
(2008) 09 AP CK 0065

In the Andhra Pradesh High Court

Case No : Appeal Suit No. 1049 of 1992

Smt. Ratnabai and Another

APPELLANT

Vs

Smt. Raju Bai and Others

RESPONDENT

Date of Decision : 11-09-2008

Acts Referred:

Andhra Pradesh Land Reforms (Ceiling on Agricultural Holdings) Act, 1973 — Section 4A
Commons Registration Act, 1965 — Section 22(1), 53A
Hindu Adoptions and Maintenance Act, 1956 — Section 4
Hindu Succession Act, 1956 — Section 6
Limitation Act, 1908 — Article 142, 144
Limitation Act, 1963 — Article 64, 65

Citation : (2009) 3 ALT 134

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

Bench : Single Bench

Advocate : P.S. Murthy, for the Appellant; Anand, representing Y. Ashok, for the Respondent

Final Decision : Allowed

Judgement

P.S. Narayana, J.—Brief episode:

Smt. Ratnabai, wife of Lakshma Reddy, who is no more, at present being aggrieved of the dismissal of the partition action in O.S. No. 25 of 1986 on the file of the Subordinate Judge, Nizamabad, had preferred the present appeal. The said appellant-plaintiff since died, appellant No. 2, the legal representative of the deceased first appellant was brought on record by order dated 05.4.2007 made in A.S.M.P. No. 755 of 2007.

2. Defendants 1 to 3 in the suit are respondents 1 to 3 in the present appeal. The said Ratnabai instituted the suit for partition claiming half share in the plaint "A" and "B" schedule properties, for mesne profits and other appropriate reliefs. The suit was resisted by the defendants by filing written statements. The learned Subordinate Judge, Nizamabad, in the light of the respective pleadings of the

parties having settled the issues, recorded the evidence of P.W.1, P.W.2, D.Ws.1 to 9, marked Exs.A-1 to A-3 and Exs.B-1 to B-40 and after recording reasons came to the conclusion that the plaintiff was never in possession of the suit lands and she was never given any share during the life time of her father and even after the death of her father, the plaintiff is not entitled for any share, whatsoever, and D-1 to be declared as exclusive owner of the plaint schedule properties and accordingly dismissed the suit, directing the parties to bear their own costs. Aggrieved by the same, the said Ratnabai, the unsuccessful plaintiff, preferred the present appeal and inasmuch as the said Ratnabai and Lakshma Reddy being no more, the son Gangadhar Reddy, as a legal representative, was brought on record and at present the said legal representative is prosecuting the present appeal.

3. Contentions of Sri P.S. Murthy:

Sri P.S. Murthy, learned Counsel representing the present appellant had taken this Court through the oral and documentary evidence available on record and would maintain that when the plaint schedule properties are the properties of the family of the plaintiff and the first defendant, being the properties of the father of the plaintiff and first defendant, and the father having died intestate in the year 1970, these parties as heirs i.e., daughters Ratnabai and Rajubai, are entitled to equal shares by virtue of intestate succession. The learned Counsel also made certain submissions relating to item No. 1 of the plaint schedule, which is said to have been acquired in the land acquisition. The learned Counsel also pointed out that though it is stated that the second defendant in the name of the first defendant had purchased item Nos. 3 to 14 and they are the separate and exclusive properties of the second defendant, no acceptable evidence in this regard had been placed. Even the evidence of D.W.3 being totally unsatisfactory, it may have to be taken that the same had not been established. The Counsel also would maintain that the trial court totally erred in recording a finding that the upstairs portion of the house was built by the second defendant. Even if the said stand to be believed, the said construction had been done only with the funds of the father-in-law of the second defendant and the father of the plaintiff and the first defendant and in that view of the matter this would also be family property of these sisters and liable for partition. The learned Counsel also would maintain that though it is stated that certain sales had been effected, no acceptable evidence in relation to sales at least had been placed before the court. The learned Counsel also had drawn the attention of this Court to the decision in *Kishtabai v. Ratna Bai and Ors.* 1979 (1) ALT 250 and would maintain that this unfortunate lady was fighting with Kishtabai relating to the family properties left by her husband and that was taken advantage by this Rajubai who is none other than sister of the said Ratnabai. The learned Counsel also had explained the evidence of D.Ws.5 and 8 as well and except D.W.8 no other alleged alienees had been examined. The Counsel also would maintain that D.W.8 deposed that he purchased the property by virtue of Ex.B-40. D.W.5, the Patwari did not mention the name of this alleged alienee at all. The learned

Counsel also would maintain that it is not as though this illatom adoption of the second defendant was not challenged at a particular point of time. The same was challenged by the husband of Ratnabai and the same ultimately resulted in a compromise. The learned Counsel also had taken this Court through the relevant portions of the evidence of P.W.1 and would maintain that though certain properties were said to have been given under the compromise to the said Ratnabai, no such properties in fact had been given and even otherwise the said Ratnabai was not a party to the prior suit and, hence, any term if any mentioned in the said compromise may not seriously alter the situation. While further elaborating his submissions, the learned Counsel also pointed out that either the plea of abandonment or the doctrine of ouster, this may not be applicable to the facts of the case for the reason that never the rights of Ratnabai had been specifically denied by either Rajubai or husband of Rajubai and never she was put on notice to the effect that such denial was being made and under such circumstances to put forth either the plea of adverse possession or the plea of ouster, definitely cannot be sustained. The learned Counsel had taken this Court through the other oral and documentary evidence available on record and would maintain that in the facts and circumstances of the case in the event of this Court coming to the conclusion that the father of plaintiff and the first defendant died intestate in the year 1970, then being the heirs these sisters are entitled to equal shares being the daughters of the deceased father or in the light of the compromise and the other material if the illatom adoption of D-2 be held to be sustainable, even in such a case Ratnabai would be entitled to 1/3rd share, Rajubai would be entitled to 1/3rd share and the husband of the Rajubai, Ramachandra Reddy would be entitled to 1/3rd share. The learned Counsel also placed strong reliance on several decisions to substantiate his submissions.

4. Contentions of Sri Anand representing Sri Y. Ashok Raj:

Sri Anand, representing Sri Y. Ashok Raj, learned Counsel representing contesting respondents would maintain that it is not as though the second defendant had no property at all in the natural family. It is but probable that second defendant in the natural family disposed of the properties and purchased these properties, item Nos. 3 to 14, in the name of the first defendant. The learned Counsel also would maintain that these purchases were made under the unregistered sale deeds. While further elaborating his submissions, the learned Counsel placed strong reliance on the evidence of D.W.3 in particular, who is related to both the parties Ratnabai and Rajubai as well. The learned Counsel had taken this Court through the evidence of D.2, examined as D.W.1, and also D- 1, examined as D.W.2, and would maintain that in the light of the findings recorded by the trial court on appreciation of the evidence available on record, the dismissal of partition action cannot be found fault. The learned Counsel also had pointed out to the contents of Ex.B-1, the registered illatom deed of adoption, dated 29.10.1954 and would point out that this illatom adoption by virtue of Ex.B-1 was prior to the Hindu Adoptions and Maintenance Act, 1956 coming into force and inasmuch as specifically the status of a son had been

conferred, by virtue of survivorship, the second defendant would become absolute owner of all the properties after the death of the father-in-law. The learned Counsel also incidentally pointed out to Section 4 of the Hindu Adoptions and Maintenance Act, 1956, as well. The Counsel also would maintain while pointing out to Ex.B-2 that though in the compromise Ratnabai also was beneficiary, those properties are not shown in the plaint schedule at all. This aspect also may have to be considered. The learned Counsel also would maintain that several of the alienations already had been made and the purchasers have been in possession of the respective properties and in the absence of such parties, the partition action cannot be maintained. Ultimately, the learned Counsel would conclude that in the light of the findings recorded by the trial court in detail, such findings need no disturbance in the hands of this Court and the appeal accordingly to be dismissed.

5. Heard the Counsel, perused the oral and documentary evidence available on record and also the findings recorded by the trial court.

6. Before taking up further discussion and before proceeding with recording of findings, it may be appropriate to have a glance at the respective pleadings of the parties.

7. Averments made in the plaint:

One Katpalli Rajeshwar Reddy, native of Ranjerla village had been the owner and possessor of the lands shown in schedule "A" at Ranjerla village, Armoor Taluk and also the house with upstairs and cattle shed shown in "B" schedule in Ranjerla village. The said K. Rajeshwar Reddy married with one Papavva and out of their wedlock they had no male children, but had two daughters. Plaintiff is the eldest daughter and defendant No. 1 is the second daughter. The plaintiff married to Lakshmareddy, who died leaving plaintiff and her children. Defendant No. 1 was married to defendant No. 2, who was native of Bhattapur village, Armoor taluk.

K. Rajeshwar Reddy, the father of the plaintiff and defendant No. 1, died on 15.01.1970 and after his death, his wife Papavva died on 12.4.1974. During the lifetime of K. Rajeshwar Reddy, he alone was the owner of the suit lands and houses and had been in possession. Besides the suit lands, he also owned the land in Sy. No. 564 an extent of 15 guntas, Sy. No. 610 an extent of 0.16 guntas at Ranjerla village, but he sold away these lands during his lifetime and after death of said K. Rajeshwar Reddy, plaintiff, D-1 and Papavva inherited the suit schedule properties at Ranjerla village and had been in joint possession of these properties as co-heirs and after the death of Papavva on 12.4.1974, plaintiff and D-1 alone had been the only heirs, who succeeded to suit properties. The plaintiff inherited the property of her husband at Manthani village and after death of her husband, there had been litigation between her, her children, first wife and her daughter for partition of properties of Lakshmareddy. One suit O.S. No. 57 of 1968 was instituted by the plaintiff and her children for partition against her co-

wife Kistabai and her daughter Lakshmi Narsu Bai on the file of Sub-Court, Nizamabad, and owing to such litigation, plaintiff diverted her attention to that suit only and lastly got share in the family properties of Lakshmareddy and D-1 had been residing at Bhattapur alone with D-2. As co-owner, she used to get the suit lands cultivated on behalf of herself and plaintiff, and as the plaintiff was engaged in litigation O.S. No. 57 of 1968, D-2 used to assist his wife in management of lands and the relationship between plaintiff and D-1 and D-2 were very cordial and plaintiff and D-2 continued to be in joint possession of suit properties as co-heirs and co-owners having half share. After successful termination of her partition suit and after taking possession of her share and share of her children, in the properties of Lakshmareddy, the plaintiff requested the defendants for partition of suit schedule properties, but to her surprise the plaintiff learnt that D-1 was trying to sell away Ac.4-20 guntas of land in Sy. No. 182/1, 2, 3 and 183/1, 2 at Ranjerla village to defendant No. 3 and that D-1 had no right to enter into any agreement for alienation of any part of suit land without the consent of plaintiff. The plaintiff got issued a legal notice to D-3 and D-1 against the said alienation, but D-1 got the notice returned stating that she was not in the village. Hence, the suit.

8. Averments made in the written statement of D-1 & D-2:

It was pleaded that Katpalli Rajeshwar Reddy was not the owner and possessor of lands shown in "A" schedule and house with upstairs and cattle shed shown in "B" schedule, but admitted that plaintiff and D-1 were daughters of late Rajeshwar Reddy and his wife Papavva; and Rajeshwar Reddy died on 15.01.1970, while Papavva died about more than 13 1/2 years ago. During the lifetime of late Rajeshwar Reddy, he performed the marriage of the plaintiff with one Lakshmareddy of Manthani village and brought defendant No. 2 as illatom son-in-law to his house by giving his youngest daughter Rajubai, defendant No. 1, in or around 1950. Since then defendant No. 2 had been living in the house of said late Rajeshwar Reddy looking after his agricultural property at Ranajerla village, Armoor taluk. The said late Rajeshwar Reddy also had executed a registered illatom adoption deed dated 29th October 1954, conferring on the defendant No. 2 all the rights of a real male issue. Later on, the husband of the plaintiff by name Lakshmareddy had filed a case No. 69/1/1955 on the file of the Munsiff Magistrate, Armoor against the said late Rajeshwar Reddy and defendant No. 2 Ramachandra Reddy for cancellation of the said illatom adoption deed, but the said case was compromised by the parties on 10.9.1956 in which the said Lakshmareddy had withdrawn his claim of illatom son-in-law of late Rajeshwar Reddy and admitted D-2 as illatom son-in-law of late Rajeshwar Reddy and Sy. Nos. 564, 610 of Ranjerla village were given to the plaintiff as her absolute property in the said compromise and with regard to ownership of Schedules "A" and "B" are concerned, late Rajeshwar Reddy was not the owner of Sy. Nos. 127/1, 2; 148/1/1, 148/1/2, 148/2, 148/3, 166/1, 2, 3; 182/1, 2, 3; 189/3 of Ranjerla village, but the said lands were purchased by D-2 on 20.5.1952 in the name of his wife D-1 from the pattedar one Janardhan Reddy with the income

and property of lands of his natural family at Bhattapur village. Similarly, late Rajeshwar Reddy was not owner of upstairs portion H. No. 1-116, as it was constructed by D-2 in the year 1983-84 and the cattle shed H. No. 1-119 was also constructed by defendant No. 2 after the death of late Rajeshwar Reddy. During the life time of late Rajeshwar Reddy the remaining properties were also mutated in the name of defendant No. 1 at the instance of late Rajeshwar Reddy in the year 1954-55, as all of them were given to defendants 1 and 2 as illatom son-in-law. The plaintiff had never shared or enjoyed the fruits of the above property right from the time when defendant No. 2 was taken as illatom son-in-law, much less after the death of late Rajeshwar Reddy and his wife Papavva. Defendant No. 2 had been the sole owner of the suit schedule properties and it was incorrect to say that the plaintiff and defendant No. 1 had been the co-owners and possessors of the said property. Moreover, during the life time of late Rajeshwar Reddy, the lands in Sy. No. 166/1, 2, 3, Sy. No. 571/2, Sy. No. 575/A, Sy. No. 2, Sy. No. 31/3, 127/1,2; 148/1/1; 148/1/2; 148/2; 148/3; 182/1, 2, 3; 183/1/1 and 518 and 519 were sold away by defendants 1 and 2. It is also averred that defendant No. 2 along with defendant No. 1 had been residing at Ranjerla village as illatom-in-law, since the time of his marriage about more than 37 years ago and both of them had enjoyed the property. The plaintiff never came to the house of defendant Nos. 1 and 2 at Ranjerla village right from the time of the death of Rajeshwar Reddy. It is further averred that the plaintiff had never been in joint possession and ownership of the suit schedule properties and she was not entitled for any share therein. Defendants 1 and 2 had sold away Ac.3-30 guntas to defendant No. 3 on 10.3.1986 under stamped agreement for Rs. 21,200/- and the remaining area 0-14 guntas had been surrendered under Land Reforms Act towards surplus land. The defendants were not aware of issuance of notice by the plaintiff. Defendants 1 and 2 had been in adverse possession of all the properties since last more than 35 years.

9. Averments made in the written statement of D-3:

D-3 in his written statement averred that he had purchased an extent of Ac.3-32 guntas out of Sy. No. 183/1/1 and 2 under stamped document dated 09.3.1986 bona fide for a valid consideration of Rs. 21,200/- from defendants 1 and 2, as D-2 was illatom son-in-law and D-1 and D-2 were absolute owners of said lands and D-1 had been the pattedar and owner of the said lands since last more than 35 years and the same lands were declared in ceiling case of D-2. It is further averred that the plaintiff was never in possession of any of the lands at Ranjerla village and she never asserted her right over the lands nor she enjoyed the same. The plaintiff never visited the house of defendants 1 and 2. D-1 and D-2 had been in possession of entire property; as such the suit filed by the plaintiff against defendant No. 3 was not maintainable and prayed for dismissal of the suit.

10. Issues settled by the trial court:

(1) Whether the suit "A" & "B" schedule properties are joint family properties,

liable for partition?

(2) Whether D-2 purchased lands Sy. Nos. 127/1, 2; 148/1/1; 148/1/2; 148/2, 148/3, 166/1, 2, 3, 182/1/2/3 and 189/3 of Ranjerla village on 20.5.1952 in the name of D-1 and not liable for partition?

(3) Whether D-2 constructed upstairs portion of H. No. 1-116 and H. No. 1-119 and they are not liable for partition?

(4) Whether lands as mentioned in para 3 of written statement of D-1 and D-2 are sold and not liable for partition?

(5) Whether D-3 purchased three acres 32 guntas on 19.3.1986 in Sy. No. 183/1/1 and 2, under agreement of sale?

(6) Whether D-2 is entitled for all the properties of late Rajeshwar Reddy as per compromise in Case No. 69/1/55 on the file of Munsiff Magistrate Court, Armoor?

(7) Whether suit is barred by limitation?

(8) To what relief the parties are entitled to?

11. Evidence available on record:

For plaintiff:

P.W.1: Ratna Bai

P.W.2: Saya Goud

For defendants:

D.W.1: Ramachandra Reddy

D.W.2: Rajubai

D.W.3: Limbareddy

D.W.4: L.V. Narayan Reddy

D.W.5: Baburao

D.W.6: Kishan Reddy

D.W.7: K.Chinnareddy

D.W.8: A. Rajeshwar

D.W.9: A. Nadipi Buchanna

Documents marked

For plaintiff:

Ex.A-1: Office copy of notice dt.28.3.1986

Ex.A-2: Returned cover addressed to D-1

Ex.A-3: C.C. of pahani for 1985-86 of Ranjerla village

For defendants:

Ex.B-1: Illatom regd. Deed dt.29.10.1954

Ex.B-1(a): Signature of scribe Hanmanth Rao on Ex.B-1

(b) Signature of D.W.4 on Ex.,B-1

(c) Signature of D.W.4 on Ex.B-1

Ex.B-2: C.C. of compromise petition

Ex.B-3: C.C. of order in Case No. 69/1/55

Ex.B-4: C.C. of Khasra pahani for 1954-55

Ex.B-5: C.C. of pahani for 1958-61

Ex.B-6: to : Certified copies of pahanies for 1961-62 to Ex.B30: 1985-86.

Ex.B-31: The memo issued by MRO dt.14.7.1987

Ex.B-32: Certificate issued by Gram Panchayat dt.4.7.1987.

Ex.B-33: Declaration form of Tribunal

Ex.B-34: C.C. of order passed by LRT d/30.7.1977

Ex.B-35: C.C. of order by LRT

Ex.B-36: C.C. of order passed by High Court

Ex.B-37: C.C. of final order d/22.12.1978

Ex.B-38: C.C. of ROR d/28.11.1990

Ex.B-39 & : Documents

Ex.B-40

12. Findings recorded by the trial court in nut-shell:

The trial court on appreciation of evidence available on record while answering issues 1 and 2 recorded findings at paras 7, 8, 9, 10, 11, 12 and 13 and came to the conclusion that D-1 and D-2 clearly established that Sy. Nos. 127/1/2, 148/1/1, 148/1/2, 148/2, 148/3, 166/1, 2, 3, 182/1, 2, 3 and 189/3 of Ranjarla village were purchased by D-2 from original pattedar Janardhan Reddy in the name of D-1, as such they are not joint family properties and they are not liable for partition. While answering issue No. 3 at para 15, the trial court recorded certain reasons and came to the conclusion that the upstairs portion of H. No. 1-116 in the year 1983-84 and cattle shed H. No. 1-119 in the year 1971 and this clearly shows that this construction was made after the death of father of the plaintiff and D.Ws.2, 3 and 5 clearly stated that D-2 constructed the upstairs

portion of H. No. 1-116 and cattle shed of H. No. 1-119, as such the plea of D-2 is accepted that they are not liable for partition. While answering issue No. 4, the learned Judge recorded reasons at paras 16, 17, 18 and 19 referred to the evidence of D.W.5 and D.W.8 in particular and recorded a finding that the lands mentioned in para 3 of the written statement were already sold by D-1 and D-2 and they were not available for partition. Further, while answering issue No. 5 at para 20 the trial court came to the conclusion that the date on Ex.B-39 is 19.3.1986 i.e., prior to the filing of the suit and thus D-3 is a bona fide purchaser. Further, while answering issue No. 6 findings had been recorded at paras 21 and 22 and came to the conclusion that if the lands specified are excluded as self acquired properties of D-2, the remaining properties specified in para 22 had been sold out during the lifetime of Rajeswara Reddy himself and, hence, the same is not liable for partition. The trial court while answering issue No. 7 recorded reasons in detail commencing from paras 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34 and 35 and came to the conclusion that long non-user or non-enjoyment amounts to ouster and the plaintiff was never in possession of the suit lands and she was never given any share during the life time of her father and even after the death of her father and as such the plaintiff is not entitled to any share. Thus, while answering issue No. 8 in the light of the said findings, the trial court came to the conclusion that the suit is liable to be dismissed, but however, directed the parties to bear their own costs.

13. Points which arise for consideration in this appeal:

The following points arise for consideration in this appeal:

- (1) Whether the appellant is entitled to partition of the family properties in the light of the oral and documentary evidence available on record?
- (2) Whether the plea taken by respondents 1 and 2 that certain of the properties are their separate properties and the findings recorded by the trial court in this regard to be confirmed or to be disturbed in the facts and circumstances of the case?
- (3) Whether the alleged alienations and the findings recorded in relation thereto by the trial court to be sustained or to be disturbed in the facts and circumstances of the case?
- (4) Whether the plea of ouster or the plea of adverse possession be sustained in the facts and circumstances of the case?
- (5) What would be the rights of the parties to the litigation in view of Exs.B-1 and B-2 the plea of illatom adoption and also the plea of compromise?
- (6) If so, to what relief the parties would be entitled?

14. Point Nos. 1 to 5:

The parties hereinafter would be referred to as plaintiff and defendants as shown in O.S. No. 25 of 1986 on the file of the Subordinate Judge, Nizamabad, for the

purpose of convenience.

15. The respective pleadings of the parties, the evidence available on record and the relevant findings recorded in relation to the issues by the trial court already had been discussed in brief supra. It is needless to say that the original plaintiff Ratnabai being no more, her legal representative Gangadhar Reddy at present is prosecuting this appeal.

16. The stand taken by the plaintiff, who examined herself as P.W.1, is that the plaintiff-P.W.1 and the first defendant, examined as D.W.2, are the real sisters and the plaint schedule properties are their family properties and in view of the fact that their father and subsequent thereto their mother also died, they being the two daughters, both of them are entitled to equal shares i.e., half share each in the plaint schedule properties. It is also the case of the plaintiff that D-2 is the husband of D-1 and these have been managing these properties and she was being given some produce in the shape of cash. It is also his case that he was busy in attending the litigation in O.S. No. 57 of 1968 between herself and co-widow and, hence, she requested D-1 and D-2 to manage her share of this property as well. The plaintiff also pleaded that D-1 and D-2 were trying to dispose of certain properties and in such circumstances a notice had been given.

17. Defendants 1 and 2 filed common written statement. Defendant No. 3 filed separate written statement. The written statement of third defendant is to the effect he had purchased an extent of Acs.3-32 guntas out of Sy. No. 183/1/1 and 2 under stamped document dated 19.3.1986 bona fide for a consideration of Rs. 21,200/- from defendants 1 and 2, as D-2 is the illatom son-in-law and D-1 and D-2 being the absolute owners of the said lands. In the written statement filed by defendants 1 and 2 the relationship is not put into serious controversy, but however specific stand had been taken that D-2 is the illatom son-in-law and even during the lifetime of Rajeshwar Reddy the entire properties were given away to D-1 and D-2 and the husband of the plaintiff raised a dispute relating to the illatom adoption of D-2 and made a claim that he is the illatom son-in-law of late Rajeshwar Reddy and filed Case No. 69/1/55 on the file of Munsiff Magistrate, Armour and the parties entered into compromise and the husband had amicably settled the same by withdrawing his claim and taking certain properties and certain other properties also had been given to Ratnabai, the plaintiff. It is their case that the second defendant purchased certain specified properties with the income from the natural family and hence they are not the properties left by Rajeshwar Reddy and further specific stand had been taken that after the compromise in Case No. 69/1/55 aforesaid the plaintiff never visited the village and hence the same to be taken that she had left away all these properties and she had been ousted from possession and these parties became absolute owners a lapse of time.

18. The plaintiff as P.W.1 deposed in detail relating to the affairs of the family. P.W.1 deposed that D-1 is her sister and D-2 is the husband of D-1 and this witness also deposed about her father and mother and their death and when her

marriage was celebrated and when her sister's marriage also was celebrated. No doubt, P.W.1 had taken specific stand that D-2 is the illatom son-in-law of her father. She also deposed that her father owned agricultural lands and house at Ranjerla village and the total extent of the lands about Ac.40-00 and after the death of the parents both P.W.1 and D.W.2, the first defendant, would be entitled to equal shares. This witness also explained under what circumstances O.S. 57 of 1968 was filed and while he made a request to look after her properties as well. This witness also deposed that she was present at the time of marriage of the first defendant and her father was cultivating the lands during his lifetime. Ex.A1 is the office copy of notice, dated 28.3.1986, Ex.A-2 is the returned cover and Ex.A-3 is the certified copy of pahanis for 1986-86 (containing 6 sheets) of Ranjerla village. This witness also deposed that it is not true to suggest that she was given 3 survey numbers as per the compromise in the suit between D-1 and her husband in Munsiff Court, Armoor, and she has sold the said lands. Here itself it may be mentioned that though P.W.1 deposed that the survey numbers as specified in the compromise had not been enjoyed by her or she had never alienated. No acceptable evidence to establish contra had been placed before the Court. This witness also further deposed about certain of the revenue entries in the revenue records.

19. In the cross-examination P.W.1 deposed about the death of her father and the mother and also deposed how she had been fighting the litigation with her co-widow and under what circumstances the present problem arose. This witness also deposed that during his lifetime i.e., the lifetime of the father, 2 and 3 years D-2 worked as Malipatel. P.W.1 also had taken a specific stand by deposing that D-2 had purchased Ac.25-00 of land from one Janardhan Reddy in the name of D-1 and patta also stands in the name of D-1. D-2 partitioned their lands between the brothers, but she does not know how much land D-2 got and when they had partitioned. Five acres of land called as "Paluguralla chenu" is the ancestral property of her father. Her father told her Ac.5-00 of Paluguralla chenu is self land. He cannot give the survey numbers of those lands. Several particulars and details of the family properties also had been elicited.

20. No doubt, she had given cogent answers to certain questions and also pleaded some want of knowledge relating to certain questions. But, in the suggestions put to this witness as P.W.1 specifically she had denied all those suggestions wherein it was suggested that certain specific lands had been purchased by D-2 in the name of D-1 out of the funds, which he got from his natural family. It is needless to say that this appears to be the principal serious question in controversy between the parties to the effect that those items, in particular items 3 to 14, are not liable for partition at all. No doubt, yet another stand is relating to illatom adoption and also the subsequent compromise and that in the light of the same, defendants 1 and 2 alone are entitled to all the rights relating to all the properties in the family and the plaintiff is not entitled to any share whatsoever.

21. Apart from the evidence of P.W.1 there is evidence of P.W.2 who deposed about this witness attending the marriages of daughters of Rajeshwar Reddy on invitation of Rajeshwar Reddy and other particulars and in a way had substantiated the stand taken by P.W.1. In cross-examination several suggestions were put to this witness and to certain of the questions P.W.2 said he was not aware of, but however, this witness also deposed that he heard some lands were purchased from Janardhan Reddy, but he does not know the extent and details of the purchased lands. This witness also deposed that Watandar Malipatel of Ranjerla village was Rajeshwar Reddy. However, this witness also deposed that it is not true to suggest that D-2 is the illatom son-in-law of Rajeshwar Reddy and he is deposing falsely.

22. The second defendant, the husband of the first defendant, was examined as D.W.1. This witness deposed that D-1 is his wife and the plaintiff is the elder sister of D-1. D-3 purchased some lands from him. Plaintiff and D-1 are the daughters of Katpalli Rajeshwar Reddy and he died in the year 1970. Papavva was the wife of Rajeshwar Reddy and she also died two years after the death of Rajeshwar Reddy. Rajeshwar Reddy is his father-in-law and his original native place is Battapur. He came as illatom son-in-law to the house of late Rajeshwar Reddy of Ranjerla village. Plaintiff was given in marriage to one Laxmareddy of Manthani village. His marriage was celebrated in the year 1950. The plaintiff's marriage was performed 4 or 5 years prior to his marriage. From the date of marriage he has been residing at Ranjerla village in the house of Rajeshwar Reddy as illatom son-in-law looking after his family affairs. He is having registered deed showing that he is illatom son-in-law and late Rajeshwar Reddy executed it in the year 1954. Ex.B-1 is the registered deed of agreement of illatom adoption. Rajeshwar Reddy mentioned in the said deed that as he is not having sons, he is giving his second daughter to him in marriage and as such he will be treated as his son to look after his properties and affairs. This witness also deposed that the husband of plaintiff Lakshmareddy filed a suit against him and Rajeshwar Reddy in DMC, Armoor, denying the illatom adoption and claiming that he is the illatom son-in-law of Rajeshwar Reddy and for cancellation of Ex.B-1. The said suit was filed in the year 1955 and in 1956 it was compromised between them. In that compromise Lakshmareddy admitted the illatom adoption and also Ex.B-1 and the lands bearing two survey numbers 564 an extent of 15 guntas and 610 an extent of 16 guntas of Ranjerla village were given to the plaintiff. He has filed the compromise petition in O.S. No. 69/1/1955. Ex.B-2 is the certified copy of compromise and Ex.B-3 is the certified copy of the order.

23. It may be appropriate to have a look at the contents of Ex.B-1 and Ex.B-2 for better appreciation of the facts of the case. Ex.B-1 reads as hereunder.

Document on Rs. 15/- I.G. for the year 1372 fasli

I, Rajeshwar Reddy, s/o Raja Ram Reddy, Asaldar Watandar Mukaddam Mali of village Rangerla, Tq. Armoor District, Nizamabad, caste Reddy, age 64 years, r/o villalge Rangerla, Tq. Armoor, do execute the agreement to the effect that I have

no male issues so I have taken illatom to one Ramchander Reddy, s/o Narayan Reddy, r/o Bhattapoor Tq., Armoor with the consent of his father and with my own consent out of free will that he will be the owner and possessor of my whole property. As such after taking into illatom, I have got him married with my daughter Smt. Raju Bai to which a period of (7) years has lapsed. Ever since that date the said Ramchander Reddy is living in my house as my own son, and he is looking after my domestic and agricultural works to its level best. Since the Rabi crop, I have initiated a proceeding for permission of illatom in the Tahsil Office Armoor, but after consultation with the legal advisors I came to know that no permission is necessary to be sought for in this respect from the Govt., so the said proceeding has been got dropped and ceased.

Hence the agreement is being completed and in future the illatom son will be vested with the same rights and title as the own son would have as per rules of Shastra.

The contents of Ex.B-2 the compromise petition in Case No. 69/1/1955 read as hereunder:

Declaration of right of illatom

In the above cited case the above named parties have entered into compromise which is as follows:

1. That the plaintiff, from this date withdraws himself from being the illatom son-in-law of defendant No. (1) and the S. Nos. of 564 bearing the area 15 guntas the revenue of which being Rs. 9-0-0 situated at Rengerla and he S. No. 610 bearing 16 guntas, he revenue of which is Rs. 9-9-0 situated at Rangerla have been given to Ratna bai wife of the plaintiff and hereafter she will be the sole owner and possessor of those survey Nos.

2. That the rest of the property (movable and immovable) will be in the possession and ownership of Defendant No. (1) and his daughter Raju Bai wife of Ramchandra Reddy deft. No. (2) who is also the illatom son-in-law of defendant No. (1). The defendant No. (1) will enjoy the possession of that property till his life time. The defendant No. (2) will not interfere such possession and enjoyment.

(3) That the parties will bear their respective costs.

Therefore it is prayed that after due verification of the compromise deed, the plaintiff's suit may be dismissed without costs.

24. It is no doubt true that in Ex.B-2 certain survey numbers said to have been given to Ratnabai had been specified. It is pertinent to note that in the said suit Ratnabai was not a party. It appears Lakshmareddy, the husband of Ratnabai, challenged the illatom adoption by filing a suit and there was a compromise between Lakshmareddy, Rajeshwar Reddy and Ramachandra Reddy, the two sons-in-law and father-in-law. Hence, it is needless to say that the said compromise, if any, and the terms, if any, which had been incorporated cannot

be said to be binding on Ratnabai and her rights would not be in any way affected. No doubt, certain submissions were made relying upon the contents of Ex.B-1 wherein it was specified that this illatom son-in-law will be vested with the same rights and title as of own son would have as per rules of Shastra. On the strength of this recital certain submissions were made by the Counsel representing respondents 1 and 2, defendants 1 and 2, that by virtue of survivorship in view of the death of Rajeshwar Reddy automatically inasmuch as the status of the son had been conferred on Ramachandra Reddy, Ramachandra Reddy would become absolute owner of all the properties of the family. This Court is of the considered opinion that this contention put forth by the learned Counsel representing respondents 1 and 2-defendants 1 and 2 cannot be accepted especially in the light of the fact that Rajeshwar Reddy died intestate in the year 1970. This fact is not in controversy. No doubt on the strength of the document Ex.B-1 dated 21.9.1954 further certain submissions were made in the light of Section 4 of the Hindu Adoptions and Maintenance Act, 1956, and also in view of the fact that this document came into existence even in 1954 prior to the said Act, clear rights accrued in favour of second respondent-second defendant. It is not as though Ex.B-1 was left untouched. Subsequent thereto may be that the husband of the plaintiff though not the plaintiff had challenged the same by instituting Case No. 69/1/1955 and a compromise had been arrived at and the compromise had been recorded. The contents of Ex.B-2 being self-explanatory which had been already referred supra, need not be further elaborated.

25. D.W.1 also further deposed relating to the income from the properties of his natural family at Battapur and also purchase of certain properties in the name of his wife and had taken a specific stand that these are all his separate and self acquired properties which cannot be thrown into the family properties of Rajeshwar Reddy. This witness also deposed about the upstairs construction of the house. D.W.1 also deposed that the plaintiff never approached them either demanding partition or claiming any share of the produce at any point of time. This witness further deposed about the declaration made before the Land Reforms Tribunal and the other details. D.W.1 also further deposed about Exs.B-3 and B-4, the certified copy of Khasra Pahani for the year 1954-55 showing the mutation of the lands in the name of D-1. No doubt, certain submissions were made on the strength of certain entries made in the revenue records, the mutation effected in favour of the first defendant.

26. It is pertinent to note that the revenue entries as such would not confer any title whatsoever. The relationship of the parties also may have to be kept in mind. One sister, who instituted the suit for partition as P.W.1, clearly deposed under what circumstances she believed and she made a request that her properties also should be looked after by the other sister D-1 and the husband of the sister D-2. It is needless to say that this sister D-1 and her husband D-2 were the persons who have been actually residing at the spot and at the village along with her deceased father during the lifetime of her father and subsequent to the death of the father. When that being so, especially inasmuch as D-2 also

was occupying an office, it is but natural that he would have mutated the name in revenue records and might have shown the name of the first defendant in all revenue records. By that itself either the plea of ouster or the plea of adverse possession or the plea of abandonment in the case of a co- sharer can not be put forth. It is needless to say that clear and categorical evidence in this regard may have to be adduced. In the absence of any evidence to show that at some point of time the right or title relating to her share of the property had been denied and P.W.1 was put on notice and despite the same subsequent thereto for sufficiently a long time she had not initiated any action, may be, this plea may not be available, absolutely no acceptable evidence had been placed relating to this aspect.

27. Sri P.S. Murthy placed strong reliance on the decisions in Janaki Pandyani v. Ganeshwar Panda (dead) by Lrs. and Anr., (2001) 10 SCC 434 ; and (1994) 2 SCC 29 (SC) . The learned Counsel also placed strong reliance on the decision of the Apex Court in P.T. Munichikkanna Reddy and Others Vs. Revamma and Others, wherein at para 12 the Apex Court observed as hereunder.

This brings us to the issue of mental element in adverse possession cases- intention.

1. Positive Intention

The aspect of positive intention is weakened in this case by the sale deeds dated 11.04.1934 and 5.07.1936. Intention is a mental element which is proved and disproved through positive acts. Existence of some events can go a long way to weaken the presumption of intention to dispossess which might have painstakingly grown out of long possession which otherwise would have sufficed in a standard adverse possession case. The fact of possession is important in more than one ways: firstly, due compliance on this count attracts limitation act and it also assists the court to unearth as the intention to dispossess.

At this juncture, it would be in the fitness of circumstances to discuss intention to dispossess vis-a-vis intention to possess. This distinction can be marked very distinctively in the present circumstances.

Importantly, intention to possess cannot be substituted for intention to dispossess which is essential to prove adverse possession. The factum of possession in the instant case only goes on to objectively indicate intention to possess the land. As also has been noted by the High Court, if the appellant has purchased the land without the knowledge of earlier sale, then in that case the intention element is not of the variety and degree which is required for adverse possession to materialize.

The High Court observed:

It is seen from the pleadings as well in evidence that the plaintiff came to know about the right of the defendants", only when disturbances were sought to be made to his possession.

In similar circumstances, in the case of Thakur Kishan Singh (dead) Vs. Arvind Kumar, :

As regards adverse possession, it was not disputed even by the trial court that the appellant entered into possession over the land in dispute under a licence from the respondent for purposes of brick-kiln. The possession thus initially being permissive, the burden was heavy on the appellant to establish that it became adverse. A possession of a co-owner or of a licensee or of an agent or a permissive possession to become adverse must be established by cogent and convincing evidence to show hostile animus and possession adverse to the knowledge of real owner. Mere possession for howsoever length of time does not result in converting the permissible possession into adverse possession. Apart from it, the Appellate Court has gone into detail and after considering the evidence on record found it as a fact that the possession of the appellant was not adverse.

The present case is one of the few ones where even an unusually long undisturbed possession does not go on to prove the intention of the adverse possessor. This is a rare circumstance, which Clarke LJ in *Lambeth London Borough Council v. Blackburn* (2001) 82 P & CR 494, 504 refers to:

I would not for my part think it appropriate to strain to hold that a trespasser who had established factual possession of the property for the necessary 12 years did not have the animus possidendi identified in the cases. I express that view for two reasons. The first is that the requirement that there be a sufficient manifestation of the intention provides protection for landowners and the second is that once it is held that the trespasser has factual possession it will very often be the case that he can establish the manifested intention. Indeed it is difficult to find a case in which there has been a clear finding of factual possession in which the claim to adverse possession has failed for lack of intention.

On intention, *The Powell v. Macfarlane* (1977) 38 P& CR (Property, Planning and Compensation 452-472 is quite illustrative and categorical, holding in the following terms:

If the law is to attribute possession of land to a person who can establish no paper title to possession, he must be shown to have both factual possession and the requisite intention to possess ("animus possidendi").

...

If his acts are open to more than one interpretation and he has not made it perfectly plain to the world at large by his actions or words that he has intended to exclude the owner as best he can, the courts will treat him as not having had the requisite animus possidendi and consequently as not having dispossessed the owner.

...

In my judgment it is consistent with principle as well as authority that a person who originally entered another's land as a trespasser, but later seeks to show that he has dispossessed the owner, should be required to adduce compelling evidence that he had the requisite animus possidendi in any case where his use of the land was equivocal, in the sense that it did not necessarily, by itself, betoken an intention on his part to claim the land as his own and exclude the true owner.

...

What is really meant, in my judgment, is that the animus possidendi involves the intention, in one's own name and on one's own behalf, to exclude the world at large, including the owner with the paper title if he be not himself the possessor, so far as is reasonably practicable and so far as the processes of the law will allow.

Thus, there must be intention to dispossess. And it needs to be open and hostile enough to bring the same to the knowledge and plaintiff has an opportunity to object. After all adverse possession right is not a substantive right but a result of the waiving (willful) or omission (negligent or otherwise) of right to defend or care for the integrity of property on the part of the paper owner of the land. Adverse possession statutes, like other statutes of limitation, rest on a public policy that do not promote litigation and aims at the repose of conditions that the parties have suffered to remain unquestioned long enough to indicate their acquiescence.

While dealing with the aspect of intention in the Adverse possession law, it is important to understand its nuances from varied angles.

Intention implies knowledge on the part of adverse possessor. The case of Saroop Singh Vs. Banto and Others, , 28:

29. In terms of Article 65 the starting point of limitation does not commence from the date when the right of ownership arises to the plaintiff but commences from the date the defendants possession becomes adverse. See Vasantiben Prahladiji Nayak v. Somnath Muljibhai Nayak AIR 2004 SCW 1704.

30. Animus possidendi is one of the ingredients of adverse possession. Unless the person possessing the land has a requisite animus the period for prescription does not commence. As in the instant case, the appellant categorically states that his possession is not adverse as that of true owner, the logical corollary is that he did not have the requisite animus. See Mohd. Mohd. Ali v. Jagadish Kalita SCC para 21.

A peaceful, open and continuous possession as engraved in the maxim *nec vi, nec clam, nec precario* has been noticed by this Court in *Karnataka Board of Wakf Vs. Government of India and Others*, in the following terms:

...Physical fact of exclusive possession and the animus possidendi to hold as

owner in exclusion to the actual owner are the most important factors that are to be accounted in cases of this nature. Plea of adverse possession is not a pure question of law but a blended one of fact and law. Therefore, a person who claims adverse possession should show: (a) on what date he came into possession, (b) what was the nature of his possession, (c) whether the factum of possession was known to the other party, (d) how long his possession has continued, and (e) his possession was open and undisturbed. A person pleading adverse possession has no equities in his favour. Since he is trying to defeat the rights of the true owner, it is for him to clearly plead and establish all facts necessary to establish his adverse possession....

It is important to appreciate the question of intention as it would have appeared to the paper-owner. The issue is that intention of the adverse user gets communicated to the paper owner of the property. This is where the law gives importance to hostility and openness as pertinent qualities of manner of possession. It follows that the possession of the adverse possessor must be hostile enough to give rise to a reasonable notice and opportunity to the paper owner.

In *Narne Rama Murthy v. Ravula Somasundaram and Ors.* (2005) 6 SCC 614, this Court held:

However, in cases where the question of limitation is a mixed question of fact and law and the suit does not appear to be barred by limitation on the face of it, then the facts necessary to prove limitation must be pleaded, an issue raised and then proved. In this case the question of limitation is intricately linked with the question whether the agreement to sell was entered into on behalf of all and whether possession was on behalf of all. It is also linked with the plea of adverse possession. Once on facts it has been found that the purchase was on behalf of all and that the possession was on behalf of all, then, in the absence of any open, hostile and overt act, there can be no adverse possession and the suit would also not be barred by limitation. The only hostile act which could be shown was the advertisement issued in 1989. The suit filed almost immediately thereafter.

The test is, as has been held in the case of *R. v. Oxfordshire County Council and Ors., Ex Parte Sunningwell Parish Council* [1999] 3 ALL ER 385 : [1999] 3 WLR 160:

Bright v. Walker (1834) 1 Cri. M. and R. 211, 219, "openly and in the manner that a person rightfully entitled would have used it...." The presumption arises, as Fry J. said of prescription generally in *Dalton v. Angus* (1881) 6 App. Cas. 740, 773, from acquiescence.

The case concerned interpretation of Section 22(1) of the Commons Registration Act, 1965. Section 22(1) defined "town or village green" as including

...land...on which the inhabitants of any locality have indulged in [lawful] sports

and pastimes as of right for not less than 20 years.

It was observed that the inhabitants' use of the land for sports and pastimes did not constitute the use "as of right". The belief that they had the right to do so was found to be lacking. The House held that they did not have to have a personal belief in their right to use the land. The court observed:

the words "as of right" import the absence of any of the three characteristics of compulsion, secrecy or licence "nec vi, nec clam, nec precario", phraseology borrowed from the law of easements.

Later in the case of *Beresford, R (on the application of) v. City of Sunderland* [2003] 3 WLR 1306 : [2004] 1 All ER 160 same test was referred to.

Thus the test of *nec vi, nec clam, nec precario* i.e., "not by force, nor stealth, nor the license of the owner" has been an established notion in law relating to the whole range of similarly situated concepts such as easement, prescription, public dedication, limitation and adverse possession.

In *Karnataka Wakf Board (Supra)*, the law was stated, thus:

In the eye of law, an owner would be deemed to be in possession of a property so long as there is no intrusion. Non-use of the property by the owner even for a long time won't affect his title. But the position will be altered when another person takes possession of the property and asserts a right over it. Adverse possession is a hostile possession by clearly asserting hostile title in denial of the title of true owner. It is a well-settled principle that a party claiming adverse possession must prove that his possession is "*nec vi, nec clam, nec precario*", that is, peaceful, open and continuous. The possession must be adequate in continuity, in publicity and in extent to show that their possession is adverse to the true owner. It must start with a wrongful disposition of the rightful owner and be actual, visible, exclusive, hostile and continued over the statutory period. See: *S.M. Karim Vs. Mst. Bibi Sakina, Parsinni (Dead) by Lrs. and Others Vs. Sukhi and Others*, and *D.N. Venkatarayappa and another Vs. State of Karnataka and others*, . Physical fact of exclusive possession and the animus possidendi to hold as owner in exclusion to the actual owner are the most important factors that are to be accounted in cases of this nature. Plea of adverse possession is not a pure question of law but a blended one of fact and law. Therefore, a person who claims adverse possession should show (a) on what date he came into possession, (b) what was the nature AIR (1993 SCW 3606 : AIR 1997 SCW 2947) of his possession, (c) whether the factum of possession was known to the other party, (d) how long his possession has continued, and (e) his possession was open and undisturbed. A person pleading adverse possession has no equities in his favour. Since he is trying to defeat the rights of true owner, it is for him to clearly plead and establish all facts necessary to establish his adverse possession.

2. Inquiry into the particulars of Adverse Possession

Inquiry into the starting point of adverse possession i.e. dates as to when the

paper owner got dispossessed is an important aspect to be considered. In the instant case the starting point of adverse possession and other facts such as the manner in which the possession operationalized, nature of possession: whether open, continuous, uninterrupted or hostile possession - have not been disclosed. An observation has been made in this regard in S.M. Karim Vs. Mst. Bibi Sakina, : Para 5

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

In Karnataka Wakf Board (Supra), it is stated:

Plaintiff, filing a title suit should be very clear about the origin of title over the property. He must specifically plead it. In P. Periasami (Dead) by Lrs. Vs. P. Periathambi and Others, this Court ruled that- "Whenever the plea of adverse possession is projected, inherent in the plea is that someone else was the owner of the property." The pleas on title and adverse possession are mutually inconsistent and the latter does not begin to operate until the former is renounced. Dealing with Mohan Lal (Deceased) through his Lrs. Kachru and Others Vs. Mirza Abdul Gaffar and Another, that is similar to the case in hand, this Court held: AIR 1996 SCW 306, Para 4

As regards the first plea, it is inconsistent with the second plea. Having come into possession under the agreement, he must disclaim his right there under and plead and prove assertion of his independent hostile adverse possession to the knowledge of the transferor or his successor in title or interest and that the latter had acquiesced to his illegal possession during the entire period of 12 years, i.e., up to completing the period his title by prescription *nec vi, nec clam, nec precario*. Since the appellant's claim is founded on Section 53A, it goes without saying that he admits by implication that he came into possession of land lawfully under the agreement and continued to remain in possession till date of the suit. Thereby the plea of adverse possession is not available to the appellant.

3. New Paradigm to Limitation Act

The law in this behalf has undergone a change. In terms of Articles 142 and 144 of the Limitation Act, 1908, the burden of proof was on the plaintiff to show within 12 years from the date of institution of the suit that he had title and possession of the land, whereas in terms of Articles 64 and 65 of the Limitation Act, 1963, the legal position has underwent complete change insofar as the onus

is concerned: once a party proves its title, the onus of proof would be on the other party to prove claims of title by adverse possession. The ingredients of adverse possession have succinctly been stated by this Court in S.M. Karim Vs. Mst. Bibi Sakina, in the following terms: Para 5

...Adverse possession must be adequate in continuity, in publicity and extent and a plea is required at the least to show when possession becomes adverse so that the starting point of limitation against the party affected can be found....

See also M. Durai Vs. Madhu and Others,

The aforementioned principle has been reiterated by this Court in Saroop Singh Vs. Banto and Others,

29. In terms of Article 65 the starting point of limitation does not commence from AIR (2004 SCW 1704) the date when the right of ownership arises to the plaintiff but commences from the date the defendants possession becomes adverse. See Vasantiben Prahladi Nayak v. Somnath Muljibhai Nayak

30. Animus possidendi is one of the ingredients of adverse possession. Unless the person possessing the land has a requisite animus the period for prescription does not commence. As in the instant case, the appellant categorically states that his possession is not adverse as that of true owner, the logical corollary is that he did not have the requisite animus. See Mohd. Ali v. Jagadish Kalita SCC para 21.

In Mohammadbhai Kasambhai Sheikh and Ors. v. Abdulla Kasambhai Sheikh (2004) 13 SCC 385, this Court held:

...But as has been held in Mahomedally Tyebally v. Safiabai the heirs of Mohammedans (which the parties before us are) succeed to the estate in specific shares as tenants-in-common and a suit by an heir for his/her share was governed, as regards immovable property, by Article 144 of the Limitation Act, 1908. Article 144 of the Limitation Act, 1908 has been materially re-enacted as Article 65 of the Limitation Act, 1963 and provides that the suit for possession of immovable property or any interest therein based on title must be filed within a period of 12 years from the date when the possession of the defendant becomes adverse to the plaintiff. Therefore, unless the defendant raises the defence of adverse possession to a claim for a share by an heir to ancestral property, he cannot also raise an issue relating to the limitation of the plaintiffs claim....

The question has been considered at some length recently in T. Anjanappa and Others Vs. Somalingappa and Another, , wherein it was opined: AIR 2006 SCW 4368

The High Court has erred in holding that even if the defendants claim adverse possession, they do not have to prove who is the true owner and even if they had believed that the Government was the true owner and not the plaintiffs, the same was inconsequential. Obviously, the requirements of proving adverse

possession have not been established. If the defendants are not sure who is the true owner the question of their being in hostile possession and the question of denying title of the true owner do not arise. Above being the position the High Court's judgment is clearly unsustainable....

See also Des Raj and Others Vs. Bhagat Ram (Dead) By LRs. and Others, ; Govindammal Vs. R. Perumal Chettiar and Others,

28. P.W.1 further deposed in detail relating to his enjoyment of the properties, how he was taken in illatom adoption and also clearly explained the documents relied upon by him Exs.B-5 to B-37 as well. This witness was cross- examined at length and no doubt D.W.1 asserted what he had deposed in the chief-examination and also several suggestions to him also specifically had been denied.

29. D.W.2 is the wife of D.W.1, the first defendant in the suit who deposed substantially on similar lines as that of D.W.1. Strong reliance was placed by the Counsel representing respondents 1 and 2 on the evidence of D.W.3. D.W.3 no doubt deposed that he knows both the parties and they are real sisters and D-2 is the husband of D-1. This witness also deposed about the family affairs and the death of Rajeshwar Reddy and further deposed about taking D-2 as illatom son-in-law by giving D-1 in marriage to D-2. He worked as Gumastha Patwari of Ranjarla village during the years 1946 to 1954. One Hanmanth Rao was the Asaldar Patwari. This witness also deposed about Ex.B-1 and further deposed that the Asaldar Patwari Hanmanth Rao died in the year 1970 or 1971 and he can identify his signature. Ex.B-1 bears the signature of Hanmanth Rao and the same was marked as Ex.B-1(a). This witness further deposed about D-2 purchasing the lands of about Ac.20-00 from Janardhana Reddy and D-2 constructing one cattle shed and the upstairs portion on the residential building and this was done out of his own money. In cross-examination also this witness deposed about Lakshmareddy, Rajeshwar Rddy, Ramachandra Reddy and also sever aspects relating to the family. D.W.4 deposed that Ex.B-1 bears his signature and also deposed that the other witnesses are no more now. This witness was cross-examined and suggestions put to this witness had been denied.

30. D.W.5 is the Village Assistant of Jankampet. This witness deposed that the father of D-1 Rajeshwar Reddy was the Asladar Malipatel of Ranjerla village. He was Asladar Patwari of Ranjerla village and he worked as Patwari of Ranjerla village from 1973 December to January 1984 when the post was abolished. D-2 is native of Battapur village. He heard that D-2 came as illatom son-in-law to the house of Rajeshwar Reddy as such he is residing at Ranjerla village. D-2 also worked as Asladar Mali Patel of Ranjerla village when he worked as Patwari. Rajeshwar Reddy died. As per the revenue records the entire properties of Rajeshwar Reddy patta stand in the name of D-1 and she is enjoying the properties. D-1 and D-2 are paying the land revenue and enjoying the properties. He heard that the plaintiff is the sister of D-1. During his tenure as Patwari, the plaintiff never enjoyed the suit properties and not paid any tax. This

witness also deposed about Ex.B-38, the certified copy of R.O.R. prepared in the year 1979-80. As per Ex.B-38 the Sy. No. 127/1 is sold to Akula Rajeshwar, Akula Pedda Nadipi Rajaram Sy. No. 127/2 sold to Pedda Nadipi Rajaram, Sy. No. 166/1 sold to one Rajeshwar, Sy. No. 166/2 sold to Anantha Rao, Sy. No. 166/3 sold to Golla Chinnu and Anantha Rao, Sy. No. 31/3 sold to Banne Chinna Rajanna, s/o Pochanna, Sy. No. 148/1 sold to Nadkoda Mallaiah and Ratapur Mallaiah and Kalladi Karrenna, Sy. No. 148/2 sold to Nadkoda Mallaiah and Ratnapur Mallaiah, Sy. No. 148/3 sold to Nadkoda Mallaiah and Ratnapur Mallaiah, Sy. No. 564 sold to Akula Rajaram, Sy. No. 575/AA sold to Nalluru Chinna Rajanna, Sy. No. 610 sold to T.R. Chinnaiah. Ex.B-38 shows the file of each transaction. This witness was cross-examined relating to the duties of the Asladar Patwari or Mali Patel and also relating to the sales shown in Ex.B-38 and it is pertinent to note that this witness cannot say whether the sales shown in Ex.B-38 are for the purpose of saving from Ceiling Act and to avoid the share to plaintiff.

31. D.W.6 deposed that he worked as Patwari of Ranjerla village from 1967 to 1973 and he deposed about relationship and also deposed that D-2 is the illitom son-in-law of Rajeshwar Reddy and Rajeshwar Reddy died in the year 1970 and all the lands and houses of Rajeshwar Reddy are in possession of D-1. D-2 also resides at Ranjerla with D-1 and he worked as Mali Patel along with him and all these lands were mutated. This witness also deposed that D-3 purchased the land in Sy. No. 182 and the said land is in his possession.

32. D.W.7 is D-3 in the suit who deposed that he purchased Ac.3-30 guntas from D-1 and D-2 for a consideration of Rs. 21,200/- about 5 years back. Ex.B-39 is the sale agreement. Ex.B-39 is drafted by one Bapurao of Ex.Patwari of the village, who is now working at Jankampet. This witness also deposed about further particulars relating to Ex.B-39. In cross-examination no doubt again he had asserted relating to the said purchases.

33. D.W.8 deposed that he purchased the land an extent of Ac.5-31 guntas from D-1 and D-2 and the land is known as "Battaporam" for a consideration of Rs. 32,600/- and he got executed a document on stamp paper. Ex.B-40 dated 03.4.1985 scribed by one Baburao in the presence of witnesses A. Rajanna and Gadanna, who also attested.

34. D.W.9 deposed that he purchased land measuring Ac.1-18 guntas called "Gollavani polam" from D-1 for Rs. 21,000/- about 8 years ago. One Banne Rajanna and this witness jointly purchased the said land. A document was executed to that extent. The said document was misplaced. It is no doubt true that though certain alienations had been deposed and some names had been mentioned, except D-3 no other parties are brought before the Court.

35. In a partition action it is no doubt true that all such alienees also to be brought on record. However, it is also pertinent to note that there is no acceptable material placed before this Court. Except, Ex.B-39 and Ex.B-40 to

show, in fact, such alienations had been made. May be that these may be unregistered transactions. Suffice to state that except some oral testimony available, no other documentary evidence is forthcoming before the court.

36. In the light of the oral and documentary evidence available on record the trial court recorded certain findings relating to item Nos. 3 to 14. D.W.1 himself stated that those properties purchased by D.W.1 in the name of D.W.2 out of the funds which he got from the natural family. There is no acceptable evidence available on record to clearly establish this fact. The fact that D.W.1 was living along with Rajeshwar Reddy continuously is not in controversy. Whether his status as illatom son-in-law to be accepted or not, that is a question to be decided in the light of the evidence available on record. It is also pertinent to note that this son-in-law also was holding an office, it is but natural that a person who had been along with the father-in-law even during the lifetime of the father-in-law prior to 1970 and subsequent thereto might have been looking after the affairs of the family and the evidence of P.W.1 is clear and categorical that in view of the same litigation in which she had been fighting relating to her husband's properties, she believed and had trust in D-1 and D-2 in view of the close relationship.

37. In the backdrop of this factual scenario this Court is satisfied that especially in a case of co-sharers like sisters, the findings recorded by the trial court either on the ground of ouster or adverse possession are totally unsustainable. Apart from this aspect of the matter certain discrepancies relating to alienations also had been pointed out. When clear evidence is not available on record and in the light of the specific stand taken by P.W.1 that this plea is being put forth only with a view to defeat her rights, to have a relief of partition in the family properties, may be that, this question may have to be left out to be worked out during the final decree proceedings, especially in the light of the fact that no clear acceptable evidence, especially the documentary proof is placed before this Court relating to the said alienations. The question, which had been argued in elaboration by the Counsel on record is in relation to the illatom adoption of the second defendant by Rajeshwar Reddy and what are the resultant rights which would flow therefrom, while deciding the present partition action. Though P.W.1 made an attempt to deny the very status of illatom son-in-law to the second defendant in the light of the voluminous evidence available on record, this Court is not inclined to accept the stand taken by P.W.1 not only Ex.B-1, the registered document is available apart from this aspect the same had been challenged by the husband of Ratnabai by instituting a suit and the same resulted in a compromise as well. The terms of the compromise already had been specified above. However, in the light of the clear stand taken by P.W.1 that the alleged properties are imaginary and those specified in Ex.B-2 had never been given to her and she never alienated those properties. Submissions made by the Counsel representing respondents 1 and 2 that those properties were not shown in the plaint schedule may not hold water, since it is the specific stand of P.W.1 that those properties are not non-existent.

38. The Counsel for respondents strongly relied upon the decision in *Vellikannu v. R. Singaperumal and Anr.* 2005 (4) SCJ 328 and contentions were advanced that if the stand that Ramachandra Reddy is the illatom son-in-law of Rajeshwar Reddy is to be accepted and in view of the specific recital that he would be treated as just like a son or equal to son, his status would be that of a coparcener and hence by virtue of survivorship Ramachandra Reddy would become absolute owner of the properties after the death of Rajeshwar Reddy. In *Vellikannu v. R. Singaperumal and Anr.* (5 supra) while dealing with Section 6 of the Hindu Succession Act, 1956, the Apex Court observed that if a male Hindu dies after commencement of the Act, an interest in a Mitakshara coparcenary property shall devolve by survivorship upon the surviving members of the coparcenary and not in accordance with the Act.

39. In *Dr. J.N. Banavalikar Vs. Municipal Corporation of Delhi and another*, while dealing with succession under Hindu Law and Illatom son-in-law in Andhra it was held that in Andhra an illatom son-in-law is a boy incorporated into the family with a view to give a daughter in marriage and is customarily recognised as an heir in the absence of a natural born son.

40. In *Vatrapu Subbarao alias Pamireddi Subbareddi and Others Vs. Pamireddi Mahalakshamma*, while dealing with an alienation made by father-in-law after taking illatom son-in-law and the effect thereof observed that the practice of illatom is a departure from ordinary Hindu law, and accordingly it lies upon the party claiming by virtue of the statute to override the provisions of that law to substantiate his claim. This cannot in general be done, as, for instance, can be done in a case of adoption, by appeal to settled rules of law because the practice of illatom being of late occurrence and confined to certain castes, has never become crystallized into fixed rules of law by a long course of judicial decisions. Where therefore, a father-in-law take a son-in-law in illatom, and subsequently alienates some of his property, it lies heavily upon the illatom son-in-law to show that by specific customary law overriding the general Hindu law, he has a preferential right to the rights of father-in-law's alienees.

41. The Division Bench of this Court in *Narasayya and Ors. v. Ramachandrayya and Ors.* AIR 1956 AP 209 while dealing with essentials and incidents of the custom in illatom adoption it was observed at paras 8 and 10 as hereunder.

The custom of affiliating a son-in-law and giving him a share, which is called illatom adoption, has been in vogue in certain communities of this stage. This institution is purely a creature of custom and judicial recognition has been given to it. The two essential conditions of this adoption are that the adoptee must marry the daughter of the adopter and there should be an agreement to give him a share though it is not necessary that the marriage should take place before he is admitted into the family.

Either of the two by itself will not be sufficient to constitute a person an illatom son-in-law, i.e., merely living in the house of the father-in-law and helping him in

the management of the property would not make him an illatom son- in-law. The incidents of this custom have been crystallised into certain rules of law and we need not enumerate them here. Any extension of the incidents would not be permitted unless proved as a special custom.

We are not impressed with this argument. This custom derogates from the ordinary rule of Hindu Law of Succession. Under the Mitakshara Law which governs the parties in question, a son-in-law has no rights in the devolution of the property of the last male-holder. The rule of succession in this regard is altered by the custom to this extent, i.e., by giving a share to the son-in-law even in cases where the natural born son exists. That custom could not be extended further as its effect would be to detract further from the Mitakshara Law of Inheritance.

It is the custom and proof of usage that gives validity to this right. As pointed out in several judicial decisions, common sense and reasoning have nothing to do with custom and the incidents cannot be extended by parity of reasoning. Reason cannot create a custom. Logical extension of this rule is not permissible. If the defendants have to succeed in their contention, they have to prove this particular incident like any other fact which is disputed. See (Mullapudi) Rangayya Vs. Emperor, , P.A.L. Pl. Palaniappa Chettiar (died) and Another Vs. V.N.S. Chockalingam Chetti, . They have to establish it as a special custom or usage either obtaining in a particular family or in a locality.

Such custom in order to have the force of law must be continuous, uniform and specific and the one instance alone cannot create a valid custom. Further, there is no basis for this custom in evidence nor was any attempt made in that direction. For these reasons, we must hold that the father of defendants 1 and 2 could not be deemed to be the illatom son-in-law of Chandrappa, and as such not entitled to inherit the property of Chandrappa on that title.

42. Sri P.S. Murthy also placed strong reliance on the decision in G. Narayanappa and another Vs. Govt. of Andhra Pradesh, wherein the Apex Court while dealing with the status of illatom son-in-law under Hindu Law and also the applicability or otherwise of Section 4A of A.P. Land Reforms (Ceiling on Agricultural Holdings) Act (1 of 1973) observed at para 12 as hereunder. "Coming to the position in law, the discussion in the text books, which we have referred to in some detail earlier, makes it clear that although an illatom son- in-law has some rights similar to those of a natural son born after the adoption of the illatom son-in-law, his rights are not identical to those of conferred by law on a son or an adopted son. To cite two main differences, he does not succeed to the properties of his father-in-law by survivorship, but only on account of custom or an agreement giving him a share in the property of his father-in-law. His position is not identical to that of an adopted son because he does not lose his rights in his natural family on being taken as an illatom son-in-law and continues to be entitled to a share in the property of his natural father. It is, therefore, difficult to regard an illatom son-in-law who has attained majority as a major son for the

purposes of Section 4A of the Ceiling Act."

43. It is pertinent to note that this view expressed by the Apex Court in the context of Section 4A of A.P. Land Reforms (Ceiling on Agricultural Holdings) Act (1 of 1973) wherein it was specifically held that an illatom son-in-law cannot be equated with major son or adopted son for the purposes of Section 4A of the Ceiling Act would clarify the situation and the same would be an answer to the contention advanced by Sri Anand relating to the concept of coparcenary and survivorship.

44. In (Mullapudi) Rangayya Vs. Emperor, the learned Judge of the Madras High Court held that illatom son-in-law is not co-parcener with his father. Thus, he is not on the same footing as a son born and as such he has no reversionary right or right of collateral succession.

45. In Sayamma v. Chinna Gowd (died) by L.Rs 1967 (2) ALT 423 it was held as hereunder:

Illatom is the affiliating of a son-in-law and giving him a share in the property in consideration of the agreement that he would work and assist in the management of the property. This institution of affiliation is none of the incidents of any substantive provision of Hindu Law. It is essentially a creature of custom. Its incidents, though crystalised into rules of law, do not brook extension by analogy. A specific agreement is necessary for bringing into being such an affiliation. Besides, it is also necessary to prove that such custom of affiliating a son-in-law is in the community to which the parties belong.

"It must be ancient, certain and reasonable and being in derogation of the general rules of law, must be construed strictly. It is further essential that it should be established to be so by clear and unambiguous evidence, for it is only by means of such evidence that the courts can be assured of its existence and of the fact that it possesses the conditions of antiquity and certainty on which alone, its legal title to recognition depends", It has been further stated:

It is incumbent on a party setting up a custom to allege and prove the custom on which he relied. Custom cannot be extended by analogy. It must be established inductively and not by apriori methods. Custom cannot be a matter of mere theory but always be a matter of fact and one custom cannot be deduced from another.

Where the proof of a custom rests upon a limited number or instances of a comparatively recent date the court may hold the custom proved so as to bind the parties to the suit and those claiming through and under them, but the decision would not in that case be a satisfactory precedent if in any future suit between other parties fuller evidence with regard to the alleged custom should be forthcoming.

46. Reliance also was placed on the decision in Peechu Ramaiah v. The Govt. of A.P. through the Tahsildar, L.R. Tribunal Kamareddy Nizamabad District 1976(2) APLJ 278; and Papanna v. Madappa and Ors. AIR 1993 Karnataka 24.

47. In the light of the clear documentary evidence Ex.B-1 read with Ex.B-2 and also the voluminous oral evidence D.W.1 and D.W.2 and also the other witnesses except those speaking alienations in one voice supporting the illatom adoption, this Court is of the considered opinion that the stand taken by P.W.1 that Ramachandra Reddy was not taken by way of illatom adoption at all by Rajeshwar Reddy, her father, cannot be accepted.

48. The next question to be decided is when by virtue of an agreement the customary mode of illatom adoption had been adopted by Rajeshwar Reddy, the said illatom adoption to be totally ignored while deciding partition action by giving half share, half share to the daughters of Rajeshwar Reddy, plaintiff and second defendant as well. It is no doubt true that Ratnabai was not a party to Ex.B-3, but the husband of Ratnabai challenged the illatom adoption and entered into a compromise. Rajeshwar Reddy, Ramachandra Reddy and Lakshmareddy, the husband of Ratnabai, were the parties to the said litigation. The deed of illatom adoption, Ex.B-1 a registered document, also is available and no doubt some evidence had been placed especially in the deposition of D.W.1 to the effect that some income from the natural family of D.W.1, the second defendant also had been utilized for the purpose of purchase of certain of the properties. Since the evidence is not clear on the aspect which items had been purchased; no clear documentary evidence being available in this regard and the same being vague, certain findings as already specified supra had been recorded.

49. On over all facts and circumstances, this Court is thoroughly satisfied that inasmuch Rajeshwar Reddy died in the year 1970 and this fact not being in controversy between the parties inasmuch as a suit for partition had been instituted, Ratnabai, one branch, one daughter as against the other branch Rajubai, other daughter, and in view of the fact that this Court is inclined to declare the status Ramachandra Reddy as the illatom son-in-law of the family though by virtue of the recitals the status of a son had been conferred by Rajeshwar Reddy on Ramachandra Reddy, this Court is inclined to grant a preliminary decree for partition of all the family properties by dividing the same, by taking into consideration the good and bad qualities by metes and bounds, into three shares and allot one such share to the legal representative of Ratnabai, who is now prosecuting the appeal, 1/3rd share to Rajubai, the daughter, 1/3rd to the illatom son-in-law, the second defendant D.W.1. In the considered opinion of this Court this would be just and equitable in the peculiar facts and circumstances of the case.

50. To what relief:

In the light of the findings recorded above, the decree and judgment made by the trial court are hereby set aside and the suit for partition is decreed passing a preliminary decree by granting 1/3rd share to each of the sharers, the legal representative of the plaintiff, the first defendant and the second defendant. It is also made clear that during final decree proceedings the equities, if any, relating to the alleged alienations also may be worked out. Inasmuch as the relief of

mesne profits also is being claimed, the successful party is at liberty to move appropriate application for ascertainment of mesne profits.

51. Accordingly, the appeal is allowed to the extent indicated above, but in view of the close relationship between the parties, let the parties bear their own costs.