defendant by her parents as "stridhana". In fact, these 2 items were excluded from partition covered by Ex.B-3. If really, these two items are the coparcenary property, nothing prevented the children of K.C.R.

Viswanatham Chetty to raise a dispute for inclusion of those 2 items in the partition but having kept quiet, after a long time from the date of execution of Ex.B-3, filed the present suit. Failure to claim right by the date of execution of Ex.B-3 is another strong circumstance to believe that the property was treated as separate property of the 4th defendant; that apart, there is oral evidence on record that 4th defendant was given property by her parents at the time of her marriage as "stridhana".

106. Mere proof of possessing sufficient nucleus by the plaintiff in O.S. No.208 of 1992 alone is not sufficient to treat the transactions pertaining to Items 5 and 6 as benami transactions. When the plaintiff never contended that the property was purchased as benami, the question of adducing any evidence to prove that it is a benami transaction is impermissible under law, as there is no factual foundation in the pleadings. Even if it is pleaded that the property was acquired in the name of 4th defendant by the sale proceeds of her property given by her parents at the time of her marriage as "stridhana", still the burden is upon the plaintiff to prove that it was acquired with the joint family nucleus and it is not the separate property of the 4th defendant.

107. The source from where the purchase money came and the motive why the property was purchased benami are by far the most important tests for determining whether the sale standing in the name of one person, is in reality for the benefit of another. It is well settled that intention of the parties is the essence of the benami transaction and the money must have been provided by the party invoking the doctrine of benami.

108. In similar circumstances, this Court in Ramaiah v. Singaraiah, 1973 (2) APLJ 10 (SN), held as follows:

"Each factor by itself may be decisive, but the cumulative effect or the totality of all the relevant and material factors should be the safe guide for determining the benami nature or otherwise of a transaction."

109. In Lachu Reddy v. Venkamma, 1956 An.W.R.943, this Court held as follows:

"In a benami transaction, the intention of the parties is the essence of the transaction and the source of the sale price also plays a large part in the determination of the nature of the transaction."

110. In Ramarao v. Srikrishna Murthi, AIR 1962 AP 226, this Court laid down four tests to determine the nature of a transaction, which are as follows:

- "1. Motive for taking the sale deed in the name of another.
2. Custody of the sale deed and connected vouchers.
3. Passing of consideration; and
4. Possession of the property."

111. In Jaydayal Poddar (deceased) v. Mrs. Bibi Hazra and others, AIR 1974 SC

171, the Apex Court laid down certain tests to decide the nature of a transaction and ruled as follows:

"It is well settled that the burden of proving that a particular sale is benami and the apparent purchaser is not the real owner, always rests on the person asserting it to be so. This burden has to be strictly discharged by adducing legal evidence of a definite character which would either directly prove the fact of benami or establish circumstances, unerringly and reasonably raising an inference of that fact. The essence of a benami is the intention of the party or parties concerned; and not unoften such intention is shrouded in a thick veil which cannot be easily pierced through. But such difficulties do not relieve the person asserting the transaction to be benami of any part of the serious onus that rests on him; nor justify the acceptance of mere conjectures or surmises, as a substitute for proof. The reason is that a deed is a solemn document prepared and executed after considerable deliberation and the person expressly shown as the purchaser or transferee in the deed, starts with the initial presumption in his favour that the apparent state of affairs is the real state of affairs."

112. In view of the law laid down by the Apex Court, the plaintiffs not only have to establish that the coparcenary possessed sufficient nucleus and that K.C.R. Viswanatham Chetty had no intention to confer any benefit on his wife i.e., 4th defendant. Here, the plaintiff in O.S. No.208 of 1992 made a bald allegation that it was acquired by K.C.R. Viswanatham Chetty in the name of his wife, 4th defendant, and it is a benami transaction but nothing was brought on record to establish that K.C.R. Viswanatham Chetty intended to confer any benefit on his wife. Therefore, in view of the facts and circumstances of the case, it is difficult to hold that Items 4 and 5 of A schedule were acquired with the coparcenary and that it is part of coparcenary property and is liable to be divided.

113. On the other hand, the plaintiff in O.S. No.208 of 1992 also claimed right in B schedule property which was bequeathed in favour of 2nd plaintiff in O.S. No.102 of 1985 and 3rd defendant in O.S. No.208 of 1992 by virtue of will marked as Ex.B-9. According to my finding on earlier points, the 3rd defendant in O.S. No.208 of 1992 and 2nd plaintiff in O.S. No.102 of 1985 became the absolute owner of the property and thereby the plaintiff in O.S. No.208 of 1992 is not entitled to claim any share in the same.

114. The plaintiff in O.S. No.208 of 1992 also claimed share in movables as per the inventory report submitted by the Advocate Commissioner. All these items were found in exclusive possession of the 2nd plaintiff in O.S. Nos.102 of 1985 and 3rd defendant in O.S. No.208 of 1992 by the Commissioner and those items were belonging to K.C.R. Viswanatham Chetty when K.C.R. Viswanatham Chetty executed the will Ex.A-9, the 3rd defendant in O.S. No.208 of 1992 and the 2nd plaintiff in O.S. No.102 of 1985 alone became entitled to claim movables which are in his exclusive possession as on the date of conducting inventory by the Advocate Commissioner. Hence, the 2nd plaintiff in O.S. No.102 of 1985 and 3rd defendant in O.S. No.208 of 1992 is the owner of the movables as per inventory

report submitted by the Advocate Commissioner and, consequently, the plaintiff in O.S. Nos.208 of 1992 is not entitled to claim any share in the property. After elaborate consideration of entire material on record, the trial Court concluded that there was a partition covered by Ex.A-2 and allotted different items to the share of different coparceners under Ex.A-2, equivalent to Ex.B-3, and later, the 1st defendant in O.S. No.208 of 1992 executed a relinquishment deed in favour of the plaintiff therein and mutated their names in the panchayat and municipal records including revenue records for the property allotted to their share; that apart, K.C.R. Viswanatham Chetty alone sold some of the items of the property allotted to his share dealing the same as his separate property. In those circumstances, the previous partition covered by Ex.B-3 was accepted as it was acted upon by all the members of the coparcenary. Similarly, the trial Court believed the will and rightly denied the relief of partition and it warrants no interference of this Court, even in these Appeals.

115. The plaintiff in O.S. No.206 of 1992 filed the suit for partition of entire schedule property as if there was no partition. Curiously, the 1st defendant therein i.e., the plaintiff in O.S. No.208 of 1992 did not contest the matter that itself indicates that the said suit was got filed by the plaintiff in O.S. No.208 of 1992 through his son represented by his mother. When this Court accepted the partition covered by Ex.B-3 and the will executed by K.C.R. Viswanatham Chetty, marked as Ex.A-9, in favour of the 2nd plaintiff in O.S. No.102 of 1985, at best, the plaintiff in O.S. No. 206 of 1992 is entitled to claim share in the property allotted to his father, the plaintiff in O.S. No.208 of 1992 and not in the entire schedule property. Therefore, the claim of the plaintiff in O.S. No.206 of 1992 is untenable claim for partition of entire schedule property by the plaintiff in O.S. No.208 of 1992 and the same was rightly rejected by the trial Court, which do not call for interference as it suffers from no legal infirmity. Hence, the point is answered against the plaintiff in O.S. No.206 and 208 of 1992 and in favour of the 2nd plaintiff in O.S. No.102 of 1985.

116. In the result, the Appeal Suit Nos.2424, 2476 of 1996 and 238 of 1998 are dismissed.

117. In consequence, miscellaneous petitions, if any, pending in these Appeals, shall stand dismissed. No order as to costs.