

Patel Munireddy and Another Vs. Appaiah Reddy and Another

Patel Munireddy and Another Vs. Appaiah Reddy and Another

SooperKanoon Citation : sooperkanoon.com/1173519

Court : Karnataka

Decided On : Sep-02-2014

Judge : R.B. Budihaal

Appeal No. : Regular Second Appeal No.763 of 2007 (PAR)

Appellant : Patel Munireddy and Another

Respondent : Appaiah Reddy and Another

Judgement :

(Prayer: This Regular Second Appeal is filed under Section 100 of CPC against the Judgment and Decree dt. 5.1.2007 passed in R.A. No.21/1999 on the file of the Additional District and Sessions Judge/ Presiding Officer, Bangalore Rural District, Bangalore, allowing the appeal and setting aside the judgment and decree dated 29.9.1999 passed in O.S.No.153/1992 on the file of the II Addl. Civil Judge (Sr. Dn.), Bangalore Rural District, Bangalore.)

1. This regular second appeal is preferred by the appellants being aggrieved by the judgment and decree dated 5.1.2007 passed by the Court of Addl. District Judge, Fast Track Court No.IV, Bangalore Rural District, Bangalore in R.A.No.21/1999 setting aside the judgment and decree dated 29.9.1999 passed by the Court of the II Addl. Civil Judge (Sr.Dn.), Bangalore Rural District in O.S.No.153/1992.

2 The appellants were the defendants 1 and 2 in the trial Court and respondents in the first appellate Court.

3. Respondent No.1 herein was the plaintiff in the trial Court and appellant in the first appellate Court. Respondent No.2 herein was defendant No.3 in the trial Court and respondent No.3 in the first appellate Court.

4. The plaintiff has filed a suit before the trial Court for partition and separate possession of his 1/3rd share in the suit schedule properties. Suit schedule properties are one landed property and two house properties as shown in the schedule to the plaint. It is the case of the plaintiff that plaintiff and defendants 1 and 2 are brothers and they constitute an undivided Hindu joint family. The father of the plaintiff and defendants namely late Chinnappa died about 45 years back. Joint family owns the schedule properties. After the death of father of the plaintiff and defendants 1 and 2, schedule properties are in joint possession of the plaintiff and defendants 1 and 2 and first defendant who is the eldest member of the family was looking after the affairs of the joint family as Kartha. Plaintiff has contended that he is the foster son of one Sri.Buddareddy Muniswamy who died about 35 years back. When plaintiff was about 10 years of age, the said Buddareddy Muniswamy took him as foster son and by way of gift, he gave some of the properties to the plaintiff. The plaintiff demanded defendants to effect partition in the suit schedule properties and put him in separate possession and enjoyment of his 1/3rd share. Though the defendants conceded to the request of the plaintiff, they were postponing the same under one or other pretext. During first week of July 1992, plaintiff approached the defendants 1 and 2 and demanded them to effect partition of the schedule property by meets and bounds, but again, defendants tried to evade by giving evasive answers and it is learnt by the plaintiff that defendants are making arrangements to alienate the properties to deprive the legitimate share of the plaintiff. Plaintiff got issued the legal notice calling upon them to effect partition of the suit schedule properties. In spite of service of legal notice, defendants have not taken any steps to effect partition. Hence, he has sought for his legitimate 1/3rd share in the suit schedule properties and also for future mesne profits.

5. The defendants have filed the written statement contending that suit is not maintainable in law and facts and it has to be dismissed; there is no joint status between the plaintiff and defendants. The suit schedule properties are not the joint family properties. There is no cause of action for the plaintiff to institute the said suit. Suit schedule properties are worth more than Rs.2 lakhs and the court fee paid is insufficient. Further, the averments in paragraphs 2 and 3 of the plaint are denied. It is further pleaded that plaintiff is not the foster son of Buddareddy Muniswamy, but he is his adopted son. At the age of eight months said Buddareddy Muniswamy took the plaintiff to his house at Bodhanahosahalli village by performing the ceremonies according to the customs and usage prevailing in the Reddy community. Said Buddareddy Muniswamy is a close relative of the father of the plaintiff. He had no issues. Therefore, he has taken the plaintiff as an adopted son. Since from the date of adoption plaintiff is residing in the adoptive family without any connection in the natural father's family. As such, plaintiff is not entitled to 1/3rd share in the suit schedule properties and there was no need for the plaintiff to request the defendants to demand for partition. Defendants are not making any attempt to alienate the properties and not making any negotiations with the prospective purchasers. As the suit schedule properties have been already divided between the defendants, question of division of the suit schedule properties does not arise at all. Further, the averments made in paragraph No.5 of the plaint are denied. It is contended that defendant No.1 has received the notice of the plaintiff and has suitably replied the same. The averments in paragraph No.7 of the plaint are also denied. It is contended that plaintiff has suppressed the actual and factual aspects and has filed false and frivolous suit. Further, by amending the written statement it is contended that out of love and affection, plaintiff's adoptive mother has gifted all the properties to the plaintiff by a registered gift deed dated 22.7.1950 after the death of her husband. Apart from that, out of other funds plaintiff has also purchased other immovable properties. In the year 1965, orally there was a division of joint family property between the defendants and the plaintiff was also present at that time along with panchayathdars and others. Plaintiff has not taken any share in view of the fact that he was residing at Bodhanahosahalli village since his childhood and has possessed lot of immovable properties and also as he was the adopted son of

Buddareddy Muniswamy. Ever since the date of partition defendants have been enjoying their respective shares. In order to avoid unnecessary complications in the family of the defendants on 19.10.1972 a panchayath palupatti was written in the presence of panchayatdars who were present at that time wherein plaintiff and defendants were present and plaintiff has not taken any share. Further, he has agreed that he has already possessed vast extent of lands at Bodhanahosahalli village and in view of the said facts the lands were allotted to the share of the defendants. Plaintiff and defendants have also put their signatures to the panchayath palupatti dated 19.10.1972 and it is acted upon and same is binding on the plaintiff and defendants. Panchayatdars also attested the said palupatti. From 1965, the revenue authorities have lawfully entered the names of the defendants in all the revenue documents and they are paying kadayam separately. Due to financial difficulties to perform the marriage defendant No.1 has sold the landed property which was allotted to his share in favour of Nanjundappa for consideration of Rs.2,000/- under registered sale deed. Plaintiff and the 2nd defendant were also witnesses to the said document. After the partition, defendants have made lot of improvements in their respective shares. Defendant No.1 has also gifted a portion of the land in Sy.No.3 measuring 1 acre in favour of his daughter and son-in-law by a registered gift deed. Hence, the defendants have contended that suit is not maintainable and the same may be dismissed.

6. On the basis of the pleadings, the trial Court has framed the following issues and additional issues:

1. Whether the plaintiff proves that the suit schedule properties are the joint family properties of plaintiff and defendants No.1 and 2?
2. Whether the plaintiff proves that he has got 1/3rd share in the plaint schedule properties?
3. Whether the defendants prove that the plaintiff was given in adoption to one Buddareddy Muniswamy and hence he has no right in the plaint schedule properties?
4. Whether the defendants prove that the court fee paid is insufficient?

5. What order or decree?

ADDITIONAL ISSUES

1. Whether the defendants prove that they have perfected their title to the suit schedule property by adverse possession?

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

7. When the above appeal was preferred before this Court and while admitting the appeal, the following substantial question of law has been framed by this Court:

"Whether the learned appellate Judge was justified in reversing the judgment and decree of the trial Court without considering the oral and documentary evidence?"

8. Heard the arguments of the learned counsel appearing for the appellants/defendants and also the learned senior counsel appearing for the 1st respondent/plaintiff.

9. Learned counsel for the appellants during the course of arguments has submitted that there was oral partition between defendants 1 and 2 in the year 1965 in the presence of plaintiff and on 19.10.1972, a palupatti under Ex.D55 was also effected and reduced into writing and the plaintiff has also signed the said Ex.D55. Ex.D2, sale deed was executed by defendant No.1 in favour of one Nanjundappa in respect of the portion of the landed property and plaintiff has also signed the said sale deed and further, Ex.D54, gift deed was executed by defendant No.1 in favour of his daughter and the donee i.e., the daughter of the defendant No.1 is not made as party to the suit. As on the date of the suit there was severance of status of the joint family between the plaintiff and defendants. Learned counsel has submitted that the conduct of the plaintiff is very important. When palupatti Ex.D55, sale deed Ex.D2 and gift deed Ex.D54 were entered into, that too in the presence of the plaintiff, he has not raised any sort of objection and has kept mum for all these years. Therefore, estoppel operates against the plaintiff for filing the suit and claiming share in the suit schedule properties. He has submitted that plaintiff has not entered into the witness box and it is only the power of attorney holder i.e., P.W.1 gave evidence on behalf of plaintiff who is not

competent to give evidence and looking to his age, it is seen that he has no personal knowledge about the earlier history of the family and the events took place in the family of plaintiff and defendants. Hence, on this ground, adverse inference can be drawn against the case of the plaintiff. He has submitted that the trial Court has considered all these aspects of the matter and has dismissed the suit of the plaintiff, but the first appellate Court, without making reference to oral as well as documentary evidence produced in the case, has allowed the appeal and set aside the judgment and decree of the trial Court and decreed the suit of the plaintiff. Hence, the judgment and decree passed by the first appellate Court is illegal, perverse and capricious. The first appellate Court being the Court of fact and law, has to consider the entire materials, oral and documentary and then pass judgment in the matter, which is the requirement of law under Order 41 Rule 31 of the CPC. Accordingly, it is submitted that the appeal may be allowed and the judgment and decree passed by the first appellate Court may be set aside by dismissing the suit of the 1st respondent-plaintiff.

10. As against this, learned senior counsel appearing for the 1st respondent during the course of his arguments has submitted that there is no partition effected in the family of plaintiff and defendants. When the suit was filed, suit schedule properties were the joint family properties. Before filing the suit, plaintiff has got issued the legal notice to the defendants demanding his legitimate share in the suit schedule properties and the reply to the legal notice under Ex.D4 itself shows that there was no partition in the family of plaintiff and defendants. The learned counsel has also submitted that there is no specific pleading in the written statement with regard to oral partition as alleged by the defendants and if at all there was an oral partition, what are the properties allotted to defendants 1 and 2 is also not specifically stated in the written statement. Learned senior counsel has also submitted that even if as per the case of the defendants the plaintiff has relinquished his share, the said document requires registration, till then, it is not admissible in evidence. Learned senior counsel drew the attention of this Court to Sections 53 and 122 of the Transfer of Property Act and has submitted that under Section 53 the purchaser who is purchasing the property by paying consideration amount is a necessary party to the suit and until and unless he is arrayed as a party to the suit, suit itself is not maintainable. It is not so in case of gift transaction under Section 122 of the

Transfer of Property Act. He has submitted that the gift is without any consideration. Hence, even if the donee is not made as a party to the suit, the suit is maintainable and the parties can work out their remedies in the final decree proceedings also. Regarding the alleged adoption it is submitted that the material on record will not prove the factum of adoption and also the ceremonies which are required to be performed under law. So far as estoppel is concerned there is no pleading by the defendants in their written statement and even there are no grounds urged in the appeal memorandum regarding estoppel and until and unless there is a pleading and issue on the point of estoppel, for the first time before the Court in the regular second appeal, the appellants are not permitted to canvas regarding estoppel. It is submitted that looking to the entries in the record of rights the alleged partition is also not acted upon by the parties to the suit. Hence, relationship between the plaintiff and defendants is admitted and it is also an admitted fact that the suit schedule properties are the ancestral properties of the plaintiff and defendants. The first appellate Court has taken into consideration all these aspects of the matter and has rightly allowed the appeal and has set aside the judgment and decree passed by the trial Court. Hence, no illegality has been committed nor there is any perverse or capricious view taken by the first appellate Court in allowing the appeal. There are no valid grounds to interfere into the judgment and decree of the first appellate Court and accordingly, it is submitted to dismiss the appeal. In support of his arguments, learned senior counsel has relied upon the following decisions:

REGARDING ORDER XLI RULE 31 OF CPC

1. 2006(3) SCC 224 (G. Amalorpavam and others Vs. R.C.Diocese of Madurai and others)
2. AIR 1979 GAUHATI 23 at para 8 (Haladhar Sarma Vs. Assam Go-Seva Samity)
3. AIR 1991 GAUHATI 23 at para 11
4. AIR 2006 BOMBAY 62 at para 5,7 and 8 (Genba Sahadu Modak Vs. Suryakant Vitthal Modak) REGARDING VALIDITY OF THE GIFT DEED EXECUTED BY DEFENDANT NO.1 IN FAVOUR OF HIS DAUGHTER AND HIS SON IN LAW I.

(2004)1 SCC 295 (R Kuppayee and Another Vs. Raja Gounder) II. 2008 AIR SCW 5666 (Baljinder Singh Vs. Rattan Singh) REGARDING NON IIMPLEADING DAUGHTER AND SON IN LAW OF DEFENDANT NO.1 I. 2012(4) AIR Kar R 424 at para 54 to 62 (S.K.

Lakshminarasappa Vs. B. Rudriah) II. AIR 1985 KARNATAKA 143 at para 19 and 20 (Ganapati Santaram Bhosale and another Vs. Ramachandra Subbarao Kulkarni and others) REGARDING FAMILY SETTLEMENT REQUIRES REGISTRATION AND RELEASE OF RIGHTS ALSO REQUIRES REGISTRATION I. (2013)9 SCC 419 at para 11, 14 (Rohit Chauhan Vs. Surinder Singh and others) II. (2009)6 SCC 194 at para 30 and 32 (Sneh Gupta Vs. Devi Sarup and others.

III. 2012 AIR SCW 3560 at para 15 (Smt. Badami (deceased) by her L.R. Vs. Bhali) IV. AIR 2007 SC 18 at para 13 (Hansa Industries Pvt. Ltd. And Others V/s Kidarsons Industries Pvt. Ltd.) V. ILR 2010 KAR 2748 at para 7 and 8 (Malakappa Vs. Annapurna and Others) VI. 2011(2) Kar LJ 453 at para 8 and 10 (Pilla Muniyappa and others Vs. H. Anjanappa and others) REGARDING REVENUE ENTRIES a. 2013(2) KCCR 1213 at para 8 (Hanumappa Vs. Sarojamma and others) REGARDING ESTOPPEL I. AIR 1965 SC 1055 (Gyarsi Bai an others Vs. Dhansukh Lal and others) II. AIR 1973 All 89(Anant Lal Goel Vs. Dr. Prem Shanker Agarwal) III. AIR 1978 P and H 260 (Inderjit Singh Vs. Randhir Singh) IV. AIR 1960 Punjab 226 (Ram Gopal Vs. L. Mohan Lal and others)

11. In reply to his arguments, learned counsel appearing for the appellants/defendants has submitted that regarding the adoption of the plaintiff by Buddareddy Muniswamy, P.W.1 himself has admitted in his cross-examination. Hence, the factum of adoption has been proved. Even with regard to the partition P.W.1 in his evidence in page No.143 of the paper book has admitted the same, as such, the oral partition is also proved. He has submitted that the father of the plaintiff and defendants 1 and 2 has expired in the year 1947 and the sister of the plaintiff and defendants was not having share in the year 1947. The learned counsel has submitted that although the specific word estoppel is not mentioned in the written statement, but there is a pleading to that effect and Court has to

consider the same. Accordingly, he has sought for to allow the appeal and to set aside the judgment and decree passed by the first appellate Court. In support of his contentions, learned counsel for the appellants/defendants has relied upon the following decisions:

1. A.I.R. 1960 S.C. 335 (Mst. Rukhmabai V/S Lala Laxminarayan and others)
2. A.I.R. 2002 Bombay 129 (Smt. P.N. Wankudre V/S C.S. Wankudre and others)
3. (2003) 2 SCC 355 (B.L. Sreedhar and Others V/S K.M. Munireddy(dead) and Others)
4. A.I.R. 2006 SC 2488 (Hari Shankar Singhania and Others V/S. Gaur Hari Singhania and Others)
5. 2013 (4) K.C.C.R 3060 (V. Shankara Rao V/S V.Eswara Rao and others)
6. 2012 (2) K.L.J 487 (Bangarappa V/S Rudrappa and another)
7. A.I.R 1995 SC 1728 (Digambar Adhar Patil V/S Devram Girdhar Patil (died) and another)
8. A.I.R(39)1952 SC 29 (Chinnathayi V/S Kulasekara Pandiya Naicker and others)
9. (1973) 1 SCR 570 (S. Shanmugam Pillai and others V/S K. Shanmugam Pillai and Others)
10. 2005 (1) K.C.C.R 227 (Janki Vashdeo Bhojwani and Another V/S Indusind Bank Limited and others)
11. A.I.R 1930 Rangoon 264 (Po Hte Maung and others V/S Ma B win)
12. A.I.R 1930 Rangoon 265(2) (Co-Operative Town Bank of Padigon V/s Shanmugam Pillay and another)
12. I have perused the pleadings submitted by both parties before the trial Court in the suit, oral evidence of P.Ws.1 and 2 and D.Ws.1 to 4 and also the documents produced by both sides as per Exs.P1 to P9 and D1 to D69 and perused the

judgment and decree passed by both the Courts below and also the decisions relied upon by learned counsel on both sides, which are referred above.

13. It is the contention of appellants/defendants in their written statement that plaintiff was given in adoption to one Buddareddy Muniswamy when he was 7-8 months old and from the date of adoption he is staying with the adoptive family. He married at the said place and never came back to the genitive family. But the plaintiff has denied the factum of adoption and it is his contention in the pleadings as well as in the evidence of P.W.1 that he is the foster son of Buddareddy Muniswamy since he was not having issues. Perusing the evidence on record, it is no doubt true that the witness P.W.1, who is the son of the plaintiff, has stated in the examination-in-chief that plaintiff is the adopted son of Buddareddy Muniswamy, but in the cross-examination when it was specifically suggested to him that his father is the adopted son of Buddareddy Muniswamy, he denied the said suggestion. Except the averment in the written statement, no supporting material is produced by the defendants to prove the factum of adoption of the plaintiff.

14. I have perused the reasonings recorded by both the Courts below and both the Courts after examining the materials placed on record have come to a concurrent finding that defendants have failed to prove that plaintiff is the adopted son of Buddareddy Muniswamy. I have also perused the decision relied upon by the learned counsel for the appellants herein on the aspect of adoption referred to above. But, when there is no material placed by the defendants to show that he is the adopted son and in all the documents name of plaintiff's genitive father Chinnappa is mentioned, only on the basis of the decisions relied upon by the counsel for the appellants herein it cannot be said that the appellants/defendants have placed satisfactory and cogent material to prove the factum of adoption of the plaintiff by Buddareddy Muniswamy and his wife Nanjamma. Therefore, I am of the opinion that both the Courts below have rightly held that the factum of adoption is not proved by the defendants/appellants herein.

15. It is the case of defendants in their written statement that as there was difference of opinion between defendant Nos.1 and 2, they divided the properties

orally in the year 1965. So they have set up an oral partition of the year 1965. It is also their case that plaintiff was personally present when the oral partition was effected in the presence of elders and from the date of oral partition defendants Nos.1 and 2 were cultivating their properties separately and they have improved their lands fallen to their share by raising loans from bank and also have dug the bore wells in their respective portions of land. Regarding the oral partition, D.Ws.1 to 4 have deposed in their evidence that there was such oral partition between the defendants and plaintiff was also present at that time.

16. D.W.1 has deposed in his evidence that to show that properties were entered into the name of himself and defendant No.2 he has produced 9 RTC extracts as per Exs.D9 to 18 and index of land and record of rights are as per Exs.D19 to 22 and separate krishi pass books in the name of himself and his brother defendant No.2 are as per Ex.D23 and 24. He has produced the kandayam receipts as per D.25 to 37. Regarding receipts for the payment of society loan he has produced Exs.D38 to D45. The notices issued to his brother from the society for payment of the society loan are at Exs.D.46 and 47 and regarding the payment of society loan the documents are at Exs.D48 and D49. To show that himself and his brother Pedda Reddy are residing separately voters list are produced as per Ex.D50 to 52. As his brother Pedda Reddy has not paid the society loan award was passed against him and copy of the award is at Ex.D.53. It is also his evidence that he has given one acre of land, out of 3 acres 19 guntas to his daughter Kanthamma under the gift deed Ex.D54. In his further examination-in-chief he has deposed that he has produced the palupatti as per Ex.D55 and demand register extracts as per Ex.D56 to 60 and two kandayam receipts as per Exs.D61 and 62. He has also produced the RTC extracts from 1964-65 to 1983-84 as per Exs.D63 to 69. In the cross- examination he has denied the suggestion that there was no oral partition in the year 1965. He has also examined one witness Nanjunda Reddy as D.W.2.

17. In the examination-in-chief D.W.2 has deposed that in the year 1963-64 as there was difference of opinion between defendants Nos.1 and 2, plaintiff Appaiah Reddy took D.W.2 to Bommasandra and D.W.2, Krishnareddy, Nanjareddy gathered and at that time, plaintiff Appaiah Reddy told that he does not want share in the properties as he is having properties at Bodenahosahalli and let defendants

1 and 2 enjoy the properties and lead happy life. Plaintiff himself asked the said elders to effect partition in between the defendants 1 and 2 and accordingly, in the land and the house properties, partition was effected and from that day itself the respective properties were given to the possession of defendant Nos.1 and 2. In the cross-examination, he has denied the suggestion that there was no partition between defendants 1 and 2 in the year 1963-64.

18. D.W.3, one Krishnareddy has also deposed in the examination-in-chief that in the year 1965 difference of opinion between the defendants started and at that time, plaintiff himself came to Bommasandra and got convened the panchayath. Himself, Nanjappa Reddy sat in the house of the defendants and at that time, plaintiff Appaiah Reddy when asked, told that he is having the properties at Bodenahosahalli and he do not want share in the properties at Alibommasandra and they can be partitioned between the defendants. Accordingly, partition was effected in the land and the house properties and they were given to the possession of the defendants 1 and 2. In the cross-examination, he has deposed that there was no difficulty to reduce the said partition to writing. He has denied the suggestion that in the year 1965 there was no such partition and he is deposing falsely.

19. D.W.4, Siddappa, who is the document writer has deposed in his evidence in the examination-in-chief that on 19.10.1972 plaintiff Appaiah Reddy went to the village of D.W.4 and took him to Alibommasandra village and told that he has to write one document. Then he went to the house of defendant No.1. Nanjundappa, Krishna Reddy and three brothers i.e., plaintiff and defendants were present. He has further deposed that he came to know that in the year 1965 there was an oral partition.

20. Looking to the evidence of P.W.2 who is the witness on the side of the plaintiff he has deposed in the examination-in-chief that there was no partition between the plaintiff and defendants in respect of suit properties and they are the properties owned by Chinnappa, the father of plaintiff and defendants. In the cross-examination, he has deposed and admitted the suggestion that defendants are residing separately and he also deposed that it is true that defendants are

separated since 1965. He has also admitted as true that properties are enjoyed by the defendants separately and that in the land bearing Survey No.3 which has fallen to the share of defendant No.1 there are mulberry plants, house and borewell, so also, same are in the land fallen to the share of defendant No.2. Defendants 1 and 2 have dug the bore wells in their respective properties fallen to their share. He has admitted as true that the said landed properties were in possession of the defendants since 37 years. He has also admitted the suggestion that defendants 1 and 2 partitioned the properties and they are enjoying the portions fallen to their shares.

21. So, the oral evidence of the parties which are referred to above and the documents produced by defendants consistently shows that the defendants have placed cogent and satisfactory material to show that there was oral partition between defendants Nos.1 and 2 in the year 1965 itself as they have pleaded in the written statement. The material both oral and documentary also shows that they are in possession and enjoyment of their respective share of the properties which they got in the oral partition of 1965 and by borrowing loan they have improved the landed property. Materials also show that plaintiff was present and in his presence only the oral partition was effected and when he was asked he told that as he is having enough property at Bodenahosahalli and he do not want to have a share in the properties at Alibommasandra village. Looking to all these materials, I am of the opinion that the defendants/appellants herein have proved the oral partition of the year 1965.

22. It is also the case of the defendants that in the year 1972 in order to avoid any objections to the earlier partition effected, they wanted to have a written document and accordingly, got written the document palupatti as per Ex.D55. The first appellate Court observing that since the said document is not registered under the provisions of the Registration Act, it is not admissible in evidence. But looking to the materials on record and establishing the fact of oral partition of the year 1965 between defendants 1 and 2 and taking possession of the respective shares of land as well as house property by defendant Nos.1 and 2 and enjoying the same separately, the subsequent document in the year 1972 by whatever name it is called either as partition deed or palupatti, but in reality, the said document is

memorandum of partition to record the partition of the properties fallen to the share of defendants 1 and 2. The materials goes to show that under the document Ex.D55 defendants Nos.1 and 2 did not get the properties to their share for the first time and taken the possession of the said properties in the year 1972. As I have already observed and at the cost of repetition, the partition had already happened in the year 1965 itself. Therefore, it cannot be said that the said document is not admissible in evidence for want of registration.

23. In this regard, learned counsel for the appellants has relied upon the decision reported in AIR 2006 SC 2488 in the case of Hari Shankar Singhania and others Vs. Gaur Hari Singhania and others "(b) Hindu law-Family settlement or arrangement-To be treated differently from any other formal commercial settlement-Technicalities of limitation etc., should not be put at risk of the implementation of a settlement drawn by a family, which is essential for maintaining peace and harmony in a family".

24. It is the case of the defendants so also the evidence of D.Ws.1, 3 and 4 that for the document under Ex.D55, plaintiff was also present. He also put his signature on the said document and on the same day another document i.e., sale deed was also executed by defendant No.1 in favour of one Nanjundappa for selling the portion of the property and to that sale deed also the plaintiff has put his signature as a witness. So this material on record shows the conduct of the plaintiff that though the properties were partitioned between defendant Nos.1 and 2 in his presence, he has not raised any objection at any point of time till the date of filing the suit. The witnesses on the side of the defendants have stated and the document writer D.W.4 has also deposed that Ex.D55 and Ex.D2 were on the same day and for both the documents plaintiff has put his signature. Even in the evidence of P.W.1 it has come on record that entering the names of defendants 1 and 2 in the RTC extracts in respect of the landed properties came to their knowledge and even then they have not taken any action before any authority about the said entries.

25. Even though as argued by the learned senior counsel for the plaintiff/respondent No.1 that unless and until there is a pleading and an issue on

the point of estoppel, for the first time the said contention regarding estoppel cannot be raised before the Court while hearing the regular second appeal, but, though the said word may not have been used by the defendants in their pleading that the plaintiff is estopped from raising such contention in the suit, but, according to Section 115 of the Evidence Act, estoppel may be by conduct also. So, the defendants have pleaded about the conduct of the plaintiff in their pleadings and also gave the oral evidence. In this connection, I have also perused the decisions relied upon by both the sides on the point of estoppel, are referred above. But, looking to the materials on record, there is a pleading that plaintiff is estopped by his conduct to go back against his own representation that he do not want any property at Alibommasandra as he is having sufficient property at Bodenahosahalli. From the material when the parties are able to make out their case regarding estoppel, the principle of estoppel can be applied to such cases. Hence, plaintiff cannot raise the contention in the suit that he is also having the share in the suit schedule properties.

26. When it is the averment in the written statement that the oral partition as well as the palupatti under Ex.D55 were in the presence of the plaintiff himself and plaintiff is also a signatory to the documents at Exs.D55 and Es.D2, it is for the plaintiff to enter into the witness box and give evidence in support of his contention pleaded in the plaint. But in this case, plaintiff after filing the suit has not at all come before the Court. As per the case of the plaintiff, he has executed special power of attorney in favour of his son P.W.1. P.W.1 in his evidence has stated that his father is not having proper eyesight, he is not able to walk and he cannot hear and hence, he has executed special power of attorney as per Ex.P1 in his favour. But looking to the evidence of P.W.2, who is the witness on the side of the plaintiff himself he has deposed in the cross-examination at paragraph No.4 that he has seen the house of the plaintiff at Alibommasandra and Bodenahosahalli; the plaintiff is able to move, his eye sight is normal and he is getting the agricultural work done. This evidence of P.W.2 falsifies the evidence of P.W.1 that his father's eyesight is not proper, he cannot move and cannot hear properly.

27. The learned counsel appearing for the appellants/defendants has also relied upon the decision reported in 2005(1) KCCR 227 of the Hon'ble Supreme Court in

the case of Janki Vashdeo Bhojwani and another Vs. Indusind Bank Limited and others and I have perused the said decision. According to the principle enunciated in the said decision P.W.1 cannot depose on behalf of the plaintiff about the acts done by principal, prior to execution of the power of attorney. In view of this principle and also the evidence of P.W.2 that he is having proper eyesight, he is moving properly and attending to agricultural work, adverse inference is to be drawn against the case of the plaintiff, as he has not entered into the witness box. The averments in the written statement; the evidence of D.W.1 to D.W.4 that the oral partition was effected between defendants 1 and 2 in the presence of the plaintiff; the palupatti Ex.D55 was also in the presence of the plaintiff and for Ex.D2 the sale deed executed by defendant No.1 in favour of Nanjappareddy and the gift deed by defendant No.1 in favour of his daughter-defendant No.3 vide Ex.D54, the plaintiff is the signatory, all these averments and documents remained unchallenged as plaintiff did not enter into witness box to give his evidence. It shows the conduct of the plaintiff that being signatory to these documents he is estopped from raising the contention that there was no partition in the family properties.

28. I have also perused the other decisions relied upon by the learned counsel for the appellants reported in AIR 1960 SC 335, AIR 2002 BOMBAY 129, 2003(2) SCC 355 on the aspect of family settlement and registration of the document severing the joint status. So also, the decisions relied upon by learned senior counsel appearing for respondent No.1/plaintiff reported in 2013 (9) SCC 419, 2009(6) SCC 194, 2012 AIR SCW 3560, AIR 2007 SC 18, ILR 2010 KAR 2748 and 2011(2) Kar.L.J. 453.

29. As I have already discussed above, in respect of 1965 oral partition the defendants have placed satisfactory and cogent material and proved the fact of oral partition with the help of oral and documentary evidence. The subsequent document i.e., palupatti, in my opinion, is only in the nature of memorandum of partition, which does not require registration at all.

30. When the first appellate Court has come to the conclusion that the defendants have failed to prove the factum of adoption of the plaintiff by Buddareddy

Muniswamy and his wife Nanjamma, then without making reference in detail to the oral and documentary evidence placed by the parties and without making a detailed discussion about these materials, has jumped to the conclusion that plaintiff being the natural brother of the defendants and as the suit schedule properties are ancestral properties, he is having a share in the said properties and has passed a cryptic judgment allowing the appeal. The judgment and decree of the first appellate Court is not in compliance of order 41 Rule 31 of the CPC. The first appellate Court being the Court of law and facts, ought to have considered the factual aspects placed on record by the parties in detail before passing such judgment and order in the first appeal.

31. In this connection, I have perused the decisions relied upon by learned counsel for the respondent No.1-plaintiff reported in 2006(3) SCC 224, AIR 1979 GAUHATI 23, AIR 1991 GAUHATI 23 and AIR 2006 BOMBAY 62. I have also perused the judgments relied upon by the learned counsel appearing for the appellants/defendants of the Honb'e Supreme Court rendered in Civil Appeal No.1467/2011 arising out of SLP (C) No.19632/2007 dated 8.2.2011. Looking to these materials on record and also the principle enunciated in the said decisions, I am of the opinion that the first appellate Court has not considered the materials placed on record in detail before reversing the judgment and decree passed by the trial Court. The judgment and decree of the first appellate Court is not in accordance with the mandatory provisions of law and it is perverse and capricious. Hence, it is not sustainable in law. Considering all the above aspects of the matter, I am of the opinion that the appellants herein have made out a case and there are valid and justifiable grounds for this Court to interfere into the judgment and decree of the first appellate Court.

32. Accordingly, the Regular Second Appeal is allowed. The judgment and decree of the first appellate Court dated 5.1.2007 passed by the Court of Addl. District Judge, Fast Track Court No.IV, Bangalore Rural District, Bangalore in R.A.No.21/1999 is hereby set aside and the suit of the respondent No.1-plaintiff is hereby dismissed.