
(2012) 03 AP CK 0106

In the Andhra Pradesh High Court

Case No : Letter Patent Appeal No. 141 of 2002

Shaik Mohd. Ali Ansari and Fatima Bee

APPELLANT

Vs

Shaik Abdul Samad, (died per LR"s RR 11 to 16) and Others

RESPONDENT

Date of Decision : 01-03-2012

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 96
Trusts Act, 1882 — Section 23, 88, 90

Citation : (2012) 5 ALT 325

Hon'ble Judges : Madan B. Lokur, C.J.; Sanjay Kumar, J

Bench : Division Bench

Advocate : V. Venkataramana, for the Appellant; Y.G. Krishna Murthy for the Respondent Nos. 2, 3, 4 and 11 to 16, for the Respondent

Final Decision : Dismissed

Judgement

Sri Justice Sanjay Kumar

1. This Letters Patent Appeal arises out of the Judgment and Decree dated 10.12.2001 in A.S.No. 23 of 1985, whereby a learned Judge of this Court reversed the Judgment and Decree dated 16.10.1978 of the learned Subordinate Judge, Bapatla, dismissing O.S.No. 41 of 1975. The learned Judge passed a preliminary decree to partition the suit schedule property into three equal shares and to allot two such shares to the plaintiffs. Enquiry into past and future mesne profits was directed to be conducted on a separate application to be filed by the plaintiffs in the trial Court. Aggrieved, respondent Nos. 2 and 8 in A.S.No. 23 of 1985 (defendant No. 2 and the widow of deceased defendant No. 5 in the suit, who was brought on record as one of his legal representatives in A.S.No. 23 of 1985) are in appeal. The appellants in A.S.No. 23 of 1985 (plaintiffs in the suit) are arrayed as respondent Nos. 1 to 4 in this appeal. Upon the death of respondent No. 1 herein, his legal representatives were brought on record as respondent Nos. 11 to 16 in this appeal. Respondent No. 5 herein is respondent No. 1 in A.S.No. 23 of 1985 (defendant No. 1 in the suit). Respondent Nos. 6, 7

and 8 in this appeal are respondent Nos. 3, 4 and 5 in A.S.No. 23 of 1985 (defendant Nos. 3, 4 and 5 in the suit). Defendant No. 5 died during the pendency of A.S.No: 23 of 1985 and his female legal representatives were brought on record therein as respondent Nos. 8 and 9. As stated supra, his widow, respondent No. 8 in A.S.No. 23 of 1985, is appellant No. 2 in this LPA. His other legal representative, respondent No. 9 in A.S.No. 23 of 1985, is shown as respondent No. 10 in this appeal. Respondent No. 7 in A.S.No. 23 of 1985 (defendant No. 7 in the suit), a tenant in the suit schedule property, is shown as respondent No. 9 in this appeal. Respondent Nos. 5 to 10 in this appeal are however shown as not necessary parties.

2. The LPA was admitted on 25.09.2002 and status quo was directed to be maintained. Final decree proceedings were permitted to continue but the trial Court was restrained from passing the final decree.

3. Parties shall be referred to as arrayed before the trial Court.

4. The suit, O.S.No. 41 of 1975, from which this appeal arises was filed for partition of the suit schedule property into three equal shares and for allotment of two such shares to the plaintiffs. They also sought past and future mesne profits along with costs. The case of the plaintiffs was as follows:

5. Shaik Abdul Khader, the father of plaintiff Nos. 2 to 4, defendant No. 1 and plaintiff No. 1 were the sons of one Mohd. Abbas Ali, who owned considerable landed property in Sangupalem Kodur in Guntur District. The eldest son, Shaik Abdul Khader, died in 1955. Mohd. Abbas Ali settled all his properties in favour of his surviving sons and grandsons under a registered Gift Deed dated 14.12.1956 (Ex.A.1). Mohd. Abbas Ali expired in the year 1957 and defendant No. 1, being the only educated member in the family and also the eldest, assumed management of all the properties. He was the President of the Gram Panchayat, having been elected unopposed, and commanded influence and respect in the village. While so, under sale deed dated 25.05.1961(Ex.A.9), defendant No. 1 purchased the suit schedule property, being a site with a rice mill situated thereon along with buildings and appurtenant accessories, from out of the income of the joint properties, by raising loans on the security of these properties and also by selling some of them. The suit schedule property is situated at Chandole Village which is about 2 K.Ms, from Sangupalem Kodur where the plaintiffs were residing. The suit schedule property was managed by defendant No. 1 alone by spending joint monies for necessary repairs, etc. The plaintiffs did not and could not question defendant No. 1 as to the management of the properties. However, defendant No. 1 began squandering the income from the joint properties and was also using the same for his political activities and personal extravagances. He was not looking after them or their welfare properly and they came to know that he had created a false and fraudulent document styled as a "sale deed" in respect of the suit schedule property in favour of defendant Nos. 2 to 5. Defendant No. 1 was only a one-third sharer and the sale of the joint property effected by him was not binding on them or their two-thirds

share therein. Their enquiries revealed that the sale deed taken by defendant Nos. 2 to 5 in the year 1974 contained all sorts of false recitals but their queries failed to evoke any response. They accordingly filed the suit for partition and profits.

6. Defendant No. 1 remained ex parte.

7. Defendant No. 5 filed a written statement which was adopted by his sons, defendant Nos. 2 to 4. Therein, he stated to this effect:

8. The relationship of the plaintiffs and the defendant No. 1 was admitted but it was denied that late Mohd. Abbas Ali had considerable properties. To his knowledge, the suit schedule property never belonged to the estate of late Mohd. Abbas Ali and it was not purchased or repaired with the funds arising out of the alleged estate. He further stated that if the plaintiffs were aggrieved by the conduct of defendant No. 1, their silence all through and even at the stage of the filing of the suit, in so far as seeking true and proper accounts is concerned, is noteworthy and indicated that the suit was collusive and fraudulent in nature. The plaintiffs being majors, he alleged that it could not be believed that they were wholly ignorant of their rights in the family properties, if any. He denied that the sale transaction covering the suit schedule property was a false or fraudulent one and asserted that the said property did not belong to the plaintiffs and that they had no interest, enjoyment or possession in respect of the same at any time. He stated that the suit schedule property was originally purchased by defendant No. 1 with borrowed money in the year 1961 and he wanted to sell the same to others. However, the said sale did not fructify and he agreed to sell the property to him under the agreement of sale dated 29.08.1963 (Ex.B.1). Possession of the property was also delivered to him on the same day and since then, defendant No. 1 ceased to have any interest, enjoyment or possession over the said property. He claimed that since then he was in exclusive and uninterrupted possession of the suit schedule property in his own right. Defendant No. 1 and he had to face a suit in O.S.No. 24 of 1964 on the file of the learned Subordinate Judge, Bapatla, which was filed by Kommuri Sambasiva Rao, the vendor of defendant No. 1, for recovery of the balance sale consideration. He discharged the said suit claim after the suit was decreed.

9. Substantial part of the consideration for which the property was purchased by him was utilized in discharge of the indebtedness of defendant No. 1. He denied that the suit schedule property was purchased by defendant No. 1 with the monies of the plaintiffs. He further stated that after running the suit rice mill for some time, he leased out the same to N.Bhushaiah (impleaded thereafter as defendant No. 6) and others in or about the year 1967. Since then, the mill was being run by his lessees, who were not impleaded in the suit, rendering the suit bad for non-joinder of necessary parties. The sale in respect of the suit schedule property was registered in favour of his sons, defendant Nos. 2 to 4, under sale deed dated 02.04.1974 (Ex.A.10/Ex.B.8). Another document (Ex.B.5) was also executed on the same day in respect of the sale of the movable machinery

installed in the suit rice mill. On account of the delay caused by the conduct of the defendant No. 1, he had to suffer and was obliged to pay interest and excess amount to the tune of Rs. 9,000/-, bringing the total sale consideration to Rs. 73,000/-. He asserted that the plaintiffs had absolutely no interest in the said property and that they were not entitled to question his enjoyment or possession and that the suit claim was barred by time. He further stated that as the parties were governed by Muslim Law they were not entitled to import the principles of Hindu Law to support their claim. He averred that defendant No. 1 never acted or purported to act on behalf of the plaintiffs at any time during the life time of his father or even thereafter. They were merely living together and under law, the same did not create any legal right in the plaintiffs in so far as the properties of defendant No. 1 are concerned. He concluded by alleging that the plaintiffs had lost all their properties and had chosen, perhaps at the instance of defendant No. 1, to canvass this vexatious and frivolous suit claim and prayed for dismissal of the suit with costs.

10. Defendant Nos. 6 and 7, being the tenants in the suit schedule property under defendant Nos. 2 to 5, were subsequently added as parties to the suit. Defendant No. 7 filed a written statement, which was adopted by defendant No. 6, wherein they asserted their rights as tenants of the suit schedule property.

11. On the above pleadings, the trial Court framed the following issues for consideration:

1. Whether the suit property belonged to the estate of late Abbas Ali, the father of the 1st defendant and whether the plaintiffs are entitled to partition and profits, if any?

2. Whether the sale transaction in favour of defendants 2 to 5 is a false and fraudulent one?

3. Whether the plaint schedule is correct?

4. Whether the suit is bad for non-joinder of necessary parties?

5. To what relief?

12. Plaintiff No. 1 examined himself as PW.1 and marked Exs.A. 1 to A.10. Defendant No. 5 was examined as DW.1 and the scribe of the agreement of sale dated 29.08.1963 (Ex.B.1) was examined as DW.2. The defendants marked Exs.B.1 to B.18 in support of their case.

13. Upon considering the pleadings and the material on record, the trial Court dismissed the suit holding that the plaintiffs had failed to prove that defendant No. 1 had paid part of the sale consideration in respect of the suit schedule property under Ex.A9 from the monies which were jointly held by him with the plaintiffs. It further held that there was no evidence that the suit schedule property was ever treated as the joint property of the plaintiffs and defendant No. 1 and declined to accept the plaintiffs' version that defendant No. 1 had

purchased the suit schedule property from out of the joint estate of the parties and that the same became a part thereof. The trial Court observed that it was clear that defendant No. 1 alone had purchased the suit schedule property in his own name and dealt with the same as his own property. It further opined that no presumption could be drawn in favour of jointness of ownership over the suit property in the absence of legal proof that defendant No. 1 had acquired the same in a fiduciary capacity. The trial Court accordingly held that the plaintiffs were not entitled to seek partition of the suit schedule property and that the sale thereof in favour of defendant Nos. 2 to 5 was true, valid and binding on them and dismissed the suit.

14. Aggrieved thereby, the plaintiffs filed A.S.No. 23 of 1985 before this Court u/s 96 CPC. By judgment and decree dated 10.12.2001, a learned Judge allowed the said appeal. The learned Judge, placing reliance on the documentary evidence (Exs.A2 to A5), concluded that part of the sale consideration paid by defendant No. 1 under Ex.A9 was sourced from the income and proceeds of the joint properties held by him with the plaintiffs. The learned Judge observed that there was absolutely no reason to disbelieve that the amounts received under Exs.A2 to A5 were used towards the consideration under Ex.A.9; more so, when the parties were living together jointly and there was no severance amongst them. The learned Judge took note of the fact that there was no evidence to show any other separate source of income to account for defendant No. 1 independently paying the consideration under Ex.A9 and drew the inference that the suit schedule property was purchased from out of the income arising out of the joint properties and more particularly, the transactions covered by Exs.A2 to A5. The learned Judge therefore held that the suit schedule property was a joint property and that the defendant No. 1 could not have alienated the same in favour of third parties to the detriment of the plaintiffs. As the initial burden resting on the plaintiffs stood discharged, the learned Judge was of the opinion that the defendants, in their turn, had failed to prove the passing of valid title to them. The learned Judge accordingly passed a preliminary decree for partition of the suit schedule property into three equal shares and for allotment of two such shares to the plaintiffs. The learned Judge further directed the plaintiffs to file a separate application before the trial Court for initiating an enquiry into the past and future mesne profits payable to them.

15. Challenging the said judgment and preliminary decree, the present LPA was filed.

16. Sri Vedula Venkataramana, learned senior counsel appearing for the appellants, contended that the learned Judge had erred in holding that the suit schedule property was the joint property of defendant No. 1 and the plaintiffs. He asserted that after the settlement effected by the father, late Mohd. Abbas Ali, under Ex.A1 gift deed, there was severance in the joint ownership over the properties. He submitted that even otherwise it was for the plaintiffs to prove that there was sufficient nucleus of joint property to account for the acquisition

of the suit schedule property. He pointed out that the plaintiffs had failed to substantiate details as to the income arising out of these properties and contended that this failure on the part of the plaintiffs to prove the nexus and sufficiency of the alleged nucleus of the joint properties was fatal to their claim. In the alternative, the learned senior counsel submitted that mere payment of a portion of the consideration from out of the alleged income arising out of the joint properties would not translate to joint acquisition of the property as a whole. He therefore asserted that, in any event, the plaintiffs could not claim rights in respect of the entire suit schedule property. Relying on the decision in *Vidhyadhar Vs. Manikrao and Another*, the learned senior counsel asserted that the Court should draw an adverse inference against the plaintiffs for their failure to examine defendant No. 1. He pointed out that the parties were governed by Muslim Law and therefore, the concept of a Hindu Joint Family would not be applicable to them and that the plaintiffs were required to prove their joint ownership before they could assert a claim for partition.

17. Refuting the above contentions, Sri Y.G. Krishna Murthy, learned centenarian counsel for respondent Nos. 2, 3 & 4 (plaintiffs 2, 3 & 4) and respondent Nos. 11 to 16 (LRs of plaintiff No. 1), contended that the nature of the parties' rights under their personal law had not been argued before the courts below and it was not open to the appellants to raise the same for the first time in this LPA. On facts, the Learned Counsel submitted that the documentary evidence in the form of Exs.A.2 to A.5 clearly demonstrated the nexus between the income/proceeds of the joint properties held by defendant No. 1 and the plaintiffs and the payment of part of the sale consideration by defendant No. 1 under Ex.A9. He contended that till the execution of the sale deed dated 02.04.1974 (Ex.A10/ Ex.B8), defendant Nos. 2 to 5 did not have title and ownership over the suit schedule property and therefore could not complain of any inaction/silence on the part of his clients prior thereto. Learned Counsel pointed out that the plaintiffs were at loggerheads with defendant No. 1 after the fallout caused by this litigation and further, defendant No. 1 was imprisoned at that time and could not therefore be summoned for examination during the trial. As defendant Nos. 2 to 5 claimed that their sale transaction with defendant No. 1 was a genuine and bonafide one, Learned Counsel asserted that, in any event, it was for them to examine defendant No. 1 to prove their case.

18. In his reply, Sri Vedula Venkataramana, learned senior counsel, stated that the plaintiffs had to succeed on the strength of their own case and it was not for his clients to examine defendant No. 1 to prove their bonafides.

19. At the outset, we may note that we are severely handicapped as the original record appears to have been destroyed during the pendency of the first appeal itself and it is only on the basis of the partially reconstructed record made available by the counsel that we are adjudicating this appeal.

20. Though Sri Y.G. Krishna Murthy, Learned Counsel, stated that the issue had not been argued before the courts below, we find that in his written statement,

defendant No. 5 did raise the aspect of the principles of Hindu law not being applicable as the parties were Muslims. Even otherwise, we are of the opinion that the personal law governing the plaintiffs and defendant No. 1 has relevance to the lis and cannot be ignored.

21. The position in Muslim Law is that at the moment of death of a Mohammedan, his estate devolves on his heirs and they take the estate as tenants-in-common in specific shares. Muslim Law does not recognize the theory of representation and the interest of each heir is separate and distinct. Therefore, there can be no presumption that acquisition of a property by one or more member(s) of the family is for the benefit of the entire family, unless there is proof to the contrary.

22. The concept of a joint family is foreign to Muslim Law. It is however common in certain areas of Andhra Pradesh, formerly belonging to the Madras State, for descendant Mohammedans to live and trade together and to acquire properties together. There is nothing contrary to law in Mohammedan adult male members of a family carrying on trade for the benefit of all the interested members, including minors and females. The Courts have upheld such legal arrangements and the legal consequences as in law that follow from them. When an adult male member holds assets and carries on business on behalf all the persons interested therein, he stands in a fiduciary relationship to such other persons. Sections 23, 88 and 90 of the Trusts Act are applicable to such cases [D. Raja Ahmed V/s. Pacha BI (1969) 1 AWR 255 (DB)].

23. Thus, it is only if a Mohammedan makes out a case of partnership, agency or fiduciary relationship that he can contend that property purchased in the name of one was for the benefit of all. In such a case the person seeking relief would have to establish that the person who stood in fiduciary capacity made use of the common fund of the parties in making the purchase or that he took advantage of his fiduciary relationship in the transaction. It must however be remembered, as pointed out by a Division Bench of the Madras High Court in Saudagar Muhammad Abdul Rahim Baig Saheb V/s. Saudagar Muhammad Abdul Hakim Baig Saheb AIR 1931 Mad. 553 and affirmed by a Division Bench of the Patna High Court in Rukaiya Begum and Others Vs. Fazalur Rahman and Others, though there is nothing contrary to law in Mohammedan adult members of a family carrying on family trade for the benefit of all the members of the family and the Court would normally uphold such an arrangement and such other legal consequences as in law that would follow from it, notwithstanding the fact that there is no presumption of jointness in Mohammedans, the Court would not import into it the same legal consequences that would follow when such an arrangement is conducted by a Hindu Joint Family.

24. In Shukrulla V/s. Mt. Zuhra Bibi AIR 1932 Allahabad 512, a Division Bench of the Allahabad High Court held:

... Where male members of a family live in union so as to have jointness in mess,

business and property, there can be little difficulty in tracing their relations inter se to an implied agreement which clothes each with a representative capacity in reference to his co-sharers. Each must be deemed to be acting not only for himself, but for all in his dealings with regard to joint property and business. Accordingly any acquisitions made by any one member should be considered to have been made by all through the one who actually made it. In such a case, as among partners, each is the manager or agent of the others. The position is not so simple as regards the heirs whose rights are not recognized by any overt act of the surviving male members. The case of female and minor heirs and those not living on the spot, all of whom belong to this category, rests on a somewhat different footing. Their right to share subsequent additions can arise only if the circumstances are such that the male members can be considered to have continued the business and held the joint property on their behalf or in some way made themselves trustees for them in making fresh acquisitions so as to be liable to hold for them part of the resultant benefit.

25. In *Aminaddin Munshi Vs. Tajaddin and Others*, a Division Bench of the Calcutta High Court observed that though members of a Mohammedan family living in commensality do not form a joint family in the sense that the expression is used with regard to Hindus and there is no presumption, as under Hindu Law, that acquisition of the members is made for the benefit of the joint family, the situation would be different when it is shown that the members of the family were possessing the disputed properties jointly. In such a case, it is not a question merely of the messing together of the members of the Mohammedan family as they possess the properties in common and in jointness. Under such circumstances, the burden would lie upon the managing member of the family to establish that the properties acquired by him during the jointness of the family would not belong to all the members of the family. The managing member would stand in a fiduciary relationship to the other members of his family and would have certain obligations to discharge with reference to them. Thus, where properties are acquired by the managing member, the burden of proving that the said property was not the property of the joint family but was self-acquired would rest upon the managing member himself.

26. This principle was followed by a Division Bench of the Patna High Court in *Mst. Bibi Bintul Fatma and Another Vs. S.M. Aftab Ahmad*, while upholding the right of the other members of such a family to seek partition of the joint movable and immovable properties held by the managing member of the family.

27. In *Soudagar Muhammad Abdul Rahim Baig Saheb Vs. Soudagar Muhammad Abdul Hakim Baig Saheb and Others*, , the Madras High Court observed that it is not an uncommon thing in the Madras Presidency where members of the Mohammedan community live surrounded by Hindus, that they absorb and adopt Hindu social ideas and tend to look upon their own social customs from a Hindu point of view. It is therefore common for descendants of Mohammedans to live and trade together and the property is held by several members of the family in

the shares to which they are entitled under Mohammedan Law. The Court therefore held that where one such member, upon the death of his father, puts himself in a fiduciary relationship with the other members of the family and assumed the management of the properties, he would be accountable to the other members of the family, not as a co-owner but because of the fiduciary relationship he adopted towards them.

28. In *Sk. Kabir and Another Vs. Narayandas Lachman Das Ltd. and Another*, a Division Bench of the Orissa High Court observed that when Mohammedans who live and mess together trace their origin to a common ancestor, carry on business jointly and make acquisitions, their rights are to be determined with reference to the contract, either express or implied.

29. In *C. Krishnamurthy Setty V/s. Abdul Khadar* AIR 1956 Mysore 14, a Division Bench of the Mysore High Court observed that if during the continuance of the family, properties are acquired in the name of the managing member of the family and it is proved that they are possessed by all the members jointly, the presumption is that they are properties of the family and not the separate properties of the member in whose name they stand.

30. Before we apply the above legal principles to the case, certain factual aspects need to be noticed.

31. Under the registered document bearing No. 2589/1956 dated 14.12.1956 (Ex.A1), late Mohd. Abbas Ali conveyed various properties to his surviving sons and the sons of his pre-deceased son, Shaik Abdul Khader. This document has been styled in the pleadings as a gift deed but it appears to be more in the nature of a settlement executed by Mohd. Abbas Ali in favour of his male progeny. The copy of the original Telugu version of this document, which is placed on record, also does not convey the meaning that it is a gift deed.

32. Though the concept of a family settlement amongst Mohammedans is not very common, there are instances when agreements in the nature of family arrangements are made which are not strictly akin to a family settlement. It is not necessary that there must exist a dispute, actual or possible in the future, in respect of each and every item of the property; and amongst all the members arrayed one against the other, for the purpose of validating such an arrangement. It would be sufficient if it is shown that there were actual or possible claims and counterclaims by parties, in settlement whereof the arrangement as a whole has been arrived at, thereby acknowledging title in one, to whom a particular property falls on the assumption that he had an anterior title therein B.R. Verma's Commentaries on Mohammedan Law, 8th Edition.

33. Such a family arrangement, even amongst Mohammedans, would be binding between the parties inter se in the same manner such an arrangement would bind Hindus. In *Mohd. Amin and Others Vs. Vakil Ahmed and Others*, , the Supreme Court recognized by implication such an arrangement amongst members of a Muslim family to represent a family settlement.

34. Ex.A. 1 makes it clear that out of love and affection, late Mohd. Abbas Ali conveyed to his male progeny the scheduled immovable properties in the shares apportioned thereunder. Defendant No. 1 and plaintiff No. 1 were given 1/3rd share each. The grandsons, being the children of his pre-deceased son, were given a 1/3rd share and defendant No. 1, being the eldest surviving son, was required to take possession of their share in the capacity of their guardian. Defendant No. 1 was to remain a guardian for the minor grandchildren and provide for their nourishment and education and maintain the family. He was to deliver possession of the 1/3rd share that fell to their lot after they attained majority.

35. Thus, Ex.A1 spelt out clearly the fiduciary obligations visited upon defendant No. 1 vis-à-vis the minors as well as the family. The requirements posited by Shukrullah AIR 1932 Allahabad 512 and Sk. Kabir and Another Vs. Narayandas Lachman Das Ltd. and Another, were therefore fulfilled by this express contract. This document was admittedly acted upon as was recorded by the trial Court in its judgment. There is no evidence to show that defendant No. 1 did not assume the role of the managing member of the family as was envisaged in Ex.A.1, after the death of his father in 1957.

36. Further, Exs.A2 to A5 support the claim of the plaintiffs that defendant No. 1 was the managing member of the family. Ex.A2, being a non-possessory mortgage deed dated 19.08.1960, was executed by defendant No. 1 and plaintiff No. 1. Thereunder, they mortgaged various extents of lands settled under Ex.A1 for a sum of Rs. 9,000/-. It is pertinent to note that the reason for creating the mortgage was also mentioned in clear terms therein, to the effect that the sum of Rs. 9,000/- was borrowed for discharging the loan due to one Y. Nagarattaiah and for the purpose of purchasing the suit schedule property.

37. Similarly, Ex.A3 sale deed dated 17.10.1960 was executed by defendant No. 1, plaintiff No. 1 and on behalf of plaintiffs 2 to 4, represented by their guardian and junior paternal uncle, defendant No. 1. Thereby, they sold a part of the land settled under Ex.A1 for a consideration of Rs. 1,000/-. Once again, the reason for the sale was stated to be for the purpose of meeting family expenses and for paying the sale consideration in respect of the suit schedule property.

38. Ex.A4 is a registered mortgage deed dated 19.08.1960 executed by defendant No. 1 and plaintiff No. 1. Thereunder, for the purpose of discharging loans incurred for family needs and for purchasing the suit schedule property, they borrowed a sum of Rs. 9,000/- on the security of the properties mortgaged thereunder. These properties also were those settled under Ex.A1.

39. Ex.A5 is a registered sale deed dated 17.10.1960, whereunder plaintiff No. 1 and defendant No. 1, acting on behalf of himself and as the guardian of plaintiff Nos. 2 to 4, sold the land scheduled therein for a sum of Rs. 1,500/- to meet family expenses and for paying the sale consideration in respect of the suit schedule property. Exs.A6, A7 and A8 also appear to be registered sale deeds

executed by and on behalf of the plaintiff No. 1, defendant No. 1 and plaintiff Nos. 2 to 4, but they are subsequent in point of time, all dated 25.07.1967, and may be of no relevance to the present controversy. In any event, copies thereof have not been made available.

40. Ex.A9 is the registered sale deed, whereunder defendant No. 1 purchased in his own name the suit schedule property from Kommuri Sambasiva Rao for a consideration of Rs. 30,000/-. Kommuri Sambasiva Rao recorded therein that Rs. 12,500/- out of the sale consideration had been received by him and that the balance of Rs. 17,500/- was secured by a promissory note executed in his favour by defendant No. 1. The sale deed further recorded that physical possession of the suit schedule property was delivered on that date.

41. In the light of the clear recitals in Exs.A2 to A5 to the effect that the proceeds thereof were intended to be used for payment of the sale consideration in respect of the suit schedule property, the lower Court was not correct in tersely brushing aside the same. Exs.A2 to A5, being registered documents anterior in point of time to Ex.A9, the recitals therein carried weight and could not be doubted lightly. Once these documents recorded that the amounts raised thereunder were intended for payment of the sale consideration under Ex.A9, the presumption would weigh in favour of the same having been acted upon.

42. That apart, there is no material to suggest that defendant No. 1 had any other independent source of income apart from the properties held by him as the managing member of the family, on behalf of himself and the other members. It can therefore be safely assumed that the part-sale consideration of Rs. 12,500/-, receipt of which was recorded in Ex.A9, was sourced from the mortgage/sale proceeds of the joint properties settled on the family members under Ex.A1. It is an admitted fact that the balance sale consideration of Rs. 17,500/- was not remitted by defendant No. 1 which led to the filing of a suit, O.S.No. 24 of 1964, by Kommuri Sambasiva Rao. It is also admitted that defendant No. 5, who was a party to the said suit, paid the balance sale consideration upon the decretal of the suit.

43. Ex.B1 agreement of sale executed by defendant No. 1 in favour of defendant No. 5 stated to the effect that the suit schedule property was agreed to be sold for a sale consideration of Rs. 64,000/-. However, the said document recorded receipt of only a sum of Rs. 8,660-72 Ps. and the balance sale consideration was shown as Rs. 55,339-28 Ps. The said amount was to be paid by defendant No. 5 by the end of the December of that year, whereupon defendant No. 1 promised to execute a proper sale deed either in the name of defendant No. 5 or the person/persons nominated by him. The agreement also recorded that possession of the suit schedule property was delivered thereunder. There is no dispute at this stage that the property was in fact so delivered to defendant No. 5 who enjoyed the same, be it in his own right or through tenants, till the execution of the registered sale deed in favour of his sons in the year 1974.

44. Prior thereto, under the endorsements (Exs.B2 to B4) made on Ex.B1, defendant No. 1 recorded receipt of additional part-sale consideration from defendant No. 5. Ex.B2 is the endorsement dated 18.10.1963 evidencing receipt of a sum of Rs. 17,000/- towards the sale consideration. Ex.B3 is the endorsement dated 18.02.1964 acknowledging receipt of Rs. 12,876/- towards the sale consideration in the form of the amounts spent by defendant No. 5 upon the repairs of the suit schedule property and the discharge of debts of defendant No. 1. Ex.B4 endorsement is dated 05.03.1964 and records receipt of Rs. 10,382-80 Ps, comprising various sums disbursed by defendant No. 5 on behalf of defendant No. 1.

45. The registered sale deed dated 02.04.1974 (Ex.A10/Ex.B8) makes for an interesting reading. Thereunder, defendant No. 1 sold the suit schedule property to defendant Nos. 2 to 4, the sons of defendant No. 5. The sale consideration was mentioned as Rs. 40,000/-, details whereof were spelt out as under:

Rs. 5,000/-

From out of the sale consideration I caused one sale delivery receipt executed on his name your father on the date of sale and took from him as advance.

Rs. 5,000/-

That as I caused this amount paid through your father on 19.7.1964 for the purpose of canceling the sale contract executed by me on 19.7.1963 in favour of Mymunnissa Begum Saheba w/o Mohammad Khasim Hussain r/o Battiprolu.

Rs. 4,000/-

That for the money payable by me towards debt of TummalaVenkataram r/o Kovvur, I caused this amount paid on 18.10.63 through your father.

Rs. 1,000/-

That for the money payable by me towards the debt of Yuddanapudi Ramaswamy, r/o SangupalemKoduru, I caused this amount paid through your father on 18.10.63.

Rs. 25,000/-

That KommuriSambasivaRao, r/o Ponnuru and others have instituted one suit O.S.24/64 against me and your father, on the file of Sub-Court, Bapatla, as I caused this amount paid through your father on my behalf to the aforesaid SambasivaRao and others in Bapatla Sub-Court towards court decree dated 26.11.1964.

46. The above recitals demonstrate that the sum of Rs. 25,000/- was paid by defendant No. 5 on behalf of defendant No. 1 to Kommuri Sambasiva Rao, pursuant to the Court decree dated 26.11.1964 in O.S.No. 24 of 1964. A separate sale deed (Ex.B5) was executed on 02.04.1974 in respect of the movables and machinery installed in the suit mill and the sale consideration in

respect thereof was stated to Rs. 21,000/-. Reference is made therein to the receipt of sale consideration of Rs. 3,000/- for conveying an extent of 7,426 square feet of land which was purchased by defendant No. 1 without a registered document and which was delivered to defendant Nos. 2 to 4 on the assurance of getting the document registered in their favour. The total consideration therefore came to Rs. 64,000/-.

47. An overview of the above facts demonstrates that part of the sale consideration for the suit schedule property came out of the income/proceeds arising out of the joint properties settled under Ex.A.1. To that extent, the plaintiffs undoubtedly could claim rights and interest in the suit schedule property.

48. The question however is whether their rights and interest would be limited only to that portion of the suit schedule property relatable to the part-sale consideration paid out of the joint funds of the family;

49. Though the precepts of Hindu Law have no strict application to the case on hand, useful reference may be made to the judgment of a Division Bench of the Madras High Court in *S. Periannan Vs. Commissioner of Income Tax*, The Madras High Court was dealing with a case where a Hindu coparcener had acquired a property with the aid/assistance of joint family funds. However, the aid/assistance only accounted for a lesser part of the sale consideration. The issue was whether the entire property would take on the character of a joint family property or whether it could be claimed as a self-acquisition. Relying on the principle that whatever is acquired by the coparcener himself, without detriment to the father's estate, would not appertain to the co-heirs, the Division Bench held that property acquired by a coparcener with the aid or assistance of joint family assets would be impressed with the character of joint property. To constitute self-acquired property, such acquisition should have been without the assistance or aid of joint family property. Relying on the Division Bench judgment of the Allahabad High Court in *Mangal Singh Vs. Harkesh and Another*, the Division Bench held that whatever may be the extent of contribution of the acquiring member himself out of his own funds, if he took the aid of any portion of the joint or ancestral property in acquiring such property, however small that aid may be, the property so acquired would assume the character of joint family property and cannot be claimed by him as a self-acquisition. In that view of the matter, the Court was of the opinion that the extent of his contribution or that of the family fund would become immaterial. If any help is taken from the family property, it is enough to make the self-acquired property the property of the family.

50. Though the aforestated decision arose in the context of Hindu Law, the principle enunciated therein would have application to the case on hand as defendant No. 1 also stood under a fiduciary obligation to the other members of the family, akin to the karta of a Hindu joint family, and as spelt out supra, property acquired by him with the aid, even in part, of the joint funds would invariably have to be treated as joint property.

51. Once part of the sale consideration under Ex.A9 came out of the joint funds, the said property inevitably took on the character of joint property. We are fortified in this view by the fact that the sale deed (Ex.A10/Ex.B8) records the fact that defendant No. 5 remitted the balance sale consideration due to the vendor, Kommuri Sambasiva Rao, on behalf of defendant No. 1 and not in his own right. The property was conveyed in its entirety under Ex.A9 only to defendant No. 1, who purchased it during the commensality and jointness of the family, consequent upon the settlement under Ex.A1, and with the aid of joint funds. Therefore, the fact that only part of the sale consideration was paid out of the joint funds of the family would not deviate from or dilute the character of jointness bestowed upon the property purchased under Ex.A9.

52. By the very nature of their claim and pleadings, the plaintiffs demonstrated that they were inimical to defendant No. 1. It was therefore for defendant Nos. 2 to 5 to discharge the onus which had shifted on to them to adduce such evidence as was necessary to prove the validity of the transaction whereunder they were claiming the suit schedule property. That being the situation, we are not inclined to draw any adverse inference against the plaintiffs for their failure to examine defendant No. 1, who was admittedly in jail during the trial.

53. We therefore hold that the plaintiffs more than adequately discharged the burden resting upon them to prove the suit claim. As the foundation for the purchase was sourced from the joint funds of the family by payment of the part-sale consideration, payment of the balance sale consideration thereafter by a subsequent vendee for and on behalf of the former vendee, the managing member of the family, would not alter the fact that such property would take on the character of joint property.

54. We therefore concur with the view taken by learned single Judge in all respects. Consequently, we affirm that the plaintiffs are entitled to a 2/3rd share in the suit schedule property and that defendant No. 1 had no right or entitlement to sell away their share to defendant Nos. 2 to 4. The learned Judge was therefore fully justified in passing a preliminary decree for partition of the suit schedule property into three shares, for allotment of two such shares to the plaintiff No. 1 and Plaintiff Nos. 2 to 4 respectively and for taking necessary further steps in the suit.

55. The appeal is devoid of merit and is accordingly dismissed with costs.

56. After the judgment was pronounced, Learned Counsel for the respondents requested for quantification of costs. We quantify the costs at Rs. 10,000/- (Rupees ten thousand only) to be paid to the respondents within six weeks from today.