REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 9546 OF 2013

VENIGALLA KOTESWARAMMA ….APPELLANT(S)

VERSUS

MALAMPATI SURYAMBA & ORS. ....RESPONDENT(S)

JUDGMENT

Dinesh Maheshwari, J.

Introductory and brief outline

1. This appeal by special leave is directed against the judgment and decree dated 20.03.2009, as passed by the High Court of Judicature for Andhra Pradesh at Hyderabad in AS No. 1887 of 1998 and arises out of a suit for partition and related reliefs, filed by the plaintiff-appellant in the Court of Subordinate Judge, Narasaraopet, Guntur District, Andhra Pradesh, being OS No. 35 of 1980 (old OP No. 106 of 1978).

2. Having regard to the circumstances of this case and questions involved, useful it would be to draw a brief outline of the case at the outset.

2.1. In the suit aforesaid, the plaintiff-appellant essentially claimed partition and division of the properties left by her step-mother in four equal shares amongst herself and her three siblings, who were arrayed as defendants 1, 2 and 3; and she also claimed other reliefs, including that of mesne profits against other defendants. The siblings of the plaintiff-appellant did not contest the suit; rather defendants 2 and 3 filed a written statement of admission.

2.2. However, the contesting defendants, led by defendant 4, brother of the step-mother of plaintiff, alleged that the step-mother of plaintiff had sold Item No. 1 of plaint A Schedule properties to defendant 15 under an agreement for sale dated 05.11.1976 (Ex. B-10); and that she had also executed a Will dated 15.06.1978 (Ex. B-9) in favour of her mother and an attendant, defendants 14 and 13 respectively. By way of subsequent pleadings, the plaintiff denied and disputed the alleged agreement for sale as also the alleged Will.

2.3. The suit was decreed by the Trial Court by way of its judgment and decree dated 29.04.1988 with specific findings on the principal issues against defendants. The Trial Court held, *inter alia*, that both the documents, of the alleged agreement for sale and of the alleged Will (Ex. B-10 and Ex. B-9 respectively), were false and fabricated.

2.4. Two regular appeals were filed in the High Court against the decree of the Trial Court: one being AS No. 1887 of 1988 by defendants 16 to 18, who were on record as legal representatives of the deceased

defendant 15 (claiming under the alleged agreement for sale); and another being AS No. 1433 of 1989 by defendants 4, 13 and 14 (claiming under the alleged Will). In both the appeals, the principal contesting respondents were the plaintiff and her siblings (defendants 1 to 3), who were arrayed as respondents 1 to 4.

2.5. During pendency of the appeals in High Court, defendant 2, brother of the plaintiff-appellant (who was respondent 3 in those appeals), expired on 09.05.1989. No steps for substitution of his legal representatives were taken in either of the appeals. Cause-title of the impugned judgment gives out that on 25.04.2006, the appeal filed by defendants 4, 13 and 14 (AS No. 1433 of 1989) was dismissed against the deceased defendant 2. However, no such order appears to have been passed in the other appeal (AS No. 1887 of 1988).

2.6. In the aforesaid appeals, questions relating to the alleged agreement for sale and the alleged Will formed the major points for determination of the High Court. In the impugned common judgment and decree dated 20.03.2009, the High Court has affirmed the findings of the Trial Court in relation to the Will in question and has held that the Will was not valid and was not binding on the plaintiff or defendants 1 to 3. However, the High Court has reversed the findings of the Trial Court in relation to the alleged agreement for sale and has held that the same was binding on the plaintiff and defendants 1 to 3, who were under obligation to execute the sale deed in favour of defendants 16 to 18. In sequel to

this, the High Court has also ordered that the property forming the subject matter of the said agreement (Item No. 1 of plaint A Schedule) would not be available for partition and has modified the decree of the Trial Court accordingly.

2.7. Aggrieved by the judgment and decree so passed by the High Court, the plaintiff-appellant has preferred this appeal. Interestingly, in this appeal, the said deceased defendant 2 was arrayed as proforma respondent 5; and after receiving the report of his demise, the applications seeking substitution of his legal representatives and condonation of delay were moved by the plaintiff-appellant, with the submissions, *inter alia*, that defendant 2 had expired during the proceedings before the High Court and no steps were taken for substitution of his legal representatives in the High Court. However, the applications so moved were dismissed by the Hon'ble Chamber Judge on 16.07.2012.

3. The aforesaid had been the position of record when this appeal came up for hearing before us. We have heard learned counsel for the parties in video conferencing and have also permitted them to file their written submissions.

Relevant factual and background aspects

4. In keeping with the outlines aforesaid, we may take note of the essential facts and background aspects, so far relevant for the points arising for determination in this appeal.

5. The plaintiff-appellant Venigalla Koteswaramma, defendant 1 Chandra Seethamma, and defendant 3 Chandra Ranganayakamma are the daughters and defendant 2 Malempati Radhakrishnamurthy was the son of Malempati Kondiah from his first wife Annapurnamma, who passed away in or about the year 1945. After the death of his first wife, the propositus Malempati Kondiah contacted second marriage with another lady known by the same name Annapurnamma, who became the step-mother of plaintiff and defendants 1 to 3. (In the narration hereafter, the name “Annapurnamma” is in reference to the second wife of Malempati Kondiah i.e., the step-mother of plaintiff and her siblings).

6. The civil suit aforesaid, seeking partition, separate possession, recovery of mesne profits and other reliefs in relation to the immoveable properties described in Schedule A and the moveable properties described in Schedule B of the plaint, was filed by plaintiff-appellant on 21.07.1978 as an indigent person, being not possessed of sufficient means to pay the court fees[1]. After narrating the aforesaid relationship of the parties, the plaintiff averred that in or about the year 1950, Malempati Kondiah separated from his son Malempati Radhakrishnamurthy (defendant 2) and the properties described in Schedule A came to the share of Malempati Kondiah, who proceeded to settle these properties on his second wife Annapurnamma. The plaintiff further averred that after partition, Annapurnamma was living separately with her husband

1 The plaint was presented in the form of application for permission to sue as indigent person, that was numbered as OP 106 of 1978. It appears that the application was granted by the Court and hence, was deemed to be the plaint in the suit, which was numbered as OS 35 of 1980.

Malempati Kondiah, till he passed away in the year 1971 and thereafter, she became owner of the properties in question. The plaintiff yet further averred that four years prior to her demise, Annapurnamma suffered paralytic stroke and, for being not in good health, she was depending mainly on her servants as also on defendants 2 and 3. The plaintiff stated that Annapurnamma died intestate and issueless on 17.06.1978.

6.1. The plaintiff referred to the dealings of Annapurnamma in relation to the properties in question before her demise and particularly averred that defendants 5 and 6 were inducted as lessees on the property described at Item No. 1 of A Schedule and they paid the lease amount to Annapurnamma for the sugar-cane crop in March, 1977. The plaintiff further averred that there had been ratoon crop on the said property for which, the defendants 5 and 6 were liable to pay the agreed rent to the heirs of Annapurnamma. The plaintiff also averred that Annapurnamma was getting good income on her properties; that though she sold some of the properties left by her husband on account of impending land legislations but, going by the instructions of her late husband that his hard-earned properties should go to his daughters and son in equal shares, Annapurnamma openly declared that she had neither executed any Will nor made any other provision in respect of her properties. The plaintiff maintained that after the death of Annapurnamma, herself and defendants 1 to 3 were equally entitled to the properties left by her.

6.2. The plaintiff, thereafter, made extensive averments about unwarranted interference and intermeddling with the properties in question by defendant 4 Chapalamadugu Satyanarayana, brother of late Annapurnamma. The plaintiff alleged that defendant 4 created differences amongst the siblings for which they could not come to an understanding with regard to partition of the properties left by Annapurnamma; and that defendant 4 prevailed upon plaintiff and her siblings to execute an agreement in favour of his own persons, who were to act as mediators.

6.2.1. While joining the said mediators as defendants 7 to 11, the plaintiff alleged that they were trying to dispose of the properties in question in their own way; that they had sold one ox and four gold bangles of Annapurnamma and the sale proceeds were lying with them; and that the agreement in favour of defendants 7 to 11 was obtained in a fraudulent manner by creating differences amongst the siblings. The plaintiff also alleged that one gold chain was mortgaged by Annapurnamma with a bank at the instance of defendant 12, who failed to redeem the same. All such averments and allegations concerning defendants 7 to 12 need not be elaborated here, for being not relevant for the purpose of the present appeal.

6.3. The principal allegations in the plaint were directed against defendant 4 where plaintiff alleged that he created differences amongst the siblings and obtained the agreement for mediation in favour of his own persons in a fraudulent manner; and was creating false debts so as

to grab the properties left by the deceased Annapurnamma. It was also alleged that after the death of Annapurnamma, the defendant 4 and the persons of his family misconducted themselves and 'took her thumb impressions immediately after her death on the blank white papers with a view to make wrongful gain'.

6.4. The plaintiff also alleged that defendant 13 was the farm servant of Annapurnamma who was occupying a portion of cattle shed of Item 7 of A Schedule property and he was liable to be evicted, for having no right to remain in occupation of the shed after the death of Annapurnamma.

6.5. The plaintiff further alleged that having come to know about the fraud played by defendant 4, she made a request to the mediators to partition the properties but they did not do so and were proceeding in their own way; and she had no other option except to file the suit for partition to claim her share in plaint A Schedule and B Schedule properties. The plaintiff asserted that she was entitled to one-fourth share and the defendants 1 to 3 were entitled to the remaining three-fourth share of the properties in question.

6.6. With the aforesaid averments, the plaintiff-appellant claimed the reliefs for partition and delivery of separate possession of her one-fourth share in the plaint A and B Schedule properties after dividing them in four equal shares; for directions to defendants 5 and 6 to pay the lease amount in the Court for the benefit of the plaintiff; and for ascertainment

of mesne profits of the plaint A Schedule properties from the date of suit until the date of putting the plaintiff in possession of her share.

6.7. In Schedules A and B attached to the plaint, the plaintiff described the properties which were subject matter of her claim. In Schedule A, the plaintiff described seven items of immoveable property. Noticeably, the parcel of land mentioned at Item 1 therein is the bone of contention in this case. In Schedule B, the plaintiff described 10 items of moveable property.

6.8. It may be pointed out at this stage that in the wake of pleadings taken by the contesting defendants, there had been an amendment to the plaint with impleadment of defendants 14 and 15 and with insertion of averments that were essentially in rebuttal of the assertions made by the contesting defendants. These aspects shall be dilated a little later and after taking note of the pleas taken by the contesting defendants.

7. As noticed, the siblings of the plaintiff-appellant did not contest the suit and in fact, the defendants 2 and 3 filed a written statement of admission. This written statement was adopted by defendants 7 and 8.

8. However, the suit was stoutly contested by defendant 4 and some other defendants, who adopted the written statement filed by defendant 4. The pleas taken in the written statement of defendant 4 form the core of contest in this matter and, therefore, the same may be noticed in necessary details.

8.1. In his written statement, defendant 4 admitted the relationship of parties as mentioned in the plaint but stated specific denial of all other plaint averments concerning the dealings of Annapurnamma with regard to the properties in question and also denied the allegations levelled against him while stating that all such allegations were invented only to suit the false and vexatious claim of the plaintiff. The defendant 4 also stated that late Malempati Kondiah married his second wife Annapurnamma after the marriage of his son (defendant 2) but they could not pull on together and late Malempati Kondiah was constrained to get separated from his son on account of misbehaviour of the latter while parting with some property, though it was styled as a gift. The contesting defendant further alleged that even Annapurnamma had to part with some of her properties in favour of defendant 2 on account of his non-cooperation regarding the performance of obsequies of late Malempati Kondiah. The contesting defendant asserted that Annapurnamma was not on good terms with plaintiff and defendants 1 to 3; and she was more attached to her mother, who used to attend to her in troubled circumstances. It was further asserted that Annapurnamma disposed of some of the properties to meet her necessities; and that the income from her land was hardly sufficient, rather she was incurring losses in agriculture.

8.2. Apart from the assertions aforesaid, the contesting defendant took specific stand in the written statement that the plaintiff and defendants 1

to 3 were aware of the fact that on 05.11.1976, Annapurnamma had sold the property mentioned at Item 1 of plaint A Schedule to one Malempati Satyanarayanavara Prasad after receiving a major portion of consideration and executed an agreement for sale while putting the vendee in possession of the land who, in turn, leased out the same to defendants 5 and 6. The contesting defendant further alleged that the plaintiff and defendants 1 to 3 were also aware of the fact that Annapurnamma had executed a Will on 15.06.1978 in a sound and disposing state of mind, bequeathing her properties in favour of her mother Chapalamadugu Punnamma and defendant 13, Kilaru Gopala Rao; and directed her mother to execute a registered sale deed in favour of the said vendee after receiving the balance sale consideration as per the agreement and also to discharge her debts. The contesting defendant also took the averments that the legatees had taken over possession of the properties respectively bequeathed to them. These averments, being the main plank of the case of the contesting defendants and forming the core of dispute in the present case, could be usefully extracted as under:-

> "3. There are no differences as such between the plaintiff and the defendants 1 to 3 as alleged in the plaint. In fact they are moving hand in glove in this nefarious litigation. **The plaintiff and defendants 1 to 3 are fully aware of the fact that on 5.11.1976 Malempati Annapurnamma and sold away item 1 of Plaint A Schedule to one Malempati Satyanarayanavara Prasad, that she received a major portion of the consideration and executed an agreement of sale in his favour and put him in possession of the land**, that the vendee Satyanarayanavara Prasad had leased out the said land to the defendants 5 and 6 at rental of Rs. 250/- per acre per year, for a period of 2 years i.e. 1977-78 and 1978-79, and that in pursuance of the said lease the defendants 5 and 6 have entered into the land and enjoyed the

same by raising Sugar-cane; that the defendants 5 and 6 duly paid the rent to their land-lord Satyanarayanavara Prasad. After the expiry of the said lease period, the said Satyanarayanavara Prasad had again leased out the said land to one Chandra Adinarayana who also raised Sugar cane therein. It is therefore false to allege that late Annapurnamma died possessed of item 1 of A schedule by leasing out to defendants 5 and 6.

4. **Late Malempati Annapurnamma executed a will dated 15th June, 1978 in a sound and disposing state of mind bequeathing her properties in favour of her mother, Chapalamadugu Punnamma and the 13th defendant, Kilaru Gopalarao as detailed therein and further directing her mother to execute a registered sale deed in favour of Malempati Satyanarayanavara Prasad in respect of item 1 of plaint A schedule after receiving the balance of sale consideration from him as per the agreement of sale executed by her in his favour. The testatrix also directed her mother to discharge the debts.** The plaintiff and defendants 1 to 3 are fully aware of the truthfulness of the said will and they have combined together in filing this suit in the sole name of the plaintiff, for the reasons best known to them scrupulously avoiding one of the legatees, Chapalamadugu Punnamma and also the above said Vendee, Malampati Satyanarayanavara Prasad.

5. One of the legatees, Chapalamadugu Punnamma took possession of items 2, 3, 5, 6 and portion of item 7 viz., about aco-16½ cents of site consisting of a Middle house of 4 beams, with three tiled Varandhas attached thereto and a tiled house in the north eastern corner of the plaint A schedule, in accordance with the terms of the will, immediately after the death of the testatrix, Chapalamadugu Punnamma, cultivated and manured items 3 and 5, transplanted paddy in item 3 and sowed caster seeds in item 5 in the suit year.

6. The testatrix Annapurnamma also bequeathed under the said will in favour of the 13th defendant, Kilaru Gopalarao item 4 and a portion of item 7. viz., 3½ cents of site consisting of a Kitchen of Plaint A schedule as he and his wife rendered her service for over 3 years during her life time in her agriculture etc., Immediately after the death of the testatrix the 13th defendant took possession of the properties bequeathed to him and has been residing in the Kitchen room, cultivated and manured item 4 of A schedule and transplanted paddy therein. The legatees have been in possession and enjoyment of their respective properties bequeathed to them in their own right and title."

(emphasis in bold supplied)

8.3. The defendant 4 also denied other plaint averments concerning the alleged mediators and maintained that no agreement was executed in

their favour. In a nutshell, the case of defendant 4 had been to the effect that neither plaintiff nor defendants 1 to 3 were entitled to the properties of late Annapurnamma.

9. It is noticed from the contents of Trial Court's judgment dated 29.04.1988 that by way of a separate written statement, defendant 11 denied the alleged agreement for mediation and also denied his having dealt with the moveable property of Annapurnamma. This defendant maintained that he was unnecessarily impleaded and was neither necessary nor a proper party to the suit. It is also noticed that defendants 9 and 10 adopted this written statement of defendant 11.

10. As noticed, initially 13 persons were arrayed as defendants in the suit. However, defendant 4 in his written statement took the averments about the alleged Will in favour of two persons, one being his mother Chapalamadugu Punnamma and another being defendant 13, Kilaru Gopala Rao; and defendant 4 also took the averments about the alleged agreement for sale in favour of Malempati Satyanarayanavara Prasad. It appears that in the wake of such averments, the plaintiff amended the plaint and it is noticed from the Trial Court's judgment that the alleged legatee Chapalamadugu Punnamma (mother of Annapurnamma and defendant 4) was impleaded as defendant 14; and the alleged vendee Malempati Satyanarayanavara Prasad Rao was impleaded as defendant 15 in the suit. It further appears that the plaintiff added paragraph 7(a) to the plaint with the averments that defendant 14 was not a legatee and

was not in possession of the property in question; and the Will as setup was false and fabricated. The plaintiff also denied the execution of agreement in favour of defendant 15 and maintained that defendant 14 was never directed to execute sale deed in favour of defendant 15. The plaintiff submitted that defendants 14 and 15 had no right in the property and their claims were liable to be ignored.

11. Apart from the aforesaid amendment to the plaint, the plaintiff also filed a rejoinder which was duly noticed by the Trial Court in paragraph 9 of its judgment dated 29.04.1988, which may be usefully reproduced hereunder for taking note of the gist of averments taken by the plaintiff by way of rejoinder. The Trial Court noted in its judgment thus:

> "9. The plaintiff filed a rejoinder with the following averments. Annapurnamma did not sell item 1 of A schedule to Satyanarayana Vara Prasad and she never received consideration and never executed or put the vendee in possession of the property. This land was never leased to that so called vendee. He did not lease it out to Adinarayana. Annapurnamma did not execute any will. It is only a forged document, fabricated for the purpose of the suit. She has no sound and disposing state of mind. She has no occasion to execute any deed voluntarily or otherwise. It was not attested in accordance with law. It must have been a forged and brought up by the 4th defendant with the support of his friends and associates. From the very reading of the plaint it is unnatural and unconscionable. It is false that the will was acted upon and legatees took possession of the properties. The dispositions referred in the will are false and fabricated. It is false to say that Annapurnamma did not own and possess items 1 to 4, 8 to 10 of the B Schedule properties. It is false to say that Annapurnamma was not in good terms with plaintiff and that she was attached to her mother and she was attending to her services in her last days. The mother herself was sufficiently old and she would not have rendered any service to Annapurnamma as the mother herself was depending upon others for services."

12. In order to complete the narrative about the stand of respective parties, it may also be noticed that defendants 5, 6, 12 and 13 filed a

memo adopting the written statement of defendant 4. The newly added defendants 14 and 15 filed another memo to the same effect, adopting the written statement of defendant 4. It is also noteworthy that defendant 15 expired during pendency of the suit and his legal representatives, wife and children, were taken on record as defendants 16 to 18, who did not file any separate written statement as well[2].

13. It has already been noticed that the plaintiff and defendants 1 to 3 are the children of propositus Malempati Kondiah and the claim in the suit has essentially been in relation to the properties left by Annapurnamma, the second wife of Malempati Kondiah, who was the step-mother of plaintiff and defendants 1 to 3. Having regard to the averments taken and questions raised in this matter, it is also apposite to take note of the

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2 For a comprehensive view of the parties finally before the Trial Court, the particulars from the cause title of the Trial Court's judgment and other material on record could be usefully noticed as under:-

Plaintiff
Venigalla Koteswaramma
v.
Defendants
1. Chandra Seethamma
2. Malempati Radhakrishnamurthy
3. Chandra Ranganayakamma
4. Chapalamadugu Satyanarayana
5. Kilaru Ramachandra Rao
6. Bollepalli Satyanarayana
7. Bollepalli Peda Venkayya
8. Malempati Seshayya
9. Kilaru Venkata Subbayya
10. Chapalamadugu Narashimha Rao
11. Chapalamadugu Gopala Rao
12. Chapalamadugu Ramakrishna Anjanoyulu alias Govardhan
13. Kilaru Gopala Rao
14. Chapalamadugu Punnamma
15. Malempati Satyanarayanavara Prasad Rao (died)
(D-14 and D-15 added as supplemental defendants as per order in IA. No. 41/84 dated 24.03.1986)
16. Malampati Suryamba
17. Malempati Madhusudana Rao
18. Malempati Durgamba
(D-16 to 18 were substituted as legal representatives of D-15)

relationship of some of the major contesting parties with late Annapurnamma. It has already been noticed that the main contestant, defendant 4, was the brother of Annapurnamma. Noticeable further it is that defendant 16 Malampati Suryamba, who later came on record as legal representative of the alleged vendee in the agreement for sale dated 05.11.1976, was the sister of Annapurnamma. Therefore, the alleged vendee under the said agreement namely, Malempati Satyanarayanavara Prasad Rao, defendant 15, was brother-in-law (sister's husband) of Annapurnamma. Further to this, one of the alleged legatees under the alleged Will dated 15.06.1978, namely, Chapalamadugu Punnamma, who was joined as defendant 14, was mother of Annapurnamma. Another legatee under the said Will, Kilaru Gopala Rao, who was already on record as defendant 13, was not directly related to the parties but was said to be the attendant/farm servant of Annapurnamma.

14. We are impelled to indicate a few striking features of the case at this stage itself. Annapurnamma was about 45 years of age at the time of her death; she expired on 17.06.1978 and allegedly executed the Will two days before her demise; and at that time, her mother, one of the legatees under the Will, was about 80 years of age. Moreover, in the said Will, Annapurnamma allegedly directed her mother to execute a registered sale deed in favour of defendant 15 after receiving the balance sale consideration as per the agreement for sale executed in his favour; and also directed her mother to discharge the debts.

15. On the pleadings of parties, the Trial Court settled as many as 12 issues for trial, which could be noticed as under:-

> "1. Whether the will dated 15.6.1978 pleaded by defendants 4 and 11 is true, valid and acted upon?
> 2. Whether item I of A schedule was pleaded out by late Malampati Annapurnamma to defendants 5 and 6 and their tenancy is subsisting and whether they are necessary parties to the suit?
> 3. Whether item I of A schedule was sold by late Malampati Annapurnamma to Malempati Satyanarayana Vara Prasad and put in possession of the same?
> 4. Whether Chapalamadugu Punnamma is a necessary and proper party to the suit?
> 5. Whether the plaintiff is entitled to the partition and if so what are the properties liable for partition and to what share is the plaintiff entitled?
> 6. Whether late Malampati Annapurnamma died owned and possessed of items 1 to 4 and 8 to 10 of plaint B schedule?
> 7. Whether the plaintiff and defendants 1 to 3 are entitled to the plaint A and B schedule properties and for partition of the same?
> 8. Whether the suit is bad for misjoinder and non-joinder of parties?
> 9. Whether the 12th defendant mortgaged late Malampati Annapurnamma's gold chain and he is not a necessary party to the suit?
> 10. Whether the defendants 5 and 6 are liable to pay the lease amount?
> 11. Whether the plaintiff is entitled to mesne profits, if so at what rate and from whom?
> 12. To what relief, if any?"[3]

16. In evidence, the plaintiff Venigalla Koteswaramma examined herself as PW-1 and one handwriting expert as PW-2. On the other hand, the defendants examined as many as 13 witnesses. The principal contestant, Chapalamadugu Satyanarayana (defendant 4) deposed as DW-1. The scribe of Will was examined as DW-2; the attestors of the Will as DW-3 and DW-13; one of the legatees under the Will, Kilaru Gopala

3 There are various typographical errors in the issues as reproduced in the copy of judgment of the Trial Court as also that of the High Court. However, we have extracted the issues from the copies so placed before us, to indicate the gist of material propositions on which the parties were at variance and the questions which fell for determination in the case.

Rao (defendant 13), as DW-4; and another legatee under the Will, Chapalamadugu Punnamma (defendant 14), was examined as DW-5. In relation to the alleged agreement for sale, the vendee Malempati Satyanarayanavara Prasad Rao (defendant 15) having expired, his wife, Malampati Suryamba (defendant 16), deposed as DW-6; and the scribe and attestor of the agreement were examined as DW-7 and DW-8 respectively. In order to prove that for the purpose of arranging the amount of sale consideration, defendant 15 sold his land and also borrowed money, the defendants examined DW-10 and DW-11. The parties produced various documents, including the alleged unregistered Will dated 15.06.1978 in favour of defendants 13 and 14, (Ex. B-9); and the alleged unregistered agreement for sale dated 05.11.1976 in favour of defendant 15 (Ex. B-10). Several other documents, including the registration extracts of various sale deeds executed by Annapurnamma and the sale deeds executed by defendant 15 were also exhibited in evidence. The defendants also produced various cist receipts in relation to the use of different parcels of land of Annapurnamma by different persons.

Judgement and Decree dated 29.04.1988 by the Trial Court

17. After taking evidence and having heard the contesting parties, the Trial Court proceeded to determine the issues involved in the case by way of its judgment dated 29.04.1988.

17.1. While examining the judgment of Trial Court, it may appear at the first blush as if the Court had rather mixed up the questions involved in the issue relating to the validity of Will (Ex. B-9) with the questions that were germane for examining the validity of the sale agreement (Ex. B-10). However, a close look at the matter, with reference to the aforesaid background aspects, makes it clear that such interlacing of the questions relating to these two documents was rather inevitable because it was suggested that in the Will (Ex. B-9), the testatrix Annapurnamma, apart from making bequest, also directed her legatee mother (defendant 14) to execute a registered sale deed in favour of defendant 15, after receiving the balance sale consideration from him as per the agreement executed in his favour; and she also directed her mother to discharge the debts. Such recitals in the document that was propounded as Will of Annapurnamma (Ex. B-9), coupled with the assertion in the written statement that Annapurnamma was reeling under debts, perforce, led the Trial Court to analogously examine the questions of validity of these two documents.

18. Having regard to the questions involved in this matter, it appears necessary to have a closer look at the observations and findings of the Trial Court, which were although recorded under the heading of issue No. 1 but in essence, covered the matter involved in issue No. 3 too.

18.1. In an elaborate discussion, the Trial Court in the first place found it intriguing that Annapurnamma, who was only 45 years of age at the time

of her death, would choose to bequeath the major part of property to her mother, who was about 80 years of age. The Trial Court also examined the financial status of Annapurnamma with reference to the evidence of defendants, who stated that Annapurnamma sold her land under the sale deeds Ex. B-4 to B-7 in order to discharge her debts but then, wondered as to what was done of the amount of Rs. 40,000/- that was allegedly paid under the agreement Ex. B-10. The Trial Court noticed that as per defendant 4, the debts to the tune of Rs. 50,000/- were to be discharged by Annapurnamma at the time of demise of her husband but he could not point out the names of creditors and could not say as to how much was discharged. After a thorough discussion concerning Annapurnamma's financial position, the Trial Court found that the suggestions about her high level of indebtedness were not correct and observed as under:-

> "…..All this discussion made by me in order to show that there cannot be much truth in the so called high level of indebtedness of Annapurnamma. It has not come on record that whether Annapurnamma was rendered any medical aid further aliment. No medical assistance has been given to Annapurnamma as no such evidence is forth coming from him on record. There is no material whatsoever to show that Annapurnamma was indebted to such a highest extent. Hence to give a colour of reality to want *(sic)* all 4th defendant has done, the aspect of indebtedness is projected."

18.2. The Trial Court, thereafter, switched over to the aspects relating to the validity of the Will in question. Those aspects do not require much dilation herein for the reason that the findings of the Trial Court, that the Will was not genuine and did not inspire confidence, have been duly approved by the High Court; and it stands established beyond doubt that the said document (Ex. B-9) was a fabricated one and was not the Will of

Annapurnamma. We may briefly indicate that some of the major reasons which prevailed with the Trial Court to hold against the validity of the Will as propounded had been: (i) that the property was sought to be bequeathed by a 45-year old lady to her octogenarian mother and such a bequeath did not inspire confidence; (ii) that the other legatee of the Will was a farm servant of Annapurnamma and it was unbelievable that she would have considered giving a big extent of land of 2 acres and a portion of house to a farm servant; (iii) the scribe, as also the attesting witnesses of the document were, one way or another, related to defendant 4 and there were no independent witnesses; (iv) the manner of execution of Will as stated by the witnesses did not inspire confidence; (v) defendant 4 was the real beneficiary under the Will and had taken active part in its execution but attempted to avoid this fact; (vi) Annapurnamma was not in a fit physical or mental condition (she expired two days later); (vii) there were several shortcomings apparent on a bare look at the document including the manner in which the thumb impressions of Annapurnamma appeared; and (viii) the Will was kept secret and the plaintiff and defendants 1 to 3 were not informed about the same.

18.3. After noticing the features operating against genuineness of the alleged Will, the Trial Court switched over, again, to the matters which were more specifically related to the agreement for sale and the reason was indicated by the Trial Court in paragraph 35 of the judgment that, to give a colour of reality to the Will and to show that Annapurnamma was

highly indebted to others which compelled her to sell the property, the suggestions were made about sale to defendant 15, who was none other than Annapurnamma's sister's husband. The Trial Court examined the evidence in relation to the said agreement and particularly that of defendant 16 (wife of deceased defendant 15) who was examined as DW-6; and referred to her assertion that for arranging consideration for purchasing the land under Ex. B-10, her husband sold some parcels of land under an agreement to Mathagi Kotaiah (DW-10) and his son Mathagi Lakshmaiah, and received an amount of Rs. 20,000/-, though the sale was registered only in the year 1984. She further stated that her husband borrowed an amount of Rs. 19,000/- from Davabhakthuni Rangarao (DW-11) under the promissory note Ex. B-18 and later on discharged that debt. The Trial court disbelieved the case of sale to Mathangi Kotaiah (DW-10) and his son in the year 1976 after finding that the sale deeds in their favour, Ex. C-1 and C-2, were dated 07.05.1984 and there was no mention therein about any earlier agreement. The findings of the Trial Court in this regard read as under:-

> "…He marked his sale deeds taken in favour of himself and his son as Ex.C1 and C2. They are dated 7-5-1984. On a personal (*sic*) of Ex.C1 and C2 they are not mentioning about any earlier agreement executed in favour of DW 10. So there is absolutely no material to show that DW 10 purchased ac. 1-25 of land from 15th defendant as stated by him in the year 1976 or 1975."

18.4. The Trial Court also found that the alleged promissory note Ex. B-18 was a document written by defendant 15 himself and he allegedly discharged such debt by making payments on three occasions. In this

regard, the Trial Court referred to the statement of DW-11 who stated that under the said promissory note, defendant 15 borrowed Rs. 19,000/- in the year 1976 to purchase land; and that 'within four months after Ex. B-18, the pronote debt was discharged' by defendant 15 by selling sugar-cane. The Court observed that such documents could be fabricated any time with the help of old papers and black ink and the same could not be connected with the alleged purchase by defendant 15.

18.5. The Trial Court also found that even the scribe of the agreement Ex. B-10 was related to the vendee as his mother's sister's son, he was not a licenced deed-writer and the reason for selling the land was not mentioned in Ex. B-10. The Trial Court also found that DW-8 attestor avoided the relevant questions. Thereafter, the Trial Court also took into consideration the fact that defendant 15 was a native of Nimmagadda and no cogent reason was forthcoming as to why he had purchased the land at a far-off place, after spending a huge amount of Rs. 40,000/-.

18.6. The Trial Court observed that the sale agreement was probably fabricated to take the property away from the reach of the heirs of Annapurnamma and else, there was no reason as to why for a long length of time, the sale document was not registered. The Trial Court also found astonishing that the cist receipts, which came into existence after filing of the suit, were sought to be relied upon and also indicated that one of the receipt Ex. B-11, said to be dated 13.11.1977, carried alteration in the name.

18.7. After an extensive and exhaustive discussion, practically covering all the matters relating to both the issues concerning the Will (Ex. B-9) and the sale agreement (Ex. B-10), Trial Court observed and held as under:-

> "……**Hence Ex. B10 is not a genuine document and it is not supported by material to show that 15th defendant paid Rs. 40000 and under Ex. B10 purchase the land and happened to be in possession of it till his death and there after it is under the possession of his children**. It is also quite astonishing that to establish possession and enjoyment of ideal by 15th defendant, the defendants place at reliance upon cist receipts….Ex. B12 and B17 are subsequent to the suit and they can be brushed aside as they have been fabricated for the sake of suit. Ex. B 11 is dated 13-11-1977. In this name is corrected as Malempati Satyanarayana Vara Prasadarao from Malempati Satyaraprasadarao. So Ex. B11 cannot be given weight. Hence there is no proof that 15th defendant is in possession and enjoyment of item in his own right….. Ex. B10 has been fabricated to give its colour of reality to Ex. B9 will. **In Ex.9 will it is mentioned that the 15th defendant shall take the balance of consideration of Rs. 2600/--from 5th defendant and 14th defendant should executant** *(sic)* **deed in favour of 15th defendant and the balance may be used to discharge her debts. So the document Ex. B10 is nothing but a fabrication of the 4th defendant in collusion with his kith and kin and hence Ex. B10 is of no help to the defendant. So I hold that the will is not true and fabricated**."
>
> (emphasis in bold supplied)

19. The aforesaid had been the discussion and findings of the Trial Court on issue No. 1 but, as noticed, the matters related with issue No. 3 concerning the agreement for sale also came to be examined therein and clear findings were recorded by the Trial Court, not only against the genuineness of the Will but also against the alleged agreement for sale. This was the reason that the Trial Court concluded on issue No. 3 only in the following words:-

> “Issue 3: It is already discussed and decided that item 1 of A schedule was not sold to 15th defendant by Annapurnamma and he never enjoyed in his right. Hence this issue is decided accordingly.”

20. The findings in relation to other issues are not much relevant for the present purpose but, it could be indicated that the Trial Court found no reason for filing of the suit against defendants 7 to 11 as also against defendant 12 and dismissed the same against them with costs. As regards defendants 5 and 6, the Trial Court found that they were lessees for two years and had already left so they were not the necessary parties. In that continuity, the Court also observed that nothing could be realised from them and mesne profits were to be recovered from defendants 13, 14 and 16. In issue No. 11, the Trial Court held as under:-

> “Issue 11: It is the admitted case of defendants that they are in possession of the land of Annapurnamma. Their right is held to be not legal. Hence their possession being illegal, **defendants 13, 14 and 16 are liable for mesne profits for the immovable properties in their possession belonging to Annapurnamma till they deliver possession of those items to plaintiffs and defendants 1 to 3.** The mesne profits should be ascertained by means of separate petition.”
>
> (emphasis in bold supplied)

21. The Trial Court, accordingly, passed the preliminary decree as follows:-

> “Issue 12: In the suit a preliminary decree is passed for partition of all the items of A schedule property and items 5 and 6 of B schedule property. They should be partitioned into four equal shares and plaintiff be put in possession of one such share. The plaintiff is entitled for costs of the suit from defendants, 4, 13, 14, 16 to 18. The suit against defendants 5 to 12 is dismissed with costs. Court fee should be paid by defendants, 4, 13, 14, 16 to 18. The plaintiff is entitled for mesne profits on the schedule properties from defendants 13, 14, 16 to 18 in respect of such properties that are in possession of these respective defendants.”

Judgement and Decree dated 20.03.2009 by the High Court

22. As noticed, the judgment and decree so passed by the Trial Court came to be challenged by way of two separate appeals. The appeal preferred by defendants 16 to 18, legal representatives of defendant 15, making a claim under the alleged agreement (Ex. B-10) came to be registered as AS No. 1887 of 1998. On the other hand, defendants 4, 13 and 14, essentially making a claim under the Will (Ex. B-9), preferred another appeal that was registered as AS No. 1433 of 1989. In the latter appeal, defendant 14 (appellant 3) died and her legal representatives were brought on record by the order dated 02.11.1999. As already noticed, defendant 2 Malempati Radhakrishnamurthy (who was respondent 3 in the said appeals) also expired during the pendency of appeals but no application was made for substitution of his legal representatives. It is noticed from the cause-title of the impugned judgment that the appeal filed by defendants 4, 13 and 14 (AS No. 1433 of 1989) was dismissed as against defendant 2 (respondent 3) on 25.04.2006. However, no such order seems to have been passed in relation to other appeal (A.S. No. 1887 of 1998) by defendants 16 to 18.

23. The High Court took up both the appeals for disposal by its common judgment dated 20.03.2009. After taking note of the pleadings, issues, evidence and findings of the Trial Court as also the submissions made before it, the High Court noticed the two questions calling for its determination in the following:

> “Thus, the case of the parties circles round Ex. B9 – Will and Ex. B10 –agreement. All other issues or points urged and to be considered are only in relation to these two documents. Hence, the two questions that require consideration are.
>
> 1. Whether Ex. B9 – Will, dated 15.06.1978 is true, valid and binding on plaintiff and defendants 1 to 3?
>
> 2. Whether Ex. B10 - agreement of sale, dated 05.11.1976, executed by Annapurnamma in favour of defendant No. 15 represented by LRs – defendants 16 to 18, is true, valid and binding on plaintiff, defendants 1 to 3 and LRs of defendant No. 14 – Punnamma?”

24. The High Court took note of various features related with proof of a Will and the principles laid down in various decisions, including those by this Court in the case of ***H. Venkatachala Iyengar v B.N. Thimmajamma:*** **AIR 1959 SC 443** and thereafter, examined the matter relating to the Will in question. The High Court found the Will to be suspicious for various reasons and, *inter alia,* made the following observations:

> “…**The active involvement of ultimate beneficiaries of Annapurnamma would certainly create a suspicion.** Further D.W. 1 admits that at the time of execution of Will, his another sister Kilaru Sitaravamma and one Rama Rajyamma, another close relative, were also present. **An inference can, therefore, be drawn that all the relations from her father’s side were present and it is not possible to draw an inference that Annapurnamma executed Ex. B9 on her free will in sound state of mind. Immediately two days after Ex. B9 she died would be ample proof that on 15.6.1978 she was not able to get up and she was seriously ill**. D.W.1 and D.W.2 admit that Annapurnamma was lifted by Rama Rajyamma and Sitaravamma took thumb impression of Annapurnamma and pressed on Vth sheets. It only means that Annapurnamma did not herself, put her thumb impression. Thus the execution of EX B9 Will itself is suspicious.
>
> **As rightly pointed out by learned counsel for plaintiff, thumb impressions are smudged. The ridges are not clear.** Secondly when admittedly D.W. 2 used fountain pen why mascara was used for obtaining thumb impressions? Ordinarily in Villages fountain pen is used to apply ink on the thumb for obtaining impression. No explanation is forthcoming for this. Ex. B9 Will contains three sheets. **Entire contents could have been written**

> **on less than two sheets but three sheets were used leaving at least 1/3rd space in every page.** In addition to this, there is a gap between thumb impression and contents of each page. In comparison with Ex. XI, writing of D.W. 2 on Ex. B9 shows that a strained effort was made to adjust the space so that an impression is given to the effect that testator put thumb impression after completion of each page. These are not at all explained by propounders of the Will."
>
> (emphasis in bold supplied)

24.1. The High Court observed that though the disposition in favour of DW-4 and DW-5 (defendants 13 and 14) while excluding the plaintiff and defendants 1 to 3 by itself was not unnatural but the propounder of the Will as also defendant 4 failed to remove all the suspicious circumstances and therefore, recorded its conclusion, essentially in affirmation of the findings of the Trial Court, in the following terms:-

> "…D.W.5 and D.W.4, propounders of the Will, and D.W.1 failed to remove all the suspicious circumstances and also failed to satisfy judicial conscience. Therefore, this Court holds that Ex. B9 Will is not last testament of Annapurnamma; it is not valid and it is not binding on plaintiff or defendants 1 to 3."

25. Thereafter, the High Court took up for consideration point No. 2 relating to the agreement for sale dated 05.11.1976 (Ex. B-10) and in the first place, observed that in the plaint or rejoinder or written statement of defendants 2 and 3, there was not even a whisper that defendant 15 had no financial capacity to pay the sale consideration nor there was any specific allegation that the document Ex. B-10 was forged or fabricated. The High Court, thereafter, examined some of the reasons given by the Trial Court but proceeded to state its different deductions, *inter alia,* in the following:

“The evidence of D.W.6 is corroborated by the evidence of D.Ws. 7, 8, 9, 10 and 11. Their evidence is consistent and supportive of the evidence of D.W.6 with regard to execution of Ex. B10 and with regard to borrowing of money by defendant No. 15. Merely because they are related to defendant No. 15, their evidence cannot be rejected. It may be mentioned that all persons belonging to Chapalamadugu and Malempati families are closely related by reason of marriages. All the relations were actively involved in execution of Ex. B10 agreement by late Annapurnamma. This is natural because wife of defendant No. 15 is sister of Annapurnamma. Another sister of them brought stamp papers. Scribe and attestors are also related. Presumably for the reason that defendant No. 15 having come to know that Annapurnamma is desirous of selling property, she called for nearest relatives to transaction. There is nothing abnormal in the transaction. Therefore Ex. B10 must be held to have been proved. **As already noticed supra, financial capacity of defendant No. 15 is not relevant issue nor on that ground, Ex. B10 can be rejected because there is no allegation either in plaint or rejoinder of plaintiff or in written statement of defendants 2 and 3 that defendant No. 15 had no capacity to pay sale consideration on the date of agreement. By way of abundant caution, defendant No. 16 as D.W. 6 spoke about method and manner of raising money by her husband and even** *(sic)* **that part of her deposition is doubt or improbable, the same does not make any difference.** Furthermore, in paragraph 6 of plaint, an allegation is made that defendant No. 4 connived with his brothers, Satyanarayana and Surya Narayana, his cousin Narasimha Rao (defendant No.9), Kilaru Sitaravamma and obtained thumb impressions of Annapurnamma immediately after her death on blank white papers with a view to make wrongful gain. **If plaintiff is suggesting that these blank papers were used for fabricating the Will and agreement, Ex. B10, she should fail for the simple reason that Ex. B10 is executed on stamp paper worth Rs. 6/-. Be that as it is vendee or his legal heirs have proved agreement, Ex. B10, in accordance with law by examining scribe and attestor, D.W.7 and D.W.8, who saw Ex. B10 being executed**, there is nothing on record to lead to a different conclusion.”

(emphasis in bold supplied)

25.1. The High Court further opined on the validity of the said agreement, while disagreeing with the findings of the Trial Court, in the following terms:

“Whether Ex.B10 is improbable by being a sale in favour of a close relative, who is resident of a far-off place. Learned trial Judge came to the conclusion that Ex.B10 is improbable because

> of reason why defendant No. 15, a resident of Machilipatnam, purchased property at Narasaraopet under Ex.B10 is not forthcoming and that he failed to obtain registered sale deed, even after lapse of considerable time. In the considered opinion of this Court, reasons which weighed with learned trial Court would not probablise *(sic)*Ex.B10. There is no dispute that Annapurnamma, Suryamba (wife of defendant No. 15) and Kiralu Sitaravamma are sisters of defendant No. 4 and all are children of Punnamma (D.W.5). Plaintiff also admits that as the yield from agricultural land was not profitable and also to get over land ceiling legislation, Annapurnamma started selling lands to convert them into cash. She was a sick lady with paralysis and, therefore, it is quite probable that she was selling the lands for intending purchasers. Exs.B4 to B7 would prove this. Annapurnamma selling land under Ex.B10 is, therefore, neither abnormal nor improbable. Having come to know that his sister-in-law is selling land, if defendant No. 15 though resident of Machillipatnam approached her to purchase land, there is no surprise. He is not a stranger to the family and it might be possible that Annapurnamma herself requested her sister Suryamba to purchase land. It is also in the evidence of D.W.7, scribe of Ex.B10, that defendant No. 15 wanted to settle at Kammavaripalem and, therefore, he purchased the land under Ex.B10. There is nothing to suggest that D.W.7 was speaking lie. It is not uncommon among members of close families to purchase lands from their relatives or raise money either by selling or mortgaging property in their favour."

25.2. The High Court also accepted the explanation of contesting defendants that Annapurnamma had put her left thumb impression on the document for having suffered paralysis and such a fact was not mentioned in the document because it was not written by a professional deed-writer. In continuity with this discussion, the High Court also made the following observation: -

> "…….D.W. 6 also gave explanation as to why sale deed was not obtained immediately after agreement and there was no serious challenge to what she stated."

25.3. Thereafter, the High Court proceeded to examine other evidence on record, including the testimony of defendant 5, who deposed as DW-9 as also of DW-6 and DW-7 and accepted the case of the contesting

defendants that possession of the land in question was handed over to defendant 15 and he leased out the same to defendant 5 and other persons.

25.4. One of the submissions on behalf of the plaintiff was that when the Will Ex. B-9 was itself surrounded by suspicious circumstances, the agreement Ex. B-10 must be rejected. However, the High Court rejected this contention while observing that Ex. B-10 stood duly proved by cogent evidence and the same was enforceable as an independent document. The High Court said, -

> "Learned Counsel for plaintiff submits that when Ex.B9 itself is surrounded by suspicious circumstances, Ex.B10 must be rejected. This Court cannot countenance the submission. **Ex.B10 is prior in point of time to Ex.B9 Will. Ex.B10 is an independent document and, therefore, even Ex.B9 Will is not proved and not binding on rival parties, Ex.B10 can be sustained on its own strength.** The contentions of plaintiff that Ex.B9 is forged, fabricated, surrounded by suspicious circumstances and that the document itself is unnatural are all the grounds, which cannot be pressed to invalidate Ex.B10 agreement. As concluded supra, Ex.B10 has been proved by defendants 4 and 16 to 18 by cogent and convincing evidence. Therefore Ex.B10 is enforceable as independent document against all those persons who succeed to the property of Annapurnamma."

26. After the aforesaid discussion, the High Court proceeded to conclude that the Will dated 15.06.1978 (Ex. B-9) was not true; was not the last testament of Annapurnamma; and was not binding on plaintiff or defendants 1 to 3. However, the High Court held that the agreement for sale dated 05.11.1976 (Ex. B-10) was valid and binding on the plaintiff and defendants 1 to 3, who were under obligation to execute sale deed in favour of defendants 16 to 18. Consequently, the High Court directed

that in the suit for partition, the property in dispute, being Item No. 1 of plaint A Schedule, shall not be available for partition. The High Court concluded on the appeals as follows:

> "In conclusion, this Court holds that Ex.B9 Will dated 15.6.1978 allegedly executed by late Annapurnamma is not true, valid and it is not the last testament of Annapurnamma. It is not binding on plaintiff or defendants 1 to 3. This Court also holds that Ex.B10 agreement of sale dated 05.11.1976 executed by Annapurnamma in favour of defendant No.15 (predecessors of defendants 16 to 18) is valid and binding on legal heirs of Annapurnamma, namely, plaintiff and defendants 1 to 3. They are bound by the same and are under obligation to execute sale deed in favour of defendants 16 to 18. In the suit for partition filed by plaintiff, item No.1 of plaint-A schedule property, which is subject matter of Ex. B10 would not be available for partition.
>
> Accordingly, Appeal Suit, No. 1887 of 1988 filed by defendants 16, 17 and 18 in the suit is allowed with costs. Appeal Suit No. 1433 of 1989 filed by defendants 4, 13 and 14 (legal heirs of defendants No. 14 were impleaded) is dismissed with costs. The impugned judgment and decree shall stand modified accordingly insofar as item No.1 of plaint-A schedule is concerned."

Rival submissions

Appellant

27. Assailing the judgement and decree of the High Court, learned counsel for the plaintiff-appellant has contended that the High Court has erred in law as also on facts in reversing the findings of the Trial Court in relation to the agreement in question without considering that the findings returned by the Trial Court were neither erroneous nor suffering from any perversity.

28. While questioning the reasons that prevailed with the High Court in upholding the validity of the agreement Ex. B-10, learned counsel has argued that the High Court has proceeded rather contrary to record while

observing that no averments were taken in the pleadings against the validity of the sale agreement. In this regard, learned counsel has referred to the observations and findings of the Trial Court, making clear reference to the pleadings taken by the plaintiff-appellant in the plaint as also in the rejoinder that the alleged sale agreement was nothing but fabrication.

29. The learned counsel has yet further argued that the High Court has committed serious error in not considering the relevant factor that there was no explanation from the side of the alleged purchaser as to why steps were not taken by him for getting the regular sale deed registered, if major part of sale consideration had already been paid. The learned counsel has particularly referred to the fact that in all other transactions, the properties were sold by Annapurnamma by way of regular and registered sale deeds and has submitted that there was no reason that the vendee would not have got the sale deed registered in his favour, if at all Annapurnamma had entered into any agreement as alleged.

30. Learned counsel for the appellant has also argued that the High Court has failed to consider the significant feature of the case that beneficiaries under the documents in question were none other but the close relatives of defendant 4, who had also suggested the existence of Will of Annapurnamma; and such assertions about the Will were rejected by the Trial Court; and those findings were affirmed by the High Court, while dismissing the other appeal filed by defendants 4, 13 and 14. According to the learned counsel, thrust of the findings against validity

and genuineness of the Will equally extend to the question of validity of the alleged sale agreement; and the cogent findings of Trial Court about falsehood and fabrication of the alleged agreement for sale called for no interference by High Court.

<u>*Respondent Nos. 2 & 3*</u>

31. *Per contra*, learned counsel appearing for respondents 2 and 3 (defendants 17 and 18) has argued in the first place that the suit for partition as filed by the plaintiff-appellant was not even maintainable for the reason that the plaintiff-appellant did not seek the relief of declaration in relation to the agreement in question. Learned counsel has contended that when the plaintiff-appellant raised the plea that the sale of the property in question by the deceased Annapurnamma to defendant 15 was not valid in law and an issue was also framed in that regard, the plaintiff ought to have amended the plaint and ought to have asked for declaration that the sale agreement executed by Annapurnamma in favour of defendant 15 was invalid and the property thereon was subject to partition. According to the learned counsel, the suit for mere partition without seeking such declaration was not maintainable and this appeal deserves to be dismissed on this count alone. The learned counsel has submitted, with reference to the decision of this Court in the case of ***State of Rajasthan v. Rao Raja Kalyan Singh (Dead by his Lrs.)*****: (1972) 4 SCC 165,** that the plea on maintainability of the suit is a legal plea and

the same could be raised for the first time before this Court, even though no specific issue was framed in that regard.

32. As regards the agreement Ex. B-10, learned counsel has contended that the same was executed prior in time to the Will Ex. B-9 and the finding on invalidity of the Will is of no effect in relation to this agreement. Learned counsel has elaborated on the submissions that execution of this agreement (Ex. B-10) on stamp paper is duly proved by defendant 16 (wife of the vendee defendant 15), who deposed as DW-6 as also by DW-7 scribe and DW-8 attestor; that payment of a sum of Rs. 40,000/- against sale consideration is duly established in the statement of these witnesses; that delivery of possession to the vendee (defendant 15) is also established, not only by the statement of DW-6 but also in the testimony of defendant 5, to whom the land was leased out and who deposed as DW-9. Learned counsel has also submitted that the effort for raising money for payment of sale consideration by the vendee (defendant 15), by sale of his land to DW-10 and by borrowing from DW-11, is also established and the High Court has rightly appreciated the relevant evidence while returning the findings in favour of the vendee. The learned counsel has further submitted that it is clearly established from the contents of the agreement Ex. B-10 and other surrounding circumstances that late Annapurnamma was in need of money to meet with her medical expenses and for that reason, she had been selling her property; and in that sequence, she sold the property in question and duly

executed the agreement Ex. B-10. Learned counsel has further submitted that the cist receipts placed on record also unfailingly prove that it was only defendant 15, and after him defendants 16 to 18, who remained in possession of the property in question and this property was not available for partition. According to the learned counsel, in regard to the questions relating to the said agreement, the Trial Court rather proceeded on conjectures and surmises while observing that defendant 15, being a resident of Machilipatnam, was not likely to purchase any property at Narasaraopet; and the decision of the Trial Court has rightly been reversed by the High Court in regard to the agreement in question while holding that execution of the agreement Ex. B-10 has been established and there being no rebuttal evidence, its validity and enforceability cannot be denied.

33. During the course of hearing, the question regarding competence of the appeal filed by defendants 16 to 18 in the High Court cropped up, particularly after we noticed the fact that defendant 2 had expired during pendency of that appeal in the High Court and no substitution was made to represent his estate. In this regard, the learned counsel for respondents 2 and 3 has made three-fold submissions. In the first place, learned counsel has contended that the said deceased defendant had been a co-sharer in the partition suit and the factum of his death was known to the plaintiff-appellant but such a fact was not stated before the High Court and, therefore, no fault could be fastened on the contesting

respondents. Secondly, with reference to Rule 2 of Order XXII of the Code of Civil Procedure, 1908[4], learned counsel has contended that the right of defendants 16 to 18 to sue survived against the plaintiff, who had instituted the suit and, therefore, the appeal before the High Court did not abate. This apart, according to the learned counsel, the question of maintainability of the suit is primarily directed against the plaintiff and if this plea is upheld, the very basis of decree in favour of the deceased respondent would be removed; such a decree shall be rendered a nullity; and there would arise no question of any inconsistent decree. On these submissions, learned counsel would maintain that the demise of defendant 2 is of no adverse effect on the competence of the appeal filed by defendants 16 to 18 in the High Court (AS No. 1887 of 1988).

34. We have given anxious consideration to the rival submissions and have examined the record with reference to the law applicable.

Points for determination

35. In the backdrop of aforementioned facts, circumstances, events and proceedings; and in view of the submissions made before us, three points arise for determination in this appeal: (1) whether the suit for partition filed by the plaintiff-appellant was not maintainable for want of relief of declaration against the agreement for sale dated 05.11.1976 (Ex. B-10); (2) what is the effect and consequence of the fact that the legal representatives of defendant 2, who expired during the pendency of

4 "CPC' or 'the Code' for short.

appeal in the High Court, have not been brought on record; and (3) whether the High Court was justified in reversing the findings of the Trial Court in relation to the said agreement for sale dated 05.11.1976 (Ex. B-10)?

Point No. 1

36. The submission on behalf of the contesting respondents, that mere suit for partition was not maintainable without seeking declaration against the agreement Ex. B-10, is not based on any statutory requirement or any case-law. Learned counsel for the contesting respondents has only referred to the decision in ***Rao Raja Kalyan Singh*** (supra) to submit that the legal question on maintainability of the suit could be raised for the first time before this Court, even though no specific issue was framed in that regard. We need not enter into the question as to whether such a plea could be raised for the first time in opposition of the appeal filed by the plaintiff-appellant because even otherwise, this plea remains entirely baseless and deserves to be rejected on merits.

37. It remains trite that partition is really a process in and by which, a joint enjoyment is transformed into an enjoyment in severalty.[5] A partition of property can be only among those having a share or interest in it. A person who does not have a share in such property cannot obviously be a party to partition. In a suit for partition, the Court is concerned with three main issues: (i) whether the person seeking division has a share or interest in the suit property/properties; (ii) whether he is entitled to the

5 *vide* ***Controller of Estate Duty v. Kantilal Trikamlal*****: (1976) 4 SCC 643** (paragraph 16).

relief of division and separate possession; and (iii) how and in what manner, the property/properties should be divided by metes and bounds?[6] Etymologically, the expression "declaration", for the purpose of a suit for partition, essentially refers to the declaration of plaintiff's share in the suit properties.

38. A reference to the relevant background makes it clear that in this suit for partition, separate possession and recovery of mesne profits, the plaintiff-appellant asserted that defendants 1 to 3 were the co-sharers and alleged that defendant 4 and other impleaded defendants were creating hinderance/obstructions in division of properties of Annapurnamma among the siblings. The principal allegations in the plaint were directed against defendant 4 with reference to his dealings with the properties of Annapurnamma; and his intermeddling with the affairs of plaintiff and her siblings by obtaining an agreement for mediation in favour of his own persons. In that sequence, it was also alleged that defendant 4 and his family persons obtained thumb impressions of Annapurnamma on papers, after her death. However, there had not been any reference to any agreement for sale nor there was any allegation of fabrication of any particular document. The plaintiff had not shown awareness about any agreement for sale executed by Annapurnamma or obtained from her by any person; and there was no reference to any agreement like Ex. B-10. As noticed, the plea regarding execution of the agreement for sale by Annapurnamma on 05.11.1976 and Will on 15.06.1978 came up only in

6 *vide* ***Shub Karan Bubna v. Sita Saran Bubna and Ors.:*** **(2009) 9SCC 689** (paragraphs 6 and 7).

the written statement filed by defendant 4. Examination of the record makes it clear that only after taking of such pleas by defendant 4 in his written statement that the legatee under the Will (Ex. B-9) and the vendee in the agreement (Ex. B-10) were added as defendants 14 and 15 respectively. Such pleas were refuted by the plaintiff by amendment of the plaint as also by way of further pleadings in rejoinder. The plaintiff denied the execution of Will and agreement by Annapurnamma and submitted that defendants 14 and 15 were having no right in the property and their claims were liable to be ignored. The plaintiff did not seek any relief of declaration, whether against the Will or against the agreement; and in our view, she was not required to seek any such declaration.

38.1. As noticed, the pleas concerning Will and sale agreement were taken only by the defendant 4 in his written statement (and by such other defendants who adopted his written statement). Obviously, the onus of establishing such pleas was on the contesting defendants. If such pleas, or any of them, stood established, the necessary consequences would have followed and in other event, the plaintiff was to succeed. In any event, the documents of Will and sale agreement, as set up by the contesting defendants, were subject to proof by the persons setting them up. On her part and for the purpose of maintaining the suit for partition and other related reliefs, the plaintiff was entitled to ignore them and there was no necessity for the plaintiff to seek the relief of declaration against the agreement set up by the defendants.

39. Apart from the above, it is also fundamental, as per Section 54 of the Transfer of Property Act, 1882, that an agreement for sale of immoveable property does not, of itself, create any interest in or charge on such property.[7] A person having an agreement for sale in his favour does not get any right in the property, except the right of obtaining sale deed on that basis[8]. For ready reference, we may reproduce Section 54 of the Transfer of Property Act that reads as under: -

> **"54. "Sale" defined.**- "Sale" is a transfer of ownership in exchange for a price paid or promised or part-paid and part-promised.
>
> **Sale how made.**- Such transfer, in the case of tangible immoveable property of the value of one hundred rupees and upwards, or in the case of a reversion or other intangible thing, can be made only by a registered instrument.
>
> In the case of tangible immoveable property of a value less than one hundred rupees, such transfer may be made either by a registered instrument or by delivery of the property.
>
> Delivery of tangible immoveable property takes place when the seller places the buyer, or such person as he directs, in possession of the property.
>
> **Contract for sale.**- A contract for the sale of immoveable property is a contract that a sale of such property shall take place on terms settled between the parties.
>
> It does not, of itself, create any interest in or charge on such property."

39.1. It goes without saying that the alleged agreement for sale did not invest the vendee with title to, or any interest in, the property in question; and the alleged agreement for sale did not invest the vendee with any such right that the plaintiff could not have maintained her claim for

7 *vide* ***Bank of India v. Abhay D. Narottam and Ors.*****: (2005) 11 SCC 520**.

8 Interestingly, in the present case, the vendee or his legal representatives, claiming under the agreement for sale dated 05.11.1976 (Ex. B-10), did not seek specific performance of the alleged agreement.

partition in respect of the properties left by Annapurnamma without seeking declaration against the agreement. Therefore, this plea about non-maintainability of suit for want for relief of declaration against the said agreement for sale remains totally baseless and could only be rejected.

Point No. 2

40. The crucial question in this case is about the effect and consequence of the fact that the legal representatives of defendant 2, who expired during the pendency of appeal in the High Court, were not brought on record.

41. The rules of procedure for dealing with death, marriage, and insolvency of parties in a civil litigation are essentially governed by the provisions contained in Order XXII of the Code. Though the provisions in Rule 1 to Rule 10A of Order XXII primarily refer to the proceedings in a suit but, by virtue of Rule 11, the said provisions apply to the appeals too and, for the purpose of an appeal, the expressions “plaintiff”, “defendant” and “suit” could be read as “appellant”, “respondent” and “appeal” respectively. Rule 1 of Order XXII of the Code declares that the death of a plaintiff or defendant shall not cause the suit to abate if the right to sue survives. When read for the purpose of appeal, this provision means that the death of an appellant or respondent shall not cause the appeal to abate if the right to sue survives. Rule 2 of Order XXII of the Code ordains the procedure where one of the several plaintiffs or defendants dies and right to sue survives to the surviving plaintiff(s) alone, or against the

surviving defendant(s) alone. The same procedure applies in appeal where one of the several appellants or respondents dies and right to sue survives to the surviving appellant(s) alone, or against the surviving respondent(s) alone. The procedure is that the Court is required to cause an entry to that effect to be made on record and the appeal is to proceed at the instance of the surviving appellant(s) or against the surviving respondent(s), as the case may be. However, by virtue of Rule 4 read with Rule 11 of Order XXII of the Code, in case of death of one of the several respondents, where right to sue does not survive against the surviving respondent or respondents as also in the case where the sole respondent dies and the right to sue survives, the contemplated procedure is that the legal representatives of the deceased respondent are to be substituted in his place; and if no application is made for such substitution within the time limited by law, the appeal abates as against the deceased respondent. Of course, the provisions have been made for dealing with the application for substitution filed belatedly but the same need not be elaborated in the present case because it remains an admitted fact that no application for substitution of legal representatives of defendant 2 (who was respondent 3 in AS No. 1887 of 1988) was made before the High Court.

41.1. The relevant provisions contained in Rules 1, 2, sub-rules (1), (2) and (3) of Rule 4 and Rule 11 of Order XXII could be usefully reproduced as under[9]:

> **"1. No abatement by party's death if right to sue survives.**-The death of a plaintiff or defendant shall not cause the suit to abate if the right to sue survives.
> **"2. Procedure where one of several plaintiffs or defendants dies and right to sue survives.**–Where there are more plaintiffs or defendants than one, and any of them dies, and where the right to sue survives to the surviving plaintiff or plaintiffs alone, or against the surviving defendant or defendants alone, the Court shall cause an entry to that effect to be made on the record, and the suit shall proceed at the instance of the surviving plaintiff or plaintiffs, or against the surviving defendant or defendants.
>
> **"4. Procedure in case of death of one of several defendants or of sole defendant.**–(1) Where one of two or more defendants dies and the right to sue does not survive against the surviving defendant or defendants alone, or a sole defendant or sole surviving defendant dies and the right to sue survives, the Court, on an application made in that behalf, shall cause the legal representative of the deceased defendant to be made a party and shall proceed with the suit.
>
> (2) Any person so made a party may make any defence appropriate to his character as legal representative of the deceased defendant.
>
> (3) Where within the time limited by law no application is made under sub-rule (1), the suit shall abate as against the deceased defendant.
>
> xxx xxx xxx
>
> "**11. Application of Order to appeals.**–In the application of this Order to appeals, so far as may be, the word "plaintiff" shall be held to include an appellant, the word "defendant" a respondent, and the word "suit" an appeal."

42. For determining if Rule 2 of Order XXII could apply, we have to examine if right to sue survived against the surviving respondents. It is

9 Rule 3 read with Rule 11 of Order XXII of the Code deals with the procedure in case of death of one of the several appellants, where right to sue does not survive to the surviving appellant or appellants as also in the case where the sole appellant dies and the right to sue survives. We are not concerned with this provision in the present case, hence not extracted.

not the case that no legal heirs were available for defendant 2. It is also not the case where the estate of the deceased defendant 2 passed on to the remaining parties by survivorship or otherwise. Therefore, applicability of Rule 2 of Order XXII CPC is clearly ruled out.

42.1. Admittedly, steps were not taken for substitution of the legal representatives of defendant 2, who was respondent 3 in AS No. 1887 of 1988. Therefore, sub-rule (3) of Rule 4 of Order XXII of the Code directly came into operation and the said appeal filed by defendants 16 to 18 abated against defendant 2 (respondent 3 therein). We may profitably recapitulate at this juncture that in fact, the other appeal filed by defendants 4, 13 and 14 (AS No. 1433 of 1989) was specifically dismissed by the High Court as against the deceased defendant 2 on 25.04.2006.

43. Once it is found that the appeal filed by defendants 16 to 18 abated as against defendant 2 (respondent 3), the question arises as to whether that appeal could have proceeded against the surviving respondents i.e., the plaintiff and defendants 1 and 3 (who were respondents 1, 2 and 4). For dealing with this question, we may usefully refer to the relevant principles, concerning the effect of abatement of appeal against one respondent in case of multiple respondents, as enunciated and explained by this Court.

43.1. The relevant principles were stated and explained in-depth by this Court in the case of ***State of Punjab v. Nathu Ram***: **AIR 1962 SC 89**. In

that case, the Punjab Government had acquired certain pieces of land belonging to two brothers jointly. Upon their refusal to accept the compensation offered, their joint claim was referred to arbitration and an award was passed in their favour that was challenged by the State Government in appeal before the High Court. During pendency of appeal, one of the brothers died but no application was filed within time to bring on record his legal representatives. The High Court dismissed the appeal while observing that it had abated against the deceased brother and consequently, abated against the surviving brother too. The order so passed by the High Court was questioned before this Court in appeal by certificate of fitness. While dismissing the appeal and affirming the views of High Court, this Court enunciated the principles concerning the effect of abatement and explained as to why, in case of joint and indivisible decree, the appeal against the surviving respondent(s) cannot be proceeded with and has to be dismissed as a result of its abatement against the deceased respondent; the basic reason being that in the absence of the legal representatives of deceased respondent, the appellate Court cannot determine between the appellant and the legal representatives anything which may affect the rights of the legal representatives. This Court pointed out that by abatement of appeal qua the deceased respondent, the decree between appellant and the deceased respondent becomes final and the appellate Court cannot, in

any way modify that decree, directly or indirectly. The Court observed in that case, *inter alia*, as under:

> "4. It is not disputed that in view of Order 22 Rule 4 Civil Procedure Code, hereinafter called the Code, the appeal abated against Labhu Ram, deceased, when no application for bringing on record his legal representatives had been made within the time limited by law. The Code does not provide for the abatement of the appeal against the other respondents. Courts have held that in certain circumstances, the appeals against the co-respondents would also abate as a result of the abatement of the appeal against the deceased respondent. They have not been always agreed with respect to the result of the particular circumstances of a case and there has been, consequently, divergence of opinion in the application of the principle. It will serve no useful purpose to consider the cases. Suffice it to say that when Order 22 Rule 4 does not provide for the abatement of the appeals against the co-respondents of the deceased respondent there can be no question of abatement of the appeals against them. To say that the appeals against them abated in certain circumstances, is not a correct statement. Of course, the appeals against them cannot proceed in certain circumstances and have therefore to be dismissed. Such a result depends on the nature of the relief sought in the appeal.
>
> 5. The same conclusion is to be drawn from the provisions of Order 1 Rule 9 of the Code which provides that no suit shall be defeated by reason of the misjoinder or non-joinder of parties and the court may, in every suit, deal with the matter in controversy so far as regards the rights and interests of the parties actually before it. It follows, therefore, that if the court can deal with the matter in controversy so far as regards the rights and interests of the appellant and the respondents other than the deceased respondent, it has to proceed with the appeal and decide it. **It is only when it is not possible for the court to deal with such matters, that it will have to refuse to proceed further with the appeal and therefore dismiss it.**
>
> 6. The question whether a court can deal with such matters or not, will depend on the facts of each case and therefore no exhaustive statement can be made about the circumstances when this is possible or is not possible. **It may, however, be stated that ordinarily the considerations which weigh with the court in deciding upon this question are whether the appeal between the appellants and the respondents other than the deceased can be said to be properly constituted or can be said to have**

all the necessary parties for the decision of the controversy before the court. The test to determine this has been described in diverse forms courts will not proceed with an appeal (*a*) when the success of the appeal may lead to the court's coming to a decision which be in conflict with the decision between the appellant and the deceased respondent and therefore which would lead to the court's passing a decree which will be contradictory to the decree which had become final with respect to the same subject-matter between the appellant and the deceased respondent; (*b*) when the appellant could not have brought the action for the necessary relief against those respondents alone who are still before the court and (*c*) when the decree against the surviving respondents, if the appeal succeeds, be ineffective, that is to say, it could not be successfully executed.

*** *** ***

8. The difficulty arises always when there is a joint decree. Here again, the consensus of opinion is that if the decree is joint and indivisible, the appeal against the other respondents also will not be proceeded with and will have to be dismissed as a result of the abatement of the appeal against the deceased respondent. Different views exist in the case of joint decrees in favour of respondents whose rights in the subject-matter of the decree are specified. One view is that in such cases, the abatement of the appeal against the deceased respondent will have the result of making the decree affecting his specific interest to be final and that the decree against the other respondents can be suitably dealt with by the appellate court. We do not consider this view correct. The specification of shares or of interest of the deceased respondent does not affect the nature of the decree and the capacity of the joint decree-holder to execute the entire decree or to resist the attempt of the other party to interfere with the joint right decreed in his favour. **The abatement of an appeal means not only that the decree between the appellant and the deceased respondent has become final, but also, as a necessary corollary, that the appellate court cannot, in any way, modify that decree directly or indirectly. The reason is plain. It is that in the absence of the legal representatives of the deceased respondent, the appellate court cannot determine anything between the appellant and the legal representatives which may affect the rights of the legal representatives under the decree.** It is immaterial that the modification which the Court will do is one to which exception can or cannot be taken."

(emphasis in bold supplied)

43.2. In this discussion, it shall also be appropriate to take note of the Constitution Bench decision of this Court in the case of ***Sardar Amarjit***

Singh Kalra (dead) by LRs. and Ors. v. Pramod Gupta (Smt) (dead) by LRs. and Ors.: **(2003) 3 SCC 272.** The matter therein arose out of the proceedings under the Land Acquisition Act, 1894 where different proprietors had different claims concerning their respective land but joined together in appeals against the orders passed in reference proceedings. Some of the appellants expired and no steps were taken within time for bringing on record their respective legal representatives but at some later stage, applications were filed by the heirs of the deceased parties for bringing them on record as legal representatives. The applications for condonation of the delay in seeking to set aside the abatement were, however, rejected. The submission of remaining appellants that the appeals abated partially and qua the deceased appellants only was not accepted by the High Court. The said decision of the High Court was not approved by the Constitution Bench of this Court, essentially after finding that the award/decrees which were subject matter of challenge before the High Court were not joint or inseparable but in substance, a mere combination of several decrees depending upon the number of claimants and, therefore, joint and several or separable vis-à-vis the individuals or their claims. Although the appeals were restored for reconsideration of the High Court but, in the process, the Constitution Bench surveyed the relevant case-law including the aforesaid decision in ***Nathu Ram's*** case and laid down the principles for dealing with such matters; and therein, also underscored the consideration about

inconsistent decrees coming into operation in case of proceeding with the appeal even after its abatement qua one of the respondents. The enunciations of the Constitution Bench could be usefully noticed as follows:-

> **"**34**.** In the light of the above discussion, we hold:
>
> (*1*) Wherever the plaintiffs or appellants or petitioners are found to have distinct, separate and independent rights of their own and for the purpose of convenience or otherwise, joined together in a single litigation to vindicate their rights, the decree passed by the court thereon is to be viewed in substance as the combination of several decrees in favour of one or the other parties and not as a joint and inseverable decree. The same would be the position in the case of defendants or respondents having similar rights contesting the claims against them.
>
> (*2*) Whenever different and distinct claims of more than one are sought to be vindicated in one single proceedings, as the one now before us, under the Land Acquisition Act or in similar nature of proceedings and/or claims in assertion of individual rights of parties are clubbed, consolidated and dealt with together by the courts concerned and a single judgment or decree has been passed, it should be treated as a mere combination of several decrees in favour of or against one or more of the parties and not as joint and inseparable decrees.
>
> (*3*) The mere fact that the claims or rights asserted or sought to be vindicated by more than one are similar or identical in nature or by joining together of more than one of such claimants of a particular nature, by itself would not be sufficient in law to treat them as joint claims, so as to render the judgment or decree passed thereon a joint and inseverable one.
>
> (*4*) The question as to whether in a given case the decree is joint and inseverable or joint and severable or separable has to be decided, for the purposes of abatement or dismissal of the entire appeal as not being properly and duly constituted or rendered **incompetent for being further proceeded with, requires to be determined only with reference to the fact as to whether the judgment/decree passed in the proceedings vis-à-vis the remaining parties would suffer the vice of contradictory or inconsistent decrees. For that reason, a decree can be said to be contradictory or inconsistent with another decree only when the two decrees are incapable of enforcement or would be mutually self-destructive and that the enforcement of one would negate or** render impossible the enforcement of the other."
>
> (emphasis in bold supplied)

43.3. The principles aforesaid have been duly applied by this Court in the case of ***Hemareddi (dead) Through Legal Representatives v. Ramachandra Yallappa Hosmani & Ors.*****: (2019) 6 SCC 756**. In that case, one Govindareddi died, leaving behind two sons Shriram Reddy and Basavareddi and a daughter. Two sons of Shriram Reddy filed a civil suit with respect to the property in question on the ground that the said property was a joint family property belonging to them. In that suit, the plaintiffs impleaded the wife of Basavareddi as defendant 2 and challenged the adoption of defendant 1 by her. The suit was dismissed by the Trial Court, while upholding the adoption of defendant 1. The plaintiff-brothers appealed against the said decree of Trial Court. During pendency of that appeal, one of the appellants expired but his legal representatives were not brought on record and, consequently, the appeal abated qua the deceased appellant. The High Court took the view that having regard to the decree passed, the appeal would abate not only qua the deceased appellant but as a whole. This Court affirmed the view of the High Court while observing that looking to the facts of case and nature of decree of the Trial Court, any decree passed in favour of the surviving appellant would be inconsistent with the decree that had attained finality between the deceased appellant and the defendants. With reference to likelihood of inconsistent decrees, this Court also rejected the contention that permission to prosecute the appeal was

granted by the Court and hence it may be proceeded with. After a survey of the relevant case-law, this Court said, *inter alia*, as under:-

> "32**. The decree, which the appellant, if successful in the appeal, would obtain, would be absolutely contrary to the decree which has also attained finality between his late brother and the defendants. They are mutually irreconcilable, totally inconsistent.** Laying one side by side, the only impression would be that one is in the teeth of the other. In one, the suit is dismissed whereas in the other, the suit would have been decreed.
>
> 33**.** The argument that in view of the order passed on 10-9-2001 by which despite the death of late brother of the appellant, permission to prosecute the appeal was granted by the court there would arise an estoppel against the order being passed holding that the appeal has abated as a whole, cannot be accepted. **The impact of death of the late brother of the appellant qua the proceeding is one arising out of the incompatibility of a decree which has become final with the decree which the appellant invites the appellate court to pass.** In such circumstances, the mere fact that the appellant was permitted to prosecute the appeal by an interlocutory order would not be sufficient to tide over the legal obstacle posed by the inconsistent decree which emerges as a result of the failure to substitute legal representative of the late brother and the abating of the appeal filed by his late brother. Consequently, we see no merit in the appeal. It is accordingly dismissed."
>
> (emphasis in bold supplied)

44. In the present case, it remains rather indisputable that the appeal in the High Court by defendants 16 to 18 (AS No. 1887 of 1988), abated against defendant 2 Malempati Radhakrishnamurthy (who was respondent 3 in appeal). When we apply the principles aforesaid to the present case, it is not far to seek that the said appeal by defendants 16 to 18, after having abated against defendant 2 Malempati Radhakrishnamurthy, could not have been proceeded against the surviving respondents i.e., the plaintiff and defendants 1 and 3. This is for the simple reason that the Trial Court had specifically returned the

findings that the agreement Ex. B-10 was not valid and defendants 16 to 18 (appellants of AS 1887 of 1988) derived no rights thereunder. The Trial Court had also ordered that the defendants 13, 14 and 16 were liable for mesne profits in respect of the immoveable properties in their possession belonging to Annapurnamma till they deliver possession of those items to plaintiff and defendants 1 to 3. Such findings in relation to the invalidity of the agreement Ex. B-10 and consequential decree for partition, for delivery of possession and for recovery of mesne profits attained finality qua defendant 2 Malempati Radhakrishnamurthy; and his entitlement to one-fourth share in the suit properties (including the property covered by Ex. B-10) also became final when the appeal filed by defendants 16 to 18 abated qua him. If at all the appeal was proceeded with and the alleged agreement Ex. B-10 was upheld (which the High Court has indeed done), inconsistent decrees were bound to come in existence, and have in fact come in existence.

44.1. As noticed, the High Court has proceeded to hold that Ex. B-10 agreement is valid and binding on plaintiff and defendants 1 to 3. This part of decree is in stark contrast, and is irreconcilable, with the decree in favour of defendant 2 which has attained finality that the said agreement Ex. B-10 is neither valid nor binding on defendant 2. The High Court has gone a step further to say that the plaintiff and defendants 1 to 3 were under obligation to execute sale deed in favour of defendants 16 to 18. Though making of such an observation in this suit, that heirs of

Annapurnamma were under obligation to execute a sale deed in favour of defendant 16 to 18, remains seriously questionable in itself but, in any event, this observation could not have been made qua the deceased defendant 2.

45. When the inconsistencies galore are writ large on the face of the record, the inescapable conclusion is that the appeal filed by defendants 16 to 18 could not have proceeded further after its abatement against defendant 2 (respondent 3).

46. The submissions made by learned counsel for contesting respondents to save their appeal before the High Court have their own failings. Applicability of Order XXII Rule 2 CPC is clearly ruled out in this matter relating to the suit for partition where decree had already been passed in favour of the plaintiff as also defendants 1 to 3. The appeal by defendants 16 to 18 against such co-sharers of the property could not have proceeded in the absence of representation of the estate of one of the co-sharers.

46.1. The other submission, that the question of maintainability of the suit, being primarily directed against the plaintiff, could save the appeal in the High Court, is bereft of any logic. We have already indicated that the question of maintainability is itself meritless. In any case, even this question could not have been raised in the absence of legal representatives of defendant 2 because such a question of maintainability of a suit for partition is directed not only against the plaintiff but also

against the other co-sharers, particularly when they had filed the written submissions of admission and, for all practical purposes, were standing in the capacity of plaintiff seeking partition.

46.2. Even the suggestion that the factum of death of defendant 2 was not stated before the High Court turns out to be rather incorrect because it is noticed that the other appeal filed by defendants 4, 13 and 14 (AS No. 1433 of 1989) was dismissed against the deceased-defendant 2 (who was respondent No. 3 therein) on 25.04.2006. Interestingly, defendants 16 to 18, appellant in AS No. 1887 of 1988, were on the record of AS No. 1433 of 1989 as respondents 5 to 7. Hence, it cannot be urged that defendants 16 to 18 were not aware about the demise of defendant 2 during pendency of their appeal in the High Court. In any case, such alleged want of knowledge of defendants 16 to 18 cannot save the operation of law whereby, their appeal stood abated against the deceased-respondent (defendant 2) and thereby, was rendered incompetent against the other respondents.

47. So far as the present appeal is concerned, though it appears that the plaintiff-appellant, clearly under a wrong advice, made an application for substitution of the legal representatives of defendant 2 but indicated in the application that the said defendant had expired during the pendency of appeal in the High Court. The legal representatives of defendant 2 having not been brought on record in the High Court, there was no necessity for the appellant to seek such a substitution in the present

appeal. Significant it is to notice that so far as the appeal of the plaintiff before us is concerned, the same could definitely proceed even in the absence of the legal representatives of defendant 2 because in case of success of this appeal, there is no likelihood of any inconsistent decree vis-à-vis defendant 2 coming into existence. The decree of the Trial Court had been in favour of the plaintiff and defendants 1 to 3 and the result of success of this appeal would only be of restoration of the decree of the Trial Court, which would be of no adverse effect on the estate of the deceased defendant 2.

48. For the reasons foregoing, we are clearly of the view that this appeal deserves to be allowed only on this ground that the appeal of defendants 16 to 18 before the High Court (AS 1887 of 1998) was rendered incompetent after its abatement against defendant 2 (respondent 3) and was liable to be dismissed as such.

Point No. 3

49. Though we could have closed the matter with determination of first two points but, in the interest of justice, we have also examined if High Court was justified in reversing the findings of Trial Court in respect of the alleged agreement Ex. B-10. Having examined the matter in its totality, in our view, the findings of the High Court in relation to the document Ex. B-10 remain unsustainable and are required to be set aside. This is for the reasons indicated *infra*.

50. A comprehension of the salient features of this case makes it clear, as observed hereinbefore, that the questions relating to the two documents, Ex. B-9 and Ex. B-10 were intrinsically intertwined, particularly when it was suggested by the contesting defendants that in the Will (Ex. B-9), apart from making bequest, Annapurnamma also directed her mother (legatee) to execute a registered sale deed in favour of defendant 15 after receiving the balance sale consideration from him as per the agreement executed in his favour; and that Annapurnamma also directed her mother to discharge the debts. The agreement mentioned in the Will was none other than Ex. B-10. This unmistakable inter-mixing of the two documents Ex. B-9 and Ex. B-10 had been the primary reason that the Trial Court examined the matters related with them together, while indicating that to give a colour of reality to the Will and to show that Annapurnamma was highly indebted to others which compelled her to sell the property, the suggestions were made about sale to the husband of Annapurnamma's sister.

51. It appears that the High Court has missed out this fundamental feature of the case that two documents, Will (Ex. B-9) and agreement for sale (Ex. B-10), as put forward by the contesting defendants cannot be analysed independent of each other, even if they were separate in terms of the alleged time of their execution by about 1½ years. As noticed, a submission was made before the High Court that when the Will (Ex. B-9) was found surrounded by suspicious circumstances, the agreement (Ex.

B-10) must also be rejected as a necessary corollary. The High Court rejected this contention with reference to the fact that the agreement (Ex. B-10) was prior in time and was an independent document which could be enforced as such. The High Court also made a comment that the ground for invalidating the Will could not be pressed to invalidate the agreement.

51.1. In our view, looking to the nature, purport and contents of these documents, time gap between the two is not of much relevance when examining the questions about their validity and genuineness; and in any case, the sale agreement (Ex. B-10) did not remain an independent or stand-alone document once it was found that this document was indeed mentioned in the disputed Will and the obligations thereunder were purportedly passed on to the legatee. Moreover, the Will also required the legatee to pay the debts of Annapurnamma. The defendants also suggested the indebtedness of Annapurnamma to be the reason for sale of the property in question.

51.2. Putting all the things together, it is beyond cavil that indebtedness of Annapurnamma and her agreeing to sell the property to defendant 15 formed an integral part of the alleged Will. Therefore, the two documents could not have been segregated.

51.3. As noticed, the Trial Court as also the High Court have recorded concurrent findings that the document of Will (Ex. B-9) was a highly suspicious document and the propounders have failed to remove the

suspicious circumstances. We are not suggesting that all such considerations against the Will in question would *ipso facto* apply to the agreement Ex. B-10 but, while examining preponderance of probabilities about existence of such an agreement for sale, the overall relationship of the parties, the beneficiaries of the alleged agreement and their conduct cannot be kept at bay. It gets perforce reiterated, that the alleged agreement is intertwined with the rejected Will because of the specific contents of the latter. Obviously, therefore, the repercussions of findings against genuineness of the Will are bound to impact the agreement too. In this view of the matter, the consideration of the High Court appears to be suffering from the fundamental error of approach.

52. The High Court has observed that the plaintiff has not taken specific pleadings regarding financial capacity of defendant 15 and about forgery of the documents. These observations carry their own shortcomings. We have noticed the pleadings of the plaintiff hereinbefore; and it cannot be doubted that after these documents were introduced by the contesting defendants, the plaintiff clearly averred that they were false and fabricated. In the given circumstances, the onus was heavy on defendants to establish the genuineness of these documents. While discharging such onus, the defendants attempted to suggest indebtedness of Annapurnamma to be the reason for her selling the land to defendant 15. The defendants also attempted to suggest the finances obtained and gathered by defendant 15 for this purchase, apart from

suggesting that the land in question was given on lease by defendant 15. In the given circumstances, the relevant factors emanating from the evidence cannot be ignored with reference to the want of specific pleadings.

53. As noticed, the Trial Court had returned clear findings that the suggestion about indebtedness of Annapurnamma was not supported by cogent evidence. The fact that the contesting defendants failed to establish indebtedness of Annapurnamma has its own bearing on the question relating to the agreement (Ex. B-10) because the same was allegedly executed due to the requirements and needs of Annapurnamma. The Trial Court, in that regard made a pertinent comment that if Annapurnamma was at all reeling under debts, nothing was shown as to who the creditors were and nothing was shown as to how the amount of Rs. 40,000/-, allegedly given by defendant 15 under the agreement (Ex. B-10), was utilised. If the story of indebtedness of Annapurnamma goes in doubt, the suspicions surround not only the Will (Ex. B-9) but agreement (Ex. B-10) too.

54. The suggestions by the contesting defendants about the manner of raising money by defendant 15 for the purchase under the agreement (Ex. B-10) carry their own intriguing features and high level of improbabilities. It has been suggested by defendant 16 (deposing as DW-6) that her husband (defendant 15) purchased the land in question from her younger sister Annapurnamma for a consideration of Rs. 42,600/-;

she was present at the time of execution of sale agreement; and a sum of Rs. 40,000/- was paid at the time of agreement and possession was delivered. According to DW-6, her husband (defendant 15) arranged for the said amount of Rs. 40,000/- by sale of his property to DW-10 and his son and by borrowing from DW-11. The sale deeds in favour of DW-10 and his son were executed as late as in the year 1984 and the Trial Court has clearly pointed out that there was no mention of any previous agreement in those sale deeds[10]. Thus, the story of obtaining Rs. 20,000/- from DW-10 in the year 1976 has no legs to stand and is required to be rejected. Then, borrowing of Rs. 19,000/- from DW-11 was suggested by way of a promissory note (Ex. B-18) written by defendant 15 himself. There being no corroborative documentary evidence, no probative value could be attached to this self-serving document of defendant 15.

54.1. The High Court has, in our view, erroneously discarded the aforesaid glaring weaknesses in the case of the defendants while observing that defendant 16 spoke about the method and manner of receiving money by her husband only by way of 'abundant caution' and even if that part of her deposition is doubtful or improbable, the same would not make any difference. We are unable to agree. If this part of the statement of defendant 16 (DW-6) is found to be improbable, the suspicion surrounding the documents is magnified further and it is seriously questionable if at all any such document (sale agreement) was

10 *vide* paragraph 18.3 supra.

executed by Annapurnamma and if at all any payment was made by defendant 15 thereunder.

55. Yet another relevant aspect of the matter, duly taken into consideration and highlighted by the Trial Court is that if at all any such agreement was executed on 05.11.1976, there was no reason that the vendee did not get the sale document registered for a long length of time because Annapurnamma expired 1½ years later. The High Court has made a cursory observation that DW-6 gave an explanation in that regard and there was no serious challenge to what she stated[11]. The High Court has not given the details of so-called explanation of DW-6. However, we have examined her statement placed on record. The explanation has been that 'they thought of getting a registered deed in the year 1977 but could not do so because they had sustained loss due to cyclone'. She was indeed cross-examined on this aspect where she stated that they had not stipulated the time for registration and they thought of getting it registered 'when got money'. Even this explanation has its problems when visualised in the context of other assertions that defendant 15 obtained Rs. 19,000/- in loan from DW-11; and that defendants 5 and 6 were inducted as lessees on the land in question.

55.1. DW-6 has suggested that her husband repaid the loan of Rs. 19,000/- taken from DW-11 and took back the pro note (Ex. B-18). The person allegedly advancing such loan (DW-11) has stated that the debt was discharged 'within four months' by defendant 15 after selling sugar-

11 Reproduced in paragraph 25.2 supra

cane. The disputed agreement bears the date 05.11.1976. If loan was taken from DW-11 for the purpose of the deal in question and was repaid within four months; and if defendants 5 and 6 were inducted lessees and were making payment of lease amount, it is difficult to accept the statement of DW-6 that they thought of getting the deed registered in the year 1977 but could not do so for having suffered loss due to cyclone. It is very difficult to reconcile that though defendant 15 could arrange for repayment of the loan amount of Rs. 19,000/- within four months and had inducted lessees on the land in question, yet he could not arrange the remaining sale consideration of about Rs. 2,600/-, allegedly due to loss! Therefore, the explanation and the reasons for not getting the deed registered also turn out to be hollow and unacceptable. Equally, the story of induction of defendants 5 and 6 as lessees by defendant 15 and payment of lease amount by them becomes highly improbable.

55.2. This aspect, that there was no plausible reason for not obtaining registered sale deed, assumes importance when viewed in the light of the fact that Annapurnamma had otherwise been selling her property only by way of registered sale deeds.

56. It is moreover interesting to notice that the defendant 15 never sought specific performance of this agreement by showing his readiness and willingness to perform his part of contract. Significantly, even when the plaintiff-appellant had filed the suit for partition claiming rights in the property of Annapurnamma including the property that was subject of the

alleged agreement; and even when he was joined as party to this suit, defendant 15 never took steps to seek specific performance from the heirs of Annapurnamma or from the alleged legatee of the Will. The same had been the position of his legal representatives, who too never claimed specific performance.

57. The factors noticed hereinabove jointly and severally operate against the genuineness of the agreement for sale Ex. B-10 and this document could only be rejected.

58. The High Court has observed that the Trial Court proceeded on consideration that the sale was made to a relative and the scribe and the attestor were also relatives. The High Court has also referred to another factor taken into account by the Trial Court that why at all defendant 15 would have thought of purchasing the land at a place far-off from his settled abode. In the assessment of the High Court, these factors were of no adverse effect and were rather of natural dealings. In our view, these factors cannot be seen and examined in isolation. Even if each of these factors, by itself, is not decisive of the matter, they cumulatively give rise to justified suspicions and when they are juxtaposed with the major factors highlighted hereinabove, the case of the defendants about existence of the agreement (Ex. B-10) is knocked to the ground.

59. Therefore, we are clearly of the view that the Trial Court had examined the matter in its correct perspective and had rightly come to the conclusion that this agreement for sale (Ex. B-10) was as invalid and

untrustworthy as was the Will (Ex. B-9). The findings of Trial Court, based on proper analysis and sound reasoning, called for no interference. The High Court has been clearly in error in interfering with the findings of the Trial Court in relation to the agreement in question.

Conclusion

60. For what has been discussed hereinabove, this appeal succeeds; the appeal filed by defendants 16 to 18 in the High Court (AS No. 1887 of 1988) is dismissed as incompetent; and the impugned decree of the High Court in relation to that appeal is reversed. Consequently, the decree of the Trial Court stands restored. In addition to the costs awarded by the Trial Court, the plaintiff-appellant shall also be entitled to the costs of this litigation in the High Court and in this Court from the contesting respondents.

……………………………J.
(SANJAY KISHAN KAUL)

……..……………………J.
(DINESH MAHESHWARI)

..……………………………J.
(HRISHIKESH ROY)

New Delhi
January 19th, 2021