

(2013) 06 MAD CK 0233

In the Madras High Court

Case No : S.A. No's. 4 and 5 of 2009 and M.P. No. 1 of 2009 and M.P. No. 1 of 2013

S. Ramasamy

APPELLANT

Vs

S. Subramanian

RESPONDENT

Date of Decision : 14-06-2013

Acts Referred:

Citation : (2013) 4 CTC 710

Hon'ble Judges : G. Rajasuria, J

Bench : Single Bench

Advocate : Hema Sampath, for R. Meenal, for the Appellant; N. Manokaran, Advocate, for the Respondent

Judgement

G. Rajasuria, J.—These Second Appeals are focussed animadverting upon the Judgments and Decrees dated 12.8.2008 in A.S. Nos. 33 & 34 of 2007 passed by the learned Principal District Judge, Salem confirming the Judgments and Decrees dated 16.11.2007 in O.S. Nos. 10 of 2006 & 19 of 2005 passed by the learned Subordinate Judge, Sankagiri. The parties are referred to hereunder according to their litigative status and ranking before the Trial Court.

2. Compendiously and concisely, the germane facts, as stood uncertained, absolutely necessary for the disposal of these two Second Appeals, would run thus:

The Plaintiff/Ramasamy initially filed the Suit O.S. No. 10 of 2006 seeking the following reliefs in respect of the immovable properties described in the schedule of the Plaint:

(a) To restrain the Defendant No. 2, his men and his power of attorney agents from in any manner alienating or encumbering or creating any kind of documents in respect of the Plaintiff's common 1/3 share of the suit properties, till final partition takes place between the Plaintiff and the Defendant No. 2 by metes and bounds, in respect of the suit properties, by decree of permanent injunction; and

(b) For costs.

Description of Properties

as against his father Sengoda Gounder as well as his younger brother Subramanian. During the pendency of the said Suit, the same Plaintiff, and that too after the death of his father Sengoda Gounder, filed the Partition Suit seeking the following reliefs:

(a) To direct the division of the suit properties which more fully described in the Plaint schedule hereunder, into 15 equal and just shares, by metes and bounds and allotting 6 of such separated shares to the Plaintiff towards his joint 6/15 shares in the suit properties and further directing the Defendants Nos. 1 to 4 to deliver actual possession of the Plaintiff's 6/15 separated shares to the Plaintiff and thereby put the Plaintiff in possession of such 6/15 separated shares and also making necessary provisions in the preliminary decree, for appointment of commissioner to effect partition and division of the suit property by metes and bounds and thereby permitting the Plaintiff to apply for appointment of commissioner for effecting such division and partition of the suit property, by metes and bounds.

(b) To restrain the Defendant No. 1 from in any manner cutting away and removing the existing trees in the suit properties, till the final decree is passed in the above Suit, by a decree of permanent injunction; and

(c) For costs.

(Extracted as such)

3. The epitome and the long and the short of the averments of the Plaintiff in those Suits could succinctly and precisely be set out thus:

The Plaintiff and his father and his younger brother constituted a Hindu Joint Family which owned ancestral properties. While so, the father of the Plaintiff, namely Sengoda Gounder, by way of settlement, got the suit properties, vide Ex. A1 dated 7.4.1956-the Settlement Deed executed by one Kumarasamy Gounder in favour of Sengoda Gounder. Ever since that time, the suit properties along with the ancestral properties were treated as Joint Family properties and all the three coparceners were enjoying them together. Inasmuch as the father and the younger brother of the Plaintiff, in collusion with each other, were attempting to alienate the suit properties, the first Injunction Suit was filed. After the death of the father, during the pendency of the Injunction Suit, the other Suit was filed seeking partition.

4. Per contra, refuting and challenging, inveighing and gainsaying, Subramanian/ D2 in O.S. No. 10 of 2006 & D1 in O.S. No. 19 of 2005, being the younger brother of the Plaintiff Ramasamy in both the Suits, filed the Written Statements, the gist and kernel of his pleas would run thus:

No Hindu Joint Family at all ever existed among Sengoda Gounder and his two

sons, namely Ramasamy and Subramanian. The suit properties were obtained by Sengoda Gounder as per Ex. A1-the Settlement Deed, during the year 1956 as his self acquired properties. Sengoda Gounder's sons, namely Ramasamy and Subramanian had nothing to do with the suit properties and they had no proprietary right or share in that, and which were never treated as Joint Family properties. In fact, Sengoda Gounder, during his life time, executed two Settlement Deeds Exs. A13 & A14 in favour of Subramanian and subsequently he also executed Ex. B24, a Will dated 8.11.2004 in favour of Subramanian. As such, Subramanian-the Defendant became the absolute owner of the suit properties and both the Suits are misconceived ones. Over and above that, the second suit is also barred by Order 2, Rule 2 of CPC as even before filing of the injunction Suit, he issued notice seeking partition. While so, without any rhyme or reason and without obtaining any permission from the Court at the time of filing the Injunction Suit, to file a Partition Suit subsequently, he simply filed the second Suit, which was barred by Order 2, Rule 2 of CPC. In fact, Ramasamy purchased separately properties in his own name. Accordingly, Subramanian the Defendant sought for the dismissal of both the Suits.

5. Whereupon the Trial Court framed the issues. Up went the joint trial of both the Suits, during which the Plaintiff/Ramasamy examined himself as PW-1 along with PWs. 2 to 4 and Exs. A1 to A46 were marked; and Subramanian, who is D2 in O.S. No. 10 of 2006 & D1 in O.S. No. 19 of 2005 examined himself as DW-1 along with DWs. 2 to 4 and Exs. B1 to B31. Exs. X1 to X15 were marked as Court documents.

6. Ultimately the Trial Court dismissed both the Suits as against which the Appeals were filed by the Plaintiff for nothing but to be dismissed by the Appellate Court confirming the judgments and decrees of the Trial Court.

7. Challenging and impugning the judgments and decrees of both the Courts below, these two Second Appeals have been focussed on various grounds and also suggesting the following substantial questions of law:

(1) Whether in law the Courts below are right in omitting to see that the private property of Sengoda Gounder was blended with the ancestral property and that the Appellant had a share in these properties ?

(2) Whether in law the Courts below are not wrong in overlooking that Ex. B24-Will and Exs. A13 & A14-Settlement Deeds were not proved in a manner known to law ?

(3) Whether in law the Courts below are right in failing to see that even otherwise Sengoda Gounder had a right to dispose of only his undivided 1/3rd share ?

(Extracted as such)

8. On hearing both sides, I thought fit to formulate the following substantial questions of law to the knowledge of both sides:

(1) Whether both the Courts below were justified in holding that the generosity shown by Sengoda Gounder should not be treated as an act of blending of the suit properties with the ancestral properties and whether the Courts below were justified in ignoring the factum of describing the properties found in Ex. A1 as "Pidhirajyam" (Ancestral property) and also Exs. A19, 24, 45 and 46 and in deciding the lis by holding as though there was no blending or treating the suit properties as Joint Family properties ?

(2) Whether the Courts below were justified in upholding Exs. A13 & 14-the Settlement Deeds and Ex. B24-the Will as valid, even though those documents according to the Plaintiff were not allegedly proved by the propounder of those documents as per law ?

(3) Whether the Courts below were justified in rendering judgment, without referring to Order 2, Rule 2 of CPC despite a plea taken in that regard in the Written Statement ?

(4) Whether there is any perversity or illegality in the judgments of both the fora below ?

9. At the outset itself, I would like to fumigate my mind with the following decisions of the Honourable Apex Court:

Union of India (UOI) Vs. Ibrahim Uddin and Another, ; an excerpt from it would run thus:

59. Section 100, C.P.C. provides for a Second Appeal only on the substantial question of law. Generally, a Second Appeal does not lie on question of facts or of law. In State Bank of India and Others Vs. S.N. Goyal, this Court explained the terms "substantial question of law" and observed as under: (SCC p. 103, para 13)

13....The word "substantial" prefixed to "question of law" does not refer to the stakes involved in the case, nor intended to refer only to questions of law of general importance, but refers to impact or effect of the question of law on the decision in the lis between the parties. "Substantial questions of law" means not only substantial questions of law of general importance, but also substantial question of law arising in a case as between the parties....any question of law which affects the final decision in a case is a substantial question of law as between the parties. A question of law which arises incidentally or collaterally, having no bearing on the final outcome, will not be a substantial question of law....There cannot, therefore, be a strait-jacket definition as to when a substantial question of law arises in a case.

(Emphasis added)

48. To sum up on the issue, it may be held that an Application for taking additional evidence on record at a belated stage cannot be filed as a matter of right. The Court can consider such an Application with circumspection, provided it is covered under either of the pre-requisite conditions incorporated in the

statutory provisions itself. The discretion is to be exercised by the Court judicially taking into consideration the relevance of the document in respect of the issues involved in the case and the circumstances under which such an evidence could not be led in the Court below and as to whether the Applicant had prosecuted his case before the Court below diligently and as to whether such evidence is required to pronounce the judgment by the Appellate Court. In case the Court comes to the conclusion that the Application filed comes within the four corners of the statutory provisions itself, the evidence may be taken on record, however, the Court must record reasons as on what basis such an Application has been allowed. However, the Application should not be moved at a belated stage.

10. In the same precedent, the following decisions are found referred to:

- (1) Sir Chunilal V. Mehta and Sons, Ltd. Vs. The Century Spinning and Manufacturing Co., Ltd.,
- (2) Vijay Kumar Talwar Vs. Commissioner of Income Tax, Delhi,
- (3 AIR 1947 19 (Privy Council)
- (4) (1949) 17 ITR 269 ;
- (5) Oriental Investment Co. Ltd. Vs. Commissioner of Income Tax, Bombay,
- (6) Jagdish Singh Vs. Natthu Singh,
- (7) Prativa Devi Vs. T.V. Krishnan,
- (8) Smt. Satya Gupta Alias Madhu Gupta Vs. Brijesh Kumar,
- (9) Ragavendra Kumar Vs. Firm Prem Machinery and Co.,
- (10) Molar Mal (Dead) Through L.Rs. Vs. M/s. Kay Iron Works(P) Ltd.,
- (11) Bharatha Matha and Another Vs. R. Vijaya Renganathan and Others,
- (12) Dinesh Kumar Vs. Yusuf Ali,
- (13) Jai Singh Vs. Shakuntala, and
- (14) Kashmir Singh v. Harnam Singh, 2008 (12) SCC 796.

11. This is a matter wherein both the Courts below gave concurrent findings and in Second Appeal, the High Court would be reluctant to set aside the concurrent findings of fact, unless there is any illegality in the findings of both the Courts below. Keeping this in mind I would like to analyse the evidence on record.

Substantial Question of Law No. 1:

12. At the inception, I would like to pithily and precisely recapitulate and recount the indubitable and indisputable facts as stood uncurtained thus:

Sengoda Gounder had two sons namely Ramasamy (Plaintiff) and Subramanian (D2 in O.S. No. 10 of 2006 & D1 in O.S. No. 19 of 2005) and two daughters

namely Chinnammal (D3) and Saraswathi (D4). D2 in O.S. No. 19 of 2005 happened to be wife of Sengoda Gounder, who died pending Second Appeal and her legal representatives are already on record.

13. Unarguably and unassailably, incontrovertibly and indubitably, there existed ancestral properties as found described in Ex. A10-the Sale Deed dated 5.2.1975 and those properties were sold jointly by Sengoda Gounder and his two sons. At this juncture itself, I would like to highlight and spotlight that the said Subramanian/Defendant was not at all justified in contending that no Joint Family ever existed at all among them, because from Ex. A10 itself it is pellucidly and palpably clear that Sengoda Gounder and his two sons, namely, Ramasamy and Subramanian, constituted a coparcenary Hindu family, so to say, Hindu Undivided Joint Family and they jointly sold such ancestral properties as per Ex. A10 during the year 1975.

14. Apparent and axiomatic as it is, that as per Ex. A1-the Settlement Deed dated 7.4.1956, Vellaya Gounder @ Kumara Gounder, so to say Sengoda Gounder's mother's sister's husband settled the suit properties along with one other house to Sengoda Gounder. The entire dispute is centered on the properties found described in Ex. A1. According to the Defendant/Subramanian, the said properties contemplated therein happened to be the self acquired properties of Sengoda Gounder. Inveighing and gainsaying such contention, Ramasamy would set forth and express that those properties are the Joint Family properties, as they were blended with the admitted ancestral properties and they were also treated as Joint Family properties.

15. Before venturing to analyse the evidence on record, I would like to refer to the precedents cited on both sides relating to the concept "blending" and treating of the property as the Joint Family property:

(i) The precedent reported in AIR 1937 233 (Privy Council) would contain the following:

.... Property inherited by father from maternal grandfather cannot be ancestral property.

The word "ancestor" in its ordinary meaning includes an ascendant in the maternal, as well as the paternal, line; but the "ancestral" estate, in which, under the Hindu law, a son acquires jointly with his father an interest by birth, must be confined, as shown by the original text of the Mitakshara, to the property descending to the father from his male ancestor in the male line. Hence the estate, which is inherited by father from his maternal grandfather, cannot be held to be ancestral property in which his son has an interest jointly with him.

... The word "ancestor" in its ordinary meaning includes an ascendant in the maternal, as well as the paternal, line; but the "ancestral" estate in which under the Hindu law, a son acquires jointly with his father an interest by birth must be confined, as shown by the original text of the Mitakshara, to the property

descending to the father from his male ancestor in the male line. The expression has sometimes been used in its ordinary sense, and that use has been the cause of misunderstanding. The estate which was inherited by Ganesh Prasad from his maternal grandfather cannot in their Lordships' opinion be held to be ancestral property in which his son had an interest jointly with him. Ganesh Prasad consequently had full power of disposal over that estate, and the devise made by him in favour of his daughter-in-law, Giri Bala, could not be challenged by his son or any other person.....

which would exemplify that any property received by a coparcener from the female side will not be treated as ancestral property.

(ii) The Honourable Apex Court in *Subramania Reddi (Dead) Vs. Venkatasubba Reddi (Dead) and Others*, while referring to the concept "blending" of the self-acquired property with the Joint Family property or treating the self-acquired property" as the Joint Family property would state thus:

15. The question of blending of properties was not considered by the High Court on the basis that there was no such plea. The learned Counsel for the Appellant relied upon *B. Shah v. Presiding Officer, Labour Court, Coimbatore* to submit that no specific plea of blending is required. We will assume for the purpose of this case that this legal position is correct. Even so, the result will not be different because there is no evidence of blending of separate property in the Joint Family property. Again the whole matter rests on appreciation of evidence. When there are concurrent findings on the question of fact we do not think we can reappreciate the same. Indeed the Appellant wanted that even properties inherited by the First Defendant under a Will should also be included in the Joint Family properties and should be treated as having got blended with other properties. We do not think such a course is permissible at all and there was no reason for the First Defendant to bring in the properties inherited by him from his relations on his maternal side to blend with the property of the Joint Family.

(iii) Similarly in *Mallesappa Bandeppa Desai and Others Vs. Desai Mallappa and Others*, the Honourable Apex Court would highlight the following:

10. It is, we think, unnecessary to investigate whether any other text can be treated as the foundation of the said doctrine since the said doctrine has been recognised in several decisions and has now become a part of Hindu Law. In AIR 1923 57 (Privy Council) the Privy Council held that "where a member of a Joint Family blends his self-acquired property with property of the Joint Family, either by bringing his self-acquired property into a Joint Family account, or by bringing Joint Family property into his separate account, the effect is that all the property so blended becomes a Joint Family property.

11. The question which falls for our decision is: Does this principle apply in regard to a property held by a Hindu female as a limited owner? In our opinion, it is difficult to answer this question in favour of the Appellants. The rule of blending postulates that a coparcener who is interested in the coparcenary

property and who owns separate property of his own may by deliberate and intentional conduct treat his separate property as forming part of the coparcenary property. If it appears that property which is separately acquired has been deliberately and voluntarily thrown by the owner into the joint stock with the clear intention of abandoning his claim on the said property and with the object of assimilating it to the Joint Family property, then the said property becomes a part of the Joint Family estate; in other words, the separate property of a coparcener loses its separate character by reason of a coparcener of the owner's conduct and get thrown into the common stock of which it becomes a part. This doctrine, therefore, inevitably postulates that the owner of the separate property is a coparcener who has an interest in the coparcener property and desires to blend his separate property with the coparcenary property. There can be no doubt that the conduct on which a plea of blending is based must clearly and unequivocally show the intention of the owner of the separate property to convert his property into an item of Joint Family property. A mere intention of benefit the members of the family by allowing them the use of the income coming from the said property may not necessarily be enough to justify an inference of blending; but the basis of the doctrine is the existence of coparcenary and coparcenary property as well as the existence of the separate property of a coparcener. How this doctrine can be applied to the case of a Hindu female, who has acquired immovable property from her father as a limited owner it is difficult to understand....

(iv) The Full Bench of the Madras High Court in the precedent reported in Kokila Vs. Swathanthira and Others, would also highlight the point that taking into account all the circumstances involved in a matter it has to be decided as to whether the coparcener treated the separate property of a coparcener as the ancestral property.

(v) In the aforesaid line, the following judgments also emerged:

(a) Lakkireddi Chinna Venkata Reddi Vs. Lakkireddi Lakshmama,

(b) K.V. Narayanan Vs. K.V. Ranganandhan and Others,

(c) Pushpa Devi Vs. Commissioner of Income Tax, New Delhi,

(d) AIR 2003 3800 (SC)

(e) Goli Eswariah Vs. Commissioner of Gift Tax, Andhra Pradesh,

(f) Alka Gupta Vs. Narender Kumar Gupta,

(g) Jai Krishan Dass Vs. Hari Kishan Dass and Others,

(h) AIR 1923 57 (Privy Council)

(i) Judgment of this Court reported in Mayandi Servai Vs. Santhanam Servai and Others,

(j) Judgment of this Court reported in Pandithurai and Another Vs. Sivalingam

and Others,

(k) S. Sathappan (Died) & 3 others v. P.S.S. Somasundaram Chettiar & 24 others, 2003 (1) LW 58;

(l) K. Sengodan Vs. K. Dharmalingam and Others,

(m) S.A. Anga Naicker v. S.A. Ponnusami and others, 1981 (2) MLJ 51;

(n) M.P.P. Jayagandhi Nadar and Company by partner, M.P.P. Jayagandhi Nadar Vs. Arunachalam Pillai and Another,

(o) P.N. Venkatasubramania Iyer and Others Vs. P.N. Easwara Iyer and Others,

(p) J Jupudi Venkata Vijaya Bhaskar Vs. Jupudi Kesava Rao (died) and others,

(q) G.B. Mallakarjuniah Vs. J.S. Kanniah Setty and Others,

(r) T. Mahalaxmiamma and Others Vs. N.S. Radhakrishna Rao and Others,

All the above precedents also would uniformly posit and reiterate the aforesaid points relating to "blending" or treating the property as the "Joint Family property".

16. Certain extracts from Mayne's Treatise on Hindu Law & Usage (Fourth Edition), could fruitfully be set out thus:

Para 301....

Once the separate property has been thrown into the common stock the coparcener cannot take it out.

The blending can be only in favour of the entire body of coparceners.

The mere fact that the Joint Family had no property does not prevent a person from declaring his self-acquired property as Joint Family property, nor is it necessary that there should exist at least-two male members of the family. In Vijaya Bhaskar (JV) v. Bhaskara Rao (J), (1994 AP 134) a person had declared in income tax and Wealth-tax returns his status as Hindu undivided family and it was contended that the declaration constituted an unequivocal intention on his part to treat his separate properties as the properties of the Joint Family property of himself and his son, relying on Goli Eswariah Vs. Commissioner of Gift Tax, Andhra Pradesh, . While agreeing that the decision of the Supreme Court was the authority for the proposition that separate property of a coparcener could be impressed with the character of Joint Family property, the learned judges held relying on Mallesappa Bandeppa Desai v. Desai Mallappa, the necessary precondition of the Doctrine of blending is the existence of coparcenary property. It is submitted that the above reasoning is not correct. The judges failed to note the distinction between declaring separate property as Joint Family property and blending separate property with Joint Family property. In the former case there is no necessity for the pre-existence of Joint Family property. In Mallesappa's case,

the Supreme Court was dealing with the case of a female who could not be said to a coparcener and hence her property cannot be said to be coparcenary property. In the case before the Andhra Pradesh High Court there is a clear declaration in the income tax and Wealth-tax returns that the property is Joint Family property and that is sufficient to constitute as Joint Family property as decided in Goli Eswaraiah's case. The existence of a coparcenary is necessary before a coparcener can throw his self-acquired property into the common stock.

A Hindu female, not being a coparcener, cannot blend her separate property with Joint Family property. If a Hindu female, who is a member of an undivided family impresses her absolute property with the character of Joint Family property, she creates new claimants to her property to the exclusion of herself because not being a coparcener, she has no right to demand a share in the Joint Family property or for a partition.

It cannot be said that once a woman enters her matrimonial home, she completely loses her exclusive stridhan by the same being treated as joint property of the spouses.

17. A mere running of the eye over those precedents and the excerpts would unambiguously and unequivocally indicate and convey that it is the intention of the person in whose name the properties stand should be considered for the purpose of adjudication as to whether those properties were continuing to be his self-acquired properties or they were treated as Joint Family properties or blended with the already existing Joint Family properties.

18. The learned Counsel for the Defendant, would placing reliance on the aforesaid decisions, submit that simply because here a little, there little references might be in some documents concerning those properties as ancestral ones, there could be no presumption that there engendered blending or treating of those properties as ancestral properties. I would like to observe that absolutely there could be no quarrel over the proposition of law as found enunciated in the aforesaid decisions.

19. Poring over those precedents would portray and project that depending upon the facts and available evidence in each and every case, the issue has to be adjudged and there is no hard and fast rule to point out that certain set of facts and evidence will invariably establish and prove blending or treating of a self-acquired property as Joint Family property.

20. Keeping this law point in mind, I would like to analyse the evidence available on record. It is also just and proper to point out that as on the date of emergence of Ex. A1-the Settlement Deed, the properties obtained by Sengoda Gounder was undoubtedly the self acquired properties because those properties were obtained not from his direct male ancestors but from his mother's sister's husband and hence, inherently that cannot be described as ancestral properties.

21. Wherefore as a sequela, it follows that the burden of proof is on the Plaintiff

to prove that the original self-acquired property became the Joint Family property, and the following maxims:

(i) *Affirmantis est probare*: [He who affirms must prove].

(ii) *Affirmanti non neganti incumbit probatio*: The burden of proof lies upon him who asserts and not upon him who denies.

would clarify the legal position.

22. After selling the admitted ancestral properties of the Hindu Joint Family vide Ex. A10-the Sale Deed, dated 5.2.1975, the same members of the Hindu Joint Family, namely Sengoda Gounder and his two sons Ramasamy and Subramanian, executed Ex. A2-the Sale Deed, dated 25.3.1977, transferring item No. 3 of the house found specified in Ex. A1-the Settlement Deed dated 7.4.1956. The recitals in Ex. A2 would run thus:

23. The learned Counsel for the Defendant would pyramid his submissions that the very extracted recital is inherently wrong because the subject matter of Ex. A2 was not obtained by sale and it was not even an ancestral property; however, it was obtained by Sengoda Gounder vide Ex. A1-the Settlement Deed; wherefore, it should be taken that the recital in Ex. A2 describing the property therein as ancestral property should be ignored and so far the defendant is concerned it is no skin off his nose.

24. Whereas, the learned Senior Counsel for the Appellant/Plaintiff in a bid to torpedo and pulverise such contention, would point out that consciously the word "pidhirajiyam" (ancestral) was used in Ex. A2 and thereby Sengoda Gounder himself treated the property contemplated in Ex. A1-the Settlement Deed, as the Joint Family property.

25. Applying the principles as found enunciated in the decision cited above, if it is seen, the mere recital in Ex. A2 itself no doubt would not be decisive and conclusive but in the meantime as suggested by the learned Senior Counsel for the Plaintiff, I cannot simply poo-poo or discard, belittle or slight the description of the property as an ancestral one during the year 1977 itself in Ex. A2. I have to see as to whether there is any evidence in support of the contention of the Plaintiff that in *stricto sensu* Sengoda Gounder treated the suit properties as his self acquired properties or as the Joint Family properties.

26. There were broadly four types of loans involved in this case:

- (1) Bore-well loan availed in the year 1985 from IOB
- (2) Crop loan availed from State Bank of India
- (3) Electric motor pump-set loan availed from Indian Bank
- (4) Jewel loans

In re bore-well loan of the year 1985:

27. The documents relating to bore-well loan would connote and denote that all the three Joint Family members namely Sengoda Gounder, Ramasamy and Subramanian borrowed loan from Indian Overseas Bank to sink bore-well in the suit property. Whereas, the Plaintiff would claim that he only discharged that loan, by placing reliance on Exs. A20 to A22. Whereas, the Defendant/ Subramanian would contend that the loan was discharged by Sengoda Gounder from out of the income derived by him from the suit property itself.

28. Both the Courts below, it appears, have not taken note of the real significance of Exs. A20 to A22. The Plaintiff in fact at the relevant time was working as agricultural assistant in the Indian Bank and he had Bank account in Sankagiri Co-operative Urban Bank and he issued a cheque drawn on the said Bank in favour of IOB, the loaner Bank for a sum of Rs. 12,955/- (Rupees twelve thousand nine hundred and fifty five only) on 30.3.1988. Ex. A22-the pass book issued by Sankagiri Co-operative Urban Bank in favour of Ramasamy and his wife Saraswathi, would reveal and display that in fact, the said cheque for Rs. 12,955/- issued in favour of the Indian Overseas Bank was encashed by it and the amount was adjusted towards the dues of the bore-well loan. Hence in view of the clinching available evidence on record it is glaringly and unchallengeable clear that it was Ramasamy-the Plaintiff, who in fact discharged the major part of the said loan.

29. Whereas, the learned Counsel for the Defendant would unsuccessfully and unsatisfactorily try to explain and expound by pointing out that even for argument's sake, it is taken that Ramasamy issued the cheque for 712,955/- by way of discharging part of the loan, it was only from out of the income which he derived from the suit property, as Sengoda Gounder only gave that income to PW-1-the Plaintiff for discharging the loan, but Ramasamy in a scheming manner deposited that cash in his own account in the Urban Bank and thereafter, issued that cheque to camouflage and conceal the source of income from the suit property.

30. I would like to point out that these are all complicate facts which the defendant ought to have proved, but absolutely there is no iota or shred, shard or miniscule extent of evidence in that regard. But on the other hand, the records would clinchingly establish that Ramasamy discharged the major portion of the bore-well loan as discussed supra.

In re three other loans:

31. No doubt similar to that of the aforesaid clinching evidence with regard to the discharging of the bore-well loan, there is no irrebuttable evidence available in respect of the other three loans.

32. However, the learned Senior Counsel for the Plaintiff would learnedly and legally placing reliance on Exs. A9, A12 & A26 submit that from the very fact that those relevant records relating to the discharge of those loans are available with the Plaintiff, as per the Indian Evidence Act, it has to be held that those are

evincing and evidencing that the Plaintiff only discharged those three other loans also.

33. The learned Counsel for the defendant would advance his argument that the Plaintiff candidly and schemingly took away all those documents from the custody of Sengoda Gounder and produced them in Court, which bespeaks and betokens that he was a deep man playing a deep game.

34. No Complaint or grievance ever surfaced at the instance of Sengoda Gounder at any point of time about such virtual thieving or taking away of those documents from his custody. Be that as it may, one fact is clear that it was the Plaintiff who produced all those documents to show and establish that he was actually dealing with the suit property as joint property and to that much extent there could be no second thought. My above observation and finding is based on the further documents discussed infra.

In re the letters and correspondences emerged between the Plaintiff Ramasamy and the Defendant Subramanian:

35. Exs. A19, 27, 45 & 46 are the letters, so to say, the correspondences which emerged between the brothers, namely Ramasamy and Subramanian, which are ante litem motem ones having probative force of their own. Even by phantasmagorical thoughts such letters cannot be labelled or dubbed as self serving documents or the ones fraught with falsity or mendacity or a load of baloney.

36. At this juncture, I would like to extract hereunder certain recitals in the aforesaid documents:

Write to me when one will renew the jewel loan..

....Before your marriage, we should do something, the house, borewell and road as much as possible. Don't be silent....

I hope my letter dated 3.2.1987 and DD for Rs. 3,000/- might reached you. Please put it in deposit for borewell loan.

Watch one agriculture to give good result. Time permits plant some coconut plants. We also plant few mango plants.

Extracted as such

37. The Court should pragmatically and practically analyse such ante litem motem occurrences.

38. A mere perusal of those extracted portions would leave no doubt in the mind of the Court that both Ramasamy and Subramanian actually were very much zealously and jealously interested in cultivating the suit property along with their father and that they also contributed their might, income and time, and they were keen as mustard in seeing that the suit property was developed.

39. None of the above decisions would come to the help of the Defendant/Subramanian so as to torpedo such evidence against his pleas.

40. The main thrust of the argument of the learned Counsel for the Defendant is that the generosity shown by Sengoda Gounder cannot be taken undue advantage of by the Plaintiff. Both the Courts below no doubt were very much carried away by the Concept "generosity". It is not the case that Sengoda Gounder had shown any generosity and that was being capitalised by the Plaintiff. Here the case of the Plaintiff is that he contributed his money, energy, time and concentration in developing the suit property along with his younger brother/Subramanian and also his father. I am fully aware of the fact that as per the decisions cited supra, had the father simply shared the income or utilised the income from the suit properties in educating his two sons and also providing them with succour, then the matter could be labelled or dubbed as generosity.

41. To the risk of repetition and pleonasm, but without being tautologous I would stress upon the fact on the strength of the documents referred to supra, that the sons contributed their effort and money for the development of the suit property along with their father and in such a case, if this set of evidence is not taken as sufficient to prove the blending/treating the suit property as Joint Family property, then in no other case, it could be held that there was blending/treating the self acquired property of the father as the Joint Family property. It is not as though, based on the bare recitals in Ex. A2 alone this Court holds that the suit properties are Joint Family properties, but based on evidence referred to supra.

42. Never was there any plea or suggestion that Sengoda Gounder was coerced or bludgeoned into agreeing for the Plaintiff's participation in developing the suit property. Volitionally and voluntarily, willingly and whole heartedly all the three coparceners toiled and moiled together to develop the suit property, which factum is writ large and the Defendant cannot try to hide a pumpkin in a small plate of rice, in fact it is an elephant in the room.

In re the Suit house standing in the name of the Plaintiff and payment of House Tax by him:

43. The learned Senior Counsel for the Plaintiff would very much place reliance on Exs. A37-House Tax Receipts and A38-E.B. receipts and submit that the Plaintiff was having that house in his own name and it was not standing in the name of Sengoda Gounder. She was quick in adding a rider to her submission by pointing out that her client is not interested in claiming exclusive right over the said property, but she places reliance on the documents to establish and prove that there was blending/treating the property as a Joint Family property. I would like to agree with her submission. If really Sengoda Gounder thought that the entire suit property should be his exclusive property then there is no knowing of the fact as to why he allowed his son Ramasamy to pay house tax for that structure bearing Door No. 4/85A, as revealed by Exs. A37 & A38, by allowing Ramasamy to get his name mutated in the civic body concerned. In fact, the

Plaintiff is not claiming exclusive right over it, but he only wants to highlight that he was having that structure in his name and paying tax also in his own name for a pretty long time to the knowledge and acceptance of Sengoda Gounder and Subramanian.

44. Ex. A38 comprising of the Electricity Receipts would reveal that it was Ramasamy ever since 2004 paid the charges concerning the suit property. There is nothing to show that Subramaman or Sengoda Gounder objected to such a course.

45. Here is a case where a father with his two sons owned ancestral properties and also the suit properties. During the year 1975 Sengoda Gounder sold the admitted ancestral properties and the Joint Family continued as such with the existing suit properties and thereafter one other house, was also sold by all the three coparceners as per Ex. A2 dated 25.3.1977. In such a case, scarcely could it be stated that there was no Hindu Joint Family existed among the three persons and that the suit properties were never treated as the Joint Family properties of those three coparceners.

In re the relevancy of two previous Judgments concerning the dispute with the neighbour of Sengoda Gounder:

46. The learned Counsel for the Defendant-Subramanian, placing reliance on Ex. A44-the photo copy of the Common Judgment in O.S. Nos. 402 & 405 of 1988, would develop his argument that one Suit was filed by Sengoda Gounder seeking injunction as against his neighbour; whereas his neighbor in fact filed one other Suit as against the Plaintiff herein-Ramasamy, Sengoda Gounder and Sengoda Gounder's wife Perumayee. According to the learned Counsel for the Defendant, in the Suit filed by Sengoda Gounder, he pleaded that the suit properties were the properties of Sengoda Gounder and Ramasamy (the Plaintiff) did not raise any objection there at.

47. In the Suit which emerged during the year 1988 between Sengoda Gounder's family and his neighbor relating to a fence, simply because there might be some reference to the ownership of the property, that would not be a decisive and conclusive proof for holding that the suit property is Sengoda Gounder's self-acquired property and that is not at all germane for deciding the issue in this case.

In re the relevant portion of the depositions of PW-1 & DW-1:

48. Advocates on both sides drew my attention to the deposition of PW-1 & DW-1 and in extenso pointed out various excerpts, which run thus.

Certain excerpts from the deposition of PW-1 in cross would run thus:

Certain excerpts from the deposition of DW-1 in cross would run thus:

49. No doubt, PW-1-the Plaintiff reiterated his pleas. However, DW-1 also accepted, apart from admitting his interest over the suit property in his

deposition, that he also contributed for the upliftment of the suit property which was earlier 9 acres and odd and on subsequent measurement turned out to be 11 acres. Sinking bore-well by availing joint Bank loan cannot be taken as something alien to the development of the suit property.

50. At this juncture, the learned Counsel for the defendant, by placing reliance on Ex. B13-the Bank Rules, would submit that since Sengoda Gounder was a quinquagenarian, to wit, 55 years admittedly at the time of availing bore-well loan, the bank insisted upon the Defendant to sign as the Co-Applicants.

51. I would like to point out that here the factual matrix betokens differently. It is not as though Sengoda Gounder as Applicant/loanee availed the bore-well loan and his two sons were asked to be the Co-Applicants as per the Bank Rules. On the contrary all the three coparceners availed the loan as joint loanees and they mortgaged, admittedly, the suit property by way of creating an equitable mortgage by deposit of Title Deeds in favour of the Bank. This said fact cannot simply be brushed aside as though it was a formal one or simply happened at the instance of the Bank and there is nothing also to indicate that the Bank insisted that all the three should be loanees and for that matter bank also has no right to insist in that manner. It was more by accident than by design.

52. As has been pointed out by me supra, the major part of that loan was discharged by the Plaintiff and the Defendant also in his deposition would state that he also contributed a sum of Rs. 3,000/- for discharge of that loan at the request of his father. As such, in the year 1985 itself all the three coparceners, namely, the father and his two sons, who were indisputably the Joint Family members, sunk the bore-well in the suit property by availing Bank loan jointly and that loan also was virtually discharged jointly. This fact should necessarily be viewed conjointly with the recitals in Ex. A2-the Sale Deed and also in concinnity with the version in the anti litam motem letters and correspondences which emerged between the plaintiff and the Defendant.

53. The learned Counsel for the Defendant would vehemently argue that the version in those letters are not germane or relevant for deciding as to whether Sengoda Gounder-the father expressed his intention unequivocally and unassailably to treat the suit property as Joint Family property.

54. At this juncture I recollect the maxim:

"Acta exteriora indicant interiora secreta"-Outward acts indicate the thoughts hidden within.

55. From the overt acts and manifestations one could understand what is in the heart of a person. The Plaintiff approached the Court with the contentions that the father and his two sons, the Plaintiff and the contesting Defendant herein, were entitled to 1/3rd share each; and in view of the death of the father, his Class-I heirs under the Hindu Succession Act, namely, his widow, his two sons and his two daughters were entitled to 1/5th share each in the 1/3rd share of the

said father. Accordingly the Plaintiff claimed his 1/3rd share along with his 1/5th share in the 1/3rd share of his father.

56. Now my discussion supra would convey and portray, establish and connote that the two Settlement Deeds-Ex. A13 & A14 could be taken as effective only to the extent of the 1/3rd share of the father and accordingly, as per the decision of the Honourable Apex Court reported in Thamma Venkata Subbamma (Dead) by Lr Vs. Thamma Rattamma and Others, his 1/3rd share enures to the benefit of his two sons and thereby, in the entire property, the Plaintiff, namely, Ramasamy and the Defendant, namely, Subramanian are entitled to half share each and in the absence of any other rival claims, the aforesaid legal position alone emerges.

57. Not to put too fine a point on it, hardly could it be stated that Sengoda Gounder had no intention to treat the property as Joint Family property or blend that property with the Joint Family properties in view of the aforesaid facts and circumstances. But both the Courts below, without au fait with law and au courant with facts, gave concurrent findings, and that too without looking into the various pleas and also the importance of those documents, which cannot be brushed aside as pococurante ones or insignificant ones for deciding this case. Accordingly, Substantial Question of Law No. (1) is decided.

Substantial Question of Law No. (2):

58. Relating to Point No. (2) the learned Counsel for the Defendant would convincingly place reliance on the deposition of DWs. 2 & 3 and submit that they attested those two Settlement Deeds-Ex. A13 & Ex. A14 relating to the suit property executed by Sengoda Gounder in favour of the Defendant and those Settlement Deeds were executed by Sengoda Gounder voluntarily and volitionally. He would also placing reliance on the deposition of DW-4 would state that Sengoda Gounder also reiterated in his Will which emerged subsequent to those Two Settlement Deeds that his last rites should be performed by the Defendant.

59. Whereas, the learned Senior Counsel for the Plaintiff would try to project Exs. 13 & 14-the Settlement Deeds (equivalent to Exs. B15 & B16) as the ones which are not genuine; that the Will-Ex. B24 emerged not out of the free will of Sengoda Gounder; that the Defendant managed to obtain those documents and that even after Sengoda Gounder's death his death intimation was not given to Sengoda Gounder's wife and such was the conduct of the Defendant.

60. Whereas, the learned Counsel for the Defendant would explain and expound, by pointing out that there was rift between Sengoda Gounder and his wife; that niggard and bereft of details, the Plaintiff throwing to winds all norms of legal procedures, would try to attack those Exs. A13 & A14 & Ex. B24; that Sengoda Gounder was taking medical treatment at Bhavani with the help of the Defendant-Subramanian and in such a case, there was nothing strange on the part of Sengoda Gounder in leaving his native village Chinnagovindanoor and staying at Bhavani; such a fact legally cannot be looked askance at.

61. Trite the proposition of law is that "Preponderance of probabilities would govern the adjudication in Civil cases". It is dime-a-dozen proposition of law that "witness might lie but the circumstances would not do so". It is quite obvious and axiomatic that Sengoda Gounder, during his life time was sympathetic towards the Defendant-Subramanian and there was no love lost between Sengoda Gounder and the Plaintiff-Ramasamy during the evening of Sengoda Gounder's life, which alone propelled and impelled Sengoda Gounder to lodge a Complaint with Police, as evidenced by Exs. XI to X5, which were given markings by the Court after summoning them from the Police Department concerned. Hence, there is nothing strange on the part of Sengoda Gounder in executing those two Settlement Deeds in favour of Subramanian-the Defendant and also subsequently the Will. The impugning of Exs. A3 & A14 & A24 by the Plaintiff, turned out to be his ipse dixit.

62. Both the Courts below gave a concurrent finding of fact that the depositions of PW-2, PW-3 & PW-4 amply established the fact that Sengoda Gounder executed the two Settlement Deeds and also the Will voluntarily based on clinching oral evidence and the circumstances. Wherefore, I am of the view that Ex. A13, A14 & B24 were in fact executed by Sengoda Gounder voluntarily. However, the point canvassed by the learned Senior Counsel for the Plaintiff that Sengoda Gounder had no competence to execute the Settlement Deeds treating the suit properties as self-acquired properties and settling the same in favour of the Defendant, deserves countenance.

63. In view of my finding supra, Sengoda Gounder at the relevant time of executing the Settlement Deeds had only 1/3rd share in the suit property and he could not have transferred validly the entire property in favour of Subramanian-the Defendant.

64. Trite as it is, that one co-owner cannot donate or settle his share in the coparcenary property in favour of another co-owner; if he does so, it will enure to the benefit of all. At this juncture I call up and recollect the following decision of the Honourable Apex Court:

Thamma Venkata Subbamma (Dead) by Lr Vs. Thamma Rattamma and Others, certain excerpts from it would run thus:

20. Coming back to the facts of the case, we find that Rami Reddy made the gift for the common benefit of the donee as well as his sons as held by the High Court. It is submitted on behalf of the respondents that really it is a case of renunciation or relinquishment by Rami Reddy of his interest in favour of his brother and his sons. It was the intention of the donor that the property might be enjoyed by his brother and his sons and, excepting that the donor had reserved to himself a life interest, presumably for his maintenance, he gifted his entire interest in the coparcenary property to his brother. There is some force in the contention of the learned Counsel for the Respondents that the gift should be construed as relinquishment or renunciation of his undivided interest by the

donor in favour of the other coparceners. Although the gift is ostensibly in favour of Veera Reddy, but really the donor meant to relinquish his interest in the coparcenary in favour of Veera Reddy and his sons. In this connection, we may refer to the following passage from Mulla's Hindu Law, Fifteenth Edn., Article 264 at p. 357:

"264. (1) Renunciation or relinquishment of his share.-- A coparcener may renounce his interest in the coparcenary property in favour of the other coparceners as a body but not in favour of one or more of them. If he renounces in favour of one or more of them the renunciation enures for the benefit of all other coparceners and not for the sole benefit of the coparcener or coparceners in whose favour the renunciation is made. Such renunciation is not invalid even if the renouncing coparcener makes it a condition that he would be paid something towards maintenance. The renunciation or relinquishment must, of course, be genuine. If fictitious and not acted upon it would not be operative as between the parties and partition can be claimed."

21. Assuming that it is a renunciation in favour of one of the coparceners, namely, Veera Reddy, such renunciation enures for the benefit of all other coparceners and not for the sole benefit of the coparcener in whose favour the renunciation was made. In our view, the gift made by Rami Reddy to Veera Reddy should be construed as renunciation of his undivided interest in the coparcenary in favour of Veera Reddy and his sons who were the remaining coparceners. The gift was, therefore, valid construing the same as renunciation or relinquishment by Rami Reddy of his interest in the coparcenary and, accordingly, the consent of other coparceners was immaterial.

65. There could be no quarrel over such a proposition. As such, it could only be taken that Sengoda Gounder's 1/3rd share enure to the benefit of both the co-owners i.e. the Plaintiff and the Defendant. A mere running of the eye over the Judgments of both the fora below would reveal that the approach of both the Courts below are totally on a different footing and not on the line discussed supra by me; there was misreading of evidence and in addition to misunderstanding of the circumstances and also the documentary evidence filed before the Court, by them. Both the fora below were carried away by the precedents cited before them as though those precedents mandated them to construe that the father showed generosity towards the sons, when the evidence both oral and documentary established and proved otherwise to the effect that both the sons contributed their effort, time and money in ameliorating and developing the suit property.

66. The First Appellate Court went to the extent of misapplying the Mayne's Hindu Law as though the Plaintiff alleged that Sengoda Gounder mixed the Joint Family income with the separate income etc, which is not at all the case here and the Appellate Court as well as the Lower Court proceeded on the aforesaid footing and thereby misdirected themselves.

67. Accordingly, Substantial Question of Law No. (2) is decided to the effect that the suit property shall be divided into two shares. The Plaintiff and the Defendant shall be entitled to half share each in the suit properties.

Substantial Question of Law No. (3):

Order 2, Rule 2 of C.P.C.

68. The learned Counsel for the Defendant, by placing reliance on the decision of the Honourable Apex Court reported in *Virgo Industries (Eng.) P. Ltd. Vs. Venturetech Solutions P. Ltd.*, certain excerpts from it would run thus:

9. Order 2, Rule 1, requires every Suit to include the whole of the claim to which the Plaintiff is entitled in respect of any particular cause of action. However, the Plaintiff has an option to relinquish any part of his claim if he chooses to do so. Order 2 Rule 2 contemplates a situation where a Plaintiff omits to sue or intentionally relinquishes any portion of the claim which he is entitled to make. If the Plaintiff so acts, Order 2, Rule 2, C.P.C. makes it clear that he shall not, afterwards, sue for the part or portion of the claim that has been omitted or relinquished. It must be noticed that Order 2, Rule 2(2), does not contemplate omission or relinquishment of any portion of the Plaintiff's claim with the leave of the Court so as to entitle him to come back later to seek what has been omitted or relinquished. Such leave of the Court is contemplated by Order 2, Rule 2(3), in situations where a Plaintiff being entitled to more than one relief on a particular cause of action, omits to sue for all such reliefs. In such a situation, the Plaintiff is precluded from bringing a subsequent Suit to claim the relief earlier omitted except in a situation where leave of the Court had been obtained. It is, therefore, clear from a conjoint reading of the provisions of Order 2, Rule 2(2) & (3) C.P.C. that the aforesaid two sub-rules of Order 2, Rule 2, contemplate two different situations, namely, where a Plaintiff omits or relinquishes a part of a claim which he is entitled to make and, secondly, where the Plaintiff omits or relinquishes one out of the several reliefs that he could have claimed in the Suit. It is only in the latter situations where the Plaintiff can file a subsequent Suit seeking the relief omitted in the earlier Suit provided that at the time of omission to claim the particular relief he had obtained leave of the Court in the First Suit.

10. The object behind the enactment of Order 2, Rules 2(2) & (3), C.P.C. is not far to seek. The Rule engrafts a laudable principle that discourages/prohibits vexing the defendant again and again by multiple Suits except in a situation where one of the several reliefs, though available to a Plaintiff, may not have been claimed for a good reason. A later Suit for such relief is contemplated only with the leave of the Court which leave, naturally, will be granted upon due satisfaction and for good and sufficient reasons. The situations where the bar under Order 2, Rule 2(2) & (3), will be attracted have been enumerated in a long line of decisions spread over a century now. Though each of the aforesaid decisions contain a clear and precise narration of the principles of law arrived at

after a detailed analysis, the principles laid down in the Judgment of the Constitution Bench of this Court in *Gurbux Singh Vs. Bhooralal*, may be usefully recalled below: (AIR P. 1812, Para 6)

6. In order that a plea of a bar under Order 2, Rule 2(3) of the CPC should succeed the defendant who raises the plea must make out (1) that the second Suit was in respect of the same cause of action as that on which the previous Suit was based; (2) that in respect of that cause of action the Plaintiff was entitled to more than one relief; (3) that being thus entitled to more than one relief the Plaintiff, without leave obtained from the Court, omitted to sue for the relief for which the second Suit had been filed. From this analysis it would be seen that the Defendant would have to establish primarily and to start with, the precise cause of action upon which the previous Suit was filed, for unless there is identity between the cause of action on which the earlier Suit was filed and that on which the claim in the later Suit is based there would be no scope for the Application of the bar.

The above principles have been reiterated in several later judgments of this Court. Reference by way of illustration may be made to the judgments in *Deva Ram and Another Vs. Ishwar Chand and Another*, and *M/s. Bengal Waterproof Limited Vs. M/s. Bombay Waterproof Manufacturing Company and Another*, .

11. The cardinal requirement for application of the provisions contained in Order 2 Rules 2(2) & (3), therefore, is that the cause of action in the later Suit must be the same as in the first Suit. It will be wholly unnecessary to enter into any discourse on the true meaning of the said expression i.e. Cause of action, particularly, in view of the clear enunciation in a recent judgment of this Court in *The Church of Christ Charitable Trust and Educational Charitable Society, represented by its Chairman Vs. Ponnamman Educational Trust represented by its Chairperson/Managing Trustee*, The huge number of opinions rendered on the issue including the judicial pronouncements available does not fundamentally detract from what is stated in Halsbury's Laws of England (4th Edn.). The following reference from the above work would, therefore, be apt for being extracted herein below:

"Cause of action" has been defined as meaning simply a factual situation existence of which entitles one person to obtain from the Court a remedy against another person. The phrase has been held from the earliest time to include every fact which is material to be proved to entitle the Plaintiff to succeed, and every fact which a Defendant would have a right to traverse. "Cause of action" has also been taken to mean that particular action on the part of the Defendant which gives the Plaintiff his cause of Complaint, or the subject-matter of grievance founding the action, not merely the technical cause of action.

12. In the instant case though leave to sue for the relief of Specific Performance at a later stage was claimed by the Plaintiff in CS Nos. 831 & 833 of 2005, admittedly, no such leave was granted by the Court. The question, therefore,

that the Court will have to address, in the present case, is whether the cause of action for the first and second set of suits is one and the same. Depending on such answer as the Court may offer the rights of the parties will follow.

17. The learned Single Judge of the High Court had considered, and very rightly, to be bound to follow an earlier Division Bench order in *R. Vimalchand and M. Ratanchand Vs. Ramalingam, T. Srinivasalu and T. Venkatesaperumal*, holding that the provisions of Order 2, Rule 2, C.P.C. would be applicable only when the first Suit is disposed of. As in the present case the second set of Suits were filed during the pendency of the earlier suits, it was held, on the ratio of the aforesaid decision of the Division Bench of the High Court, that the provisions of Order 2, Rule 2(3) will not be attracted. Judicial discipline required the learned Single Judge of the High Court to come to the aforesaid conclusion. However, we are unable to agree with the same in view of the object behind the enactment of the provisions of Order 2, Rule 2, C.P.C. as already discussed by us, namely, that Order 2, Rule 2, C.P.C. seeks to avoid multiplicity of litigations on the same cause of action. If that is the true object of the law, on which we do not entertain any doubt, the same would not stand fully sub-served by holding that the provisions of Order 2, Rule 2, C.P.C. will apply only if the first Suit is disposed of and not in a situation where the second Suit has been filed during the pendency of the first Suit. Rather, Order 2, Rule 2, C.P.C. will apply to both the aforesaid situations. Though direct judicial pronouncements on the issue are somewhat scarce, we find that a similar view had been taken in a decision of the High Court at Allahabad in *Murti v. Bholu Ram*, ILR 1894 (16) All 165 and by the Bombay High Court in *Krishnaji Ramchandra Vs. Raghunath Shankar and Another*,

would submit that since the Suit for partition came to be filed after the filing of the Injunction Suit and that too, without getting any leave to file the Partition Suit, at a later point of time, the latter Suit should be held as one hit by Order 2, Rule 2, of C.P.C.

69. Whereas, the learned Senior Counsel for the Plaintiff would submit that the Injunction Suit is entirely different from the Partition Suit and the cause of action for injunction suit is different from cause of action for the Partition Suit. In such a case, Order 2, Rule 2, cannot be pressed into service at all.

70. I would like to recollect the common or garden proposition of law that till partition is effected, the cause of action should be taken as a continuing one available with the claimant concerned. No doubt, before filing the Injunction Suit, in the pre-litigation notice, the Plaintiff expressed his desire for partition, but he filed only the Suit for injunction seeking relief to the effect that the other co-sharers should not alienate or encumber the suit properties. However, during the pendency of that Suit and that too, after the death of Sengoda Gounder, the Plaintiff filed the Suit for Partition and both the Suits were tried together.

71. My mind is reminiscent and redolent of the following decisions of this Court:

(i) *P. Paul James alias Paulus Vs. P. Jesudas Cyril and Others*, certain excerpts

from it would run thus:

17. In *Rajah V. Maheswara Rao Vs. Rajah V. Rajeswara Rao*) the entire case-law was considered, and it was held thus:

In a partition action till a preliminary decree has been passed, the Plaintiff is at liberty to withdraw the Suit.

So far as a Suit for Partition or a Suit for Redemption is concerned, it is axiomatic that, when the Plaintiff withdraws his Suit, he will be entitled to file a fresh Suit as the cause of action is recurring cause of action. Even if the Plaintiff is not granted permission, under Order 23, Rule 1, Civil Procedure Code, he will nevertheless have a right to file a Suit for partition at any time he pleases.

18. From the above decisions, it is clear that the rights of parties are recurring causes of action, and the Plaintiff's right to partition is lost only when his right to property is lost, in the sense that his right as co-owner to claim partition is lost. Being a recurring cause of action, the principle of Section 11, C.P.C. cannot have any Application. For a bar u/s 11, C.P.C., the Suit must be based, on the same cause of action. The cases cited supra make it clear that even if the Suit is withdrawn, the right of the Plaintiff to seek partition once again is not lost. If that be so, the finding of the Lower Appellate Court that the Suit is barred by res judicata cannot stand.

(ii) *Sulochana and Others Vs. Thilakavath*, certain excerpts from it would run thus:

17. I would like to fumigate my mind with the following decisions of this Court:

(i) *J.A. Roche Vs. The State of Tamil Nadu and Others*, and

(ii) *Balamani and Murugesan Vs. S. Balasundaram*,

18. Simply because a Partition Suit was dismissed earlier for default or settled out of Court, the co-sharers are not precluded from instituting a fresh Suit for partition, if in reality no settlement got fructified. Compromise decrees are on a different footing, one should not get perplexed or flummoxed by indulging in making false analogy between compromise decrees and suits dismissed as settled out of Court. It is not a case, where, the Defendant is trying to put forth a case to the effect that before the dismissal of the previous Suit, the matter was completely settled and that the present Plaintiffs, by having a volte face and quite antithetical to their earlier stand are trying to canvas the old case itself. According to the Defendant, after the dismissal of the Suit, there were alienations of the Joint Family properties by all the co-sharers, as revealed by Exs. A4 & A5 and in fact, Ex. A3 emerged two days before the dismissal of the earlier Suit.

72 In view of the settled proposition of law that the cause of action for seeking partition is a continuing one, Order 2, Rule 2 of C.P.C. will not be applicable. The cited decision in *Virgo Industries (Eng.) P. Ltd. Vs. Venturetech Solutions P. Ltd.*,

is concerning the Suit for Specific Performance. The person who is entitled to file the Suit for Specific Performance cannot, at the initial stage, file an injunction Suit and thereafter, file Specific Performance Suit and that too, without getting any leave from the Court at the time of filing the Injunction Suit itself. As such, the cited precedent will not be applicable for partition Suit. Accordingly, Substantial Question of Law (3) is decided.

M.P. No. 1 of 2013:

73 During the pendency of the Second Appeal, M.P. No. 1 of 2013 was filed invoking Order 41, Rule 27 of C.P.C., seeking permission to adduce additional evidence, by filing the following documents:

74 After hearing both sides and also considering the Judgment of the Honourable Apex Court reported in Union of India (UOI) Vs. Ibrahim Uddin and Another, as excerpt from it would run thus:

State of consideration:

49. An Application under Order 41, Rule 27, C.P.C. is to be considered at the time of hearing of Appeal on merits so as to find out whether the documents and/or the evidence sought to be adduced have any relevance/bearing on the issues involved. The admissibility of additional evidence does not depend upon the relevancy to the issue on hand, or on the fact, whether the Applicant had an opportunity for adducing such evidence at an earlier stage or not, but it depends upon whether or not the Appellate Court requires the evidence sought to be adduced to enable it to pronounce judgment or for any other substantial cause.

The true test, therefore is, whether the Appellate Court is able to pronounce judgment on the materials before it without taking into consideration the additional evidence sought to be adduced. Such occasion would arise only if on examining the evidence as it stands the court comes to the conclusion that some inherent lacuna or defect becomes apparent to the Court (vide Natha Singh and Others Vs. The Financial Commissioner, Taxation, Punjab and Others,

75 I am of the considered view that the additional documents referred to supra, are totally unnecessary, because the available evidence amply speaks about the recitals as contained in those documents. Hence, a fortiori those documents are nothing but surplusage.

76 Accordingly, the substantial questions of law are answered as follows:

Substantial Question of Law (1) is decided to the effect that both the Courts below were not justified in holding that the generosity shown by Sengoda Gounder should not be treated as an act of blending of the suit properties with the ancestral properties and the Courts below were not justified in ignoring the factum of describing the properties found in Ex. A1 as "Pidhirajyam" (Ancestral property) and also Exs. A19, 24, 45 & 46 in deciding the lis by holding as though there was no blending or treating the suit property as a Joint Family property.

Substantial Question of Law No. (2) is decided to the effect that the Courts below were justified in upholding the execution of Exs. A13 & 14-the Settlement Deeds and Ex. A24-the Will, however, in view of my discussion supra Sengoda Gounder had no competence to execute the Settlement Deeds treating the suit property as self-acquired property in entirety, but his 1/3rd share could only be considered as the one relinquished by him in favour of the remaining two coparceners namely, his sons. Wherefore, the Suit property shall be divided into two shares. The Plaintiff and the Defendant shall be entitled to half share each in the suit property.

Substantial Question of Law No. (3) is decided to the effect that the Courts below were justified in rendering judgment, without referring to Order 2, Rule 2 of CPC, in view of my finding supra that the cause of action for seeking partition is a continuing one.

On balance, both the Appeals are allowed setting aside the Common Judgment and Decrees of the Trial Court as well as the Appellate Court and the Preliminary Decree for Partition allotting half share each in favour of the Plaintiff and the Defendant shall follow with usual clauses. However, in the facts and circumstances of this case, there is no order as to costs. Consequently, connected Miscellaneous Petition is closed.