

Purna Bai and Others Vs. Ranchhoddas and Others

Purna Bai and Others Vs. Ranchhoddas and Others

SooperKanoon Citation : sooperkanoon.com/424721

Court : Andhra Pradesh

Decided On : Apr-30-1992

Reported in : AIR1992AP270; 1992(2)ALT495

Judge : Bhaskar Rao and ;Ranga Reddy, JJ.

Acts : [Succession Act, 1925](#) - Sections 74; [Evidence Act, 1872](#) - Sections 58; Limitation Act - Schedule - Article 110

Appeal No. : C.C.C. Appeal No. 190 of 1982 and 104 of 1983

Appellant : Purna Bai and Others

Respondent : Ranchhoddas and Others

Advocate for Pet/Ap. : A. Satyanarayana Rao, ;B. Devender Rao, ;P. Parimal Rao, ;M.L. Ramkrishna Rao, ;H.S. Gururaja Rao, ;G. Mohan Rao ;L, Purushottam Reddy and ;M.R. Harsha

Judgement :

ORDER

Bhaskar Rao, J.

1. These two appeals, one preferred by the plaintiffs and the other, by the 9th defendant, arise out of the same judgment, and therefore are disposed of by this common judgment. The suit was filed for partition and separate possession of the

moveable and immoveable properties covered by the plaint schedules.

2. The relevant facts in brief are : One Purandas had four sons and one daughter, namely, (i) Ranchhoddas, (ii) Dwarakadas, (iii) Motilal, (iv) Babulal and (v) Yoga Bai. Purandas died in 1962. His fourth son, Babulal, pre-deceased Purandas while Dwarakadas, another son, died on 3-5-1966 leaving behind him the plaintiffs wife and two sons. After the death of Purandas, the eldest son, Ranchhod das, was managing the joint family. The family is a business family; the business being run in the name of Purandas Ranchhoddas & Sons. The family has perfume shop at Gulzar house, Hyderabad, and a medical shop at Sultan Bazar. Since the plaintiffs did not wish to continue their joint status with the defendants, they issued a suit notice, Ex.A-15, for division of the joint family properties and having found a negative attitude with the defendants laid the present suit. Respondents 1 to 3 and 10 filed a common written statement contending that it is not true that the plaintiffs and the defendants constitute a joint family, that the plaintiffs have no share in the properties and that they are not entitled to the share claimed, that Purandas having died in 1962 did not leave any properties moveable or immoveable behind him and that it is not true that the 1st defendant managed the family business. Late Purandas during his life time settled his properties and business on his sons and since then the parties have been enjoying their properties separately. Late Purandas started two shops, one at Gulzar house and another at Secunderabad. After some time Purandas allowed his sons, Ranchhoddas, Motilal and Babulal, to manage the business at Gulzar house and Dwarakadas i.e., the husband of the 1st plaintiff and father of the 2nd and 3rd plaintiffs, to manage the business at Secunderabad. Late Purandas in the year 1942 migrated to Burhanpur in Madhya Pradesh. Late Purandas settled his business and properties before migrating to Burhanpur. He also executed a settlement deed to avoid confusion. The three sons that were given the business at Gulzar house effected partition among themselves. Dwarakadas entered into partnership with one Ramanlal and started business under the name and style Purandas Ranchhoddas Agencies at Sultan Bazar and the partnership was dissolved subsequently and Dwarakadas alone continued the business at Sultan Bazar and Secunderabad. On the death of Babulal in the year 1958, his two sons viz. defendants 2 and 6, became partners in the business at Gulzar house and the same was continued upto 1966, that the

partnership was reconstituted and the four sons of the first defendant, i.e. D-2, D-3, D-4 and D-5, became partners, that on 6-1-1973 this partnership was dissolved and defendants 6, 7 and 8 retired from partnership from 5-11-1972, that a fresh partnership was effected between the remaining partners, that on 24-2-1975 the 4th defendant retired from the partnership and defendants 1, 2, 3 and 5 continued the business as before as new partnership, that item No. 1 of the plaint B schedule was purchased in the name of the firm, Purandas Ranchhoddas & Sons, from the income of the said firm, that similarly the land at Ramanthapur shown in the plaint 'B' schedule was purchased from the income of the firm and house was also constructed on that land, that item No. 3 of the plaint 'B' schedule was purchased in the year 1949 from out of the income of the firm and in the partition it fell to the share of the 1st defendant and he reconstructed the same with his own funds, that item No. 4 of the plaint 'B' schedule was purchased by the 3rd defendant for residential purpose out of his income, that item No. 5 of the plaint 'B' schedule was purchased by the 4th defendant in the year 1971 for his residential purposes, that item No. 6 was purchased in the name of the firm in the year 1973 from out of the income of the firm, that item No. 7 was purchased by defendants 1 and 6 in the year 1962 out of their own earnings and that the 1st defendant subsequently relinquished his rights in the said house in favour of the 6th defendant, that item Nos. 8 and 10 in the plaint 'B' schedule do not belong to the defendants and that item No. 9 was purchased by the 6th defendant in the year 1968 with his own funds. It is also alleged that the suit is misconceived, that the suit schedule properties were acquired from the income of the joint family is false, that the properties were acquired by different members with their own earnings and that the suit, therefore, is liable to be dismissed.

3. The 4th defendant filed a separate written statement reiterating the averments made by defendants 1, 2, 3, 5 and 10.

4. Defendants 6, 7 and 8 in their written statement denied the plaint allegations and contended that there are no joint family properties liable for partition.

5. The 9th defendant filed a written statement supporting the case of the plaintiffs and further contending that she is entitled to a share in the plaint schedule

properties.

6. The trial Court after framing the relevant issues went on with the trial. During the trial the plaintiffs examined P.Ws. 1 to 3 and marked Exs.A-1 to A-7 while the defendants examined the 1st defendant as D.W. 1 and marked Exs. B-1 to B-28. After considering the entire material available before it. the trial Court held that the plaintiffs and the defendants did not constitute a joint family and that the suit schedule properties are not joint family properties and that the plaint 'D' schedule properties are not proved to be in existence. Ultimately the suit was dismissed. Hence this appeal.

7. The learned counsel for the plaintiffs, Sri Devender Rao, contended that the business was started by Purandas, that Purandas and his four sons worked together and developed the business. He submitted that though there is no nucleus of ancestral property, the entire members of the family by their joint and common efforts developed the business and therefore the properties covered by the plaint schedule have got to be treated as joint family properties. Sri H. S. Gururaja Rao, the learned counsel appearing for the respondent-defendants contended that the business as started by Purandas exclusively without any nucleus of the ancestral property and he developed the business. It is the self-acquired property of Purandas. Merely because, the learned counsel contended, the sons worked along with the father the property cannot become joint family property like that of the Hindu Coparcenary Joint Family property. He contended that there is no joint family conception in the suit property and that the properties are purely self-acquired, and therefore the suit for partition is liable to be dismissed in limine.

8. In view of these rival contentions, the question that arises for consideration is, whether the suit properties are joint family properties of Purandas and his four sons. In the plaint it is alleged that late Purandas came to Hyderabad from Burhanpur in Madhya Pradesh and started business in the old city even before Ranchhoddas was born. Thereafter, Purandas shifted the business to Gulzara house after the birth of Ranchhoddas (D-1) and continued the business in the name and style Purandas Ranchhoddas and sons. Thus, when the business was

shifted to Gulzara house it was in the name and style 'Purandas and Ranchhoddas'. Thereafter the other sons were born. It is the case of the plaintiff that when the sons grew up, they started working along with the father and all of them together worked and developed the business. They used to manufacture perfumes, etc., in Gulzar House and sell the same at the shop in Gulzara House as well as in the shop at Secunderabad. P.W. 1 is the first plaintiff. She is the wife of Dwaraka Das. She deposed that Purandas started business in perfumes even before her marriage. After some time the shop having been shifted to Gulzara House, they used to prepare the perfumes in the ground floor of the house and they used to reside in the first floor. They used to supply the items for sale at the Secunderabad shop from Gulzara House. Even in the cross-examination she stated that her father-in-law (Purandas) started the business in the name and style 'Purandas Ranchhoddas and sons.' Earlier the shop at Gulzara house was managed by Purandas and later by his sons. The shop at Secunderabad was managed by her husband, Dwaraka Das. After closure of the shop at Secunderabad, they opened another shop at Sultan Bazar. According to P.W. 1 that was opened by Purandas and given to her husband. She denied the suggestion that it is not correct to say that since 1942 the parties carried on the business separately and were living separately.

9. P.W. 2 is the third plaintiff. He is the son of Dwaraka Das and grandson of Purandas. He deposed that his grandfather was having business in perfumes at Gulzara House. Purandas was manufacturing as well purchasing the perfumes for being sold at Gulzara House and Secunderabad. The shop at Gulzara House was being managed by his grandfather and later by his sons, i.e. D-1, D-2 and Babulal (husband of D-10) and by his father, Dwarakadas. The shop at Sultan Bazar was run in the name of Purandas Ranchhoddas. It is stated that to his knowledge there was no partition of the properties belonging to the joint family. He again stated that Purandas was managing the shop at Gulzara house till he left for Burhanpur. After that, D-1, D-6 and the husband of D-10 were managing the shop. He stated that to his personal knowledge his father was also silling in Gulzara House shop. He deposed that he was regularly attending the shop at Gulzara House till the year 1975. He denied the suggestion that the shop at Sultan Bazar fell exclusively to his share. He further stated that the shop at Secunderabad was the branch of the

shop at Gulzara House, that the goods were being sent from Gulzara House shop and that the sale-proceeds were sent to Gulzara House shop. He denied the suggestion that his father was managing the shop at Secunderabad separately for himself as a proprietary concern. He further stated that all the books relating to the shop at Secunderabad were sent to D-1 and D-6. He stated that he did not know whether Purandas divided the properties among his sons in 1942. He stated that the defendants and the plaintiffs were living separately since 20 to 25 years.

10. P.W. 3 is the father-in-law of the 3rd plaintiff. He deposed that he is a resident of Burhanpur in Madhya Pradesh and that the marriage of P.W. 2 was performed in the month of December, 1973 with the daughter of the witness. For the marriage alliance D-1 along with his wife and the husband of D-9 came to his place. D-1 settled the marriage. There was correspondence between D-1 and himself regarding the alliance. Ex. A-17 is the letter dated 19-7-1973 received by P.W. 3 from D-1. He stated that D-1 told him that the family is a joint family and he is negotiating the marriage of his nephew. The witness stated that he had no knowledge of the partition of the family properties and according to him the family continues to be joint. In the cross-examination he stated that Ex.A-17 letter was in his possession from the date of its receipt. He deposed that D-1 took him to the shops at Gulzara House as well as Sultan Bazar and he found all the family members including the plaintiffs coming and going to the shop. He found the second plaintiff sitting in the medical shop. He denied the suggestion that with the help of the second plaintiff he produced Ex.A-17 and was giving false evidence.

11. The 1st defendant examined himself as D.W. 1. He deposed that Purandas was his father and he died in the year 1962. He was doing the business in perfumes. He had two shops one at Gulzara House and the other at Secunderabad. He stated that in the year 1942, his father went away to Berhanpur after giving the shop at Gulzara House to himself, D-6 and the husband of D-10; and the shop at Secunderabad to Dwaraka Das. He deposed that his father did not purchase any properties at Hyderabad. His father started business in the shop at Gulzara House about sixty years back. The witness was working with his father when he started the business. At that time he was fifteen years old. The business was started in the name and style 'Purandas Ranchhod Das and Sons'. The

witness added, Purandas is his father's name while Ranchhod Das is his. His father was having business at Secunderabad also. The witness was assisting his father in the entire business after the school hours. In the shop, they were having factory in the ground floor and shop in the first floor. His brother, Dwaraka Das, was working at Secunderabad and not at Gulzara House. His another brother, Motilal, was working at Gulzara House along with his father. He stated that he did not have a separate business of his own apart from that of his father. During the period, 1950-51 to 1956-57 they were having two shops one at Gulzara House and another at Secunderabad. Apart from these two shops, there was no other shop during the above period. Kunta Bai is the daughter of Dwaraka Das. Her marriage was performed in 1950-51. Susheela Bai was the daughter of D-1 and her marriage was performed by Purandas in the year 1952-53. Purandas performed the marriage of the 2nd plaintiff in the year 1954. Purandas performed the marriage of Kokila, daughter of the 6th defendant. The marriage of Sarala, the daughter of D-10 was performed by Purandas. There is no separate account maintained in the name of Purandas. He denied the suggestion that they filed the returns as the joint family business. He also denied the suggestion that money for payment of insurance premium was given by his father. He stated that Narasimha Iyengar's Company has been the auditors throughout both for them and Dwaraka Das. He stated that few days prior to his leaving Hyderabad for Berahanpur his father, Purandas, divided the properties among them. Prior to the division, the business belonged to all of them and not exclusive or separate property of his father. The income derived from the business was being enjoyed by all of them prior to 1942. He also denied the suggestion that the business and the properties are self-acquired properties of his father.

12. The above evidence establishes that the business was originally started by Purandas himself in the old city and thereafter Ranchhoddas was born it was shifted to Gulzara House. The business was in the name and style 'Purandas Ranchhod Das and Sons', that all the sons and father Purandas worked together and improved the business at Gulzara House and Secunderabad. Even the 1st defendant admitted that prior to the division in 1942 the entire business belonged to them and the income therefrom was enjoyed by all of them.

13. The question, thus, arises for our consideration is:

Whether the properties acquired by the father and the sons by putting their efforts together in their family business constitute joint family properties amenable for partition by the sons and their sons as coparceners.

14. In *Haridas v. Devkuvarbai* AIR 1928 Bombay 408, the question before a Division Bench of the Bombay High Court is, whether the property acquired jointly by father and son is joint family property even though there is no nucleus of ancestry property. The Division Bench held that the property acquired jointly by father and son living together becomes joint family property even in the absence of family nucleus for its acquisition. Similar is the question in *Lachmi Narain v. Musaddi Lal* AIR 1942 Oudh 155. It is held therein that the fact that a firm is a joint family concern is itself a nucleus and the property acquired by the joint labours of the members must be deemed to be the joint family property. To the same effect are the decisions in *Suthersanam Maistri v. Narasi-mulu Maistri* (1901) 11 Mad LJ 353, *Krishnan V. Rengachari* : AIR1965 Mad340 and *Selvaraj v. Radhakrishna Pillai* (1976) 1 Mad LJ 105 : (AIR 1976 Madras 156). In *Parbhu Lal v. Bhagwan* AIR 1927 Bombay 412, the Bombay High Court held that for formation of a coparcenary under the Hindu Law, a nucleus of property which has come down to the father from his father, grandfather or great grandfather is not necessary, provided the persons constituting it stand in the relation of father and son or any other relationship requisite for a coparcenary. Thus, it is well settled that when members of the joint family by their joint labour do the business and acquire properties, the properties so acquired -- in the absence of an intention to a contrary effect -- would be the joint family properties. In *Venkata Chenchayya v. Ramalingam* AIR 1957 Andh Pra 744, a Division Bench of this Court held (at p. 746 of AIR) :

'Property acquired by members of a joint family by their joint labour or in their joint business would be their joint family property, in the absence of a clear indication of a contrary intention to hold the property as co-owners, between themselves.'

15. In view of the above discussion, we have to hold that the business started by Purandas running the shops at Secunderabad and Gulzara House in the name

and style 'Purandas Ranchhoddas and Sons' is the joint family business and the subsequent acquisitions made from out of the profits and earnings from the said business after developing the same with the joint efforts of Purandas and his sons are the joint family properties amenable for partition among the father and sons, viz. Purandas & his sons, and the grandsons Purandas as coparceners.

16. The second question that arises for consideration is, whether there was a settlement or partition as alleged by the defendants in the year 1942. The evidence of P. Ws. 1 and 2 is that there is no partition and the properties are enjoyed jointly. P.W. 1 deposed that her father-in-law (Purandas) started business in perfumes, jarda, etcetra, etc. in the name and style 'Purandas Ranchhoddas and sons' and that the properties shown in the plaint schedules belong to her father-in-law. She denied the suggestion that the father-in-law settled the business shops and gave properties separately to his sons. Earlier the shop at Gulzara House was managed by Purandas and later by his son, Ranchhoddas. She further stated that the house in which they are living is in her name. She did not remember when it was purchased, may be 30 to 38 years back. The amount was given by Purandas. She did not know since how long the businesses are shown separately and inividually in income-tax records. She denied the suggestion that since 1942 the parties have been carrying on business separately and living separately. She stated that since 1957 onwards the business was carried (on) partnership basis. She denied the suggestion that there was a family partition long back during the lefttime of her husband. She did not know whether her father-in-law left any will. She denied the suggestion that since 1942 the parties have been carrying (sic) there was any partition of jewellery during the life time of her father-in-law. She denied the suggestion that there was a partition of moveable and immoveable properties that took place some thirty years back. She stated in her cross-examination that even when her husband Dwarakadas was alive and carrying on the business at Secunderabad shop and Sultan Bazar, her father-in-law used to give them Rs. 1,500- per month for the maintenance of the family. After the death of her father-in-law D-2 and D-3 used to pay them Rs. 1,500/-from the income of the shop at Gulzara House. Even after the demise of her husband they continued to pay the amount and they stopped making the payment only some time prior to the laying of the suit.

17. P.W.2 stated that all the properties covered by the plaint schedules belonged to the joint family and that the shop at Sultan Bazar was run in the name of Purandas Ranchhoddas. Ex. A-11 dated 13-2-1970 is the office-copy of the letter addressed to Purandas Ranchhoddas & Sons by M/s. Gurco Pharma Pvt. Limited, New Delhi, showing the names of the partners of the firm including that on the 2nd defendant. Ex. A-12 dated 4-4-1970 is a letter from Gurco Pharma Private Limited addressed to M/s. Purandas Ranchhoddas & Sons. Ex. A-13 dated 20-11-1970 is a copy of the bill for the goods sold by Purandas Ranchhoddas & Sons prepared by D-3. P.W.2 stated that in December, '75 he asked for partition and since the defendants refused it, he issued Ex.A-15 notice and later laid the suit. He stated that during the lifetime of Purandas he used to pay Rs. 1,500/-towards their maintenance. After the death of Purandas, D-1 used to pay the amount till the death of his father, Dwaraka Das. After the death of his father, for some time D-1 and later D-2 and D-3 used to pay the amount till they demanded for pariition. P.W. 2 stated that to his knowledge Purandas never executed any will. He stated that to his personal knowledge his father was sitting at Gulzara House shop and managing the affairs of the shop. No doubt, he could not produce any proof to show that they were being paid Rs. 1,500/- per month. He denied the suggestion that the items covered by plaint 'B' schedule are the self-acquired properties of the defendants. He also stated that he was regularly attending the shop at Gulzara House till 1975. He denied the suggestion that the shop at Sultan Bazar exclusively belongs to his share. He denied the suggestion that the shop at Sultan Bazar was run on partnership basis between D-1, D-7 and his father, Dwaraka Das, He denied the suggestion that Purandas gave the shop at Secunderabad to his father while going to Barahanpur and that the shop at Gulzara House was given to D-1, D-6 and Babulal (husband of D-7). He did not know whether Purandas left Hyderabad in 1942 as he was not born by then. He stated that no partition was effected by Purandas of the properties during his lifetime. The shop at Secunderabad was managed by his father on the instructions of Purandas. As per Ex. A-9 Pahani for the year 1972-73 the land is shown in the name of Purandas Ranchhoddas. The Secunderabad shop was a branch of Gulzara House Shop and the sale process were being sent to Gulzara House shop every day. He denied the suggestion that his father was managing the shop at Secunderabad

exclusively for himself as a proprietary concern. He stated that all the books relating to the shop at Secunderabad were sent to D-1 and D-6 after the accounting year is over. The license of the medical shop was in the name of the firm 'Purandas Ranchhoddas & Sons'. The partners were shown as plaintiffs Nos. 1 to 3. Purandas died in 1962. The witness (P.W. 2) did not know whether the business at Gulzara House after 1942 was changed and continued by different partnerships from time to time. P.Ws. 1 and 2 stated that the families of the plaintiffs and the defendants were living separately since 20-25 years.

18. D. W. 1 stated that Purandas had two shops, one at Secunderabad and the other at Gulzara House. In the year 1942 Purandas left for Barahanpur in Madhya Pradesh. At that time he gave the shop at Gulzara House to the witness (D. W. 1), D-6 and Babulal; and the shop at Secunderabad was given to Dwaraka Das. Ex. B-3 is the settlement-deed executed by Purandas on 1-3-1957. It bears the signatures of D-6 and Babulal (the husband of D-10). It is attested by one Sobhanlai and another Gopinath (husband of D-9), Ex. B-4 is the registered will executed by Purandas on 9-3-1960. Ex. B-1 is the declaration filed before the Income-tax authorities. It is signed by D.W. 1, D-6, D-9 and D-10. Ex. B-5 is the copy of the order dated 13-6-1963 regarding the properties at Berahanpur. As per the will the father, Purandas, bequeathed the properties at Berahanpur and cash. The firm's name 'Purandas Ranchhod-das & Sons' was permitted to be used by all the members. Since 1942 when the settlement was done by the father, Purandas, each brother was earning separately and residing separately. The father did not purchase any moveable properties at Hyderabad. After 1942, the business at Gulzara House was being run in partnership by D.W. 1, D-6 and late Babulal and that there was also a change in the partnership from time to time. Exs. B-9 to B-13 are the income-tax certificates and assessment orders. Ex. B-14 is the letter dated 6-6-1966 written by Gopinath (husband of D-9) stating that he distributed the amounts as per the Will. He denied the suggestion that he was paying Rs. 1,500/- to the plaintiffs for their maintenance. He stated that he did not have separate business apart from that of his father. He stated that except Exs. B-3 and B-4 (the settlement deed and Will) Purandas did not execute any other document either with regard to the business or the properties. There is nothing mentioned in the account books as to what happened to the family prior to 1942. D.W. 1 stated that

Dwaraka Das was residing separately and that he and his brothers were residing with their families separately along with their father. As to how Ex. B-3 came into existence, the witness (D.W. 1) states, since the Government was demanding inspection of their account books Ex. B-3 came to be executed by Purandas in the year 1957. The witness could not give the year of handing over the shop to them by Purandaas prior to 1942. During 1950-51 to 1956-57 they were having two shops one at Gulzara House and the other at Secunderabad. He stated that the father has no share and also has no concern with the business since 1942. Ex. B-22 is an entry at page 165 in the cash-book for 1954-55 crediting the account of Purandas with Rs. 2269-3-0, being matured policy of Purandas taken from Hindusthan Co-operative Insurance. Ex. B-23 is another entry in the same Cash book at page 260 showing encashment of the cheque covered by the above matured policy. Ex. B-24 is the entry in the ledger for 1954-55 at page 249 for the year 1954-55 relating to the account of Purandas Ranchhoddas. The witness denied the suggestion that he did not pay the premium on the insurance policy relating to his father. In the cross-examination he stated that Babulal during his lifetime and after his death his wife and daughter have no separate properties or business, but they have a share in the house in which he was living and in the land in Ramananthapur.

19. The above evidence shows that as per the plea of the plaintiffs the suit properties are the joint family properties and the same were earned by the joint efforts of Purandas and his sons whereas the case of the defendants, excepting D-9, is that there was a settlement in 1942, which was reduced into writing in 1957. Thus, the specific case of the defendants is that there was a settlement and division of properties among the sons in the year 1942 itself and thereafter in 1957 the settlement deed was executed. Now, we have to examine whether this plea of the defendants is correct.

20. The plaintiffs have issued the suit notice, Ex. A-15, demanding partition. To that Ex. A-16 is the reply given by the defendants. In the reply it is stated that Purandas acquired properties at Hyderabad as well as Berahanpur, settled the properties in favour of his sons and the business and properties at Hyderabad were given to Ranchhoddas, Motilal and Babulal while the business at Hyderabad

(Secunderabad?) was given to Dwarakadas. All this according to Ex. A-16 was as early as on 1-3-1957. Since then, according to Ex. A-16, the parties were in separate possession and enjoyment of the properties and business. It is also mentioned that late Purandas executed a registered Will, Ex. B-4, bequeathing the properties situated at Berahanpur in favour of his sons and daughter. Thus all the businesses and properties -- moveables and immovable -- treated either as joint or separate were settled and distributed among the sons and the daughter. In the notice, Ex. A-16, there is no reference that there was settlement in 1942 while Purandas was leaving Hyderabad. But the specific case is that the shop was given as early as on 1-3-1957. Thus, the notice specifically indicates that the settlement was in 1957 and not in 1942. It is also to be noted that there is no mention of a written settlement deed in Ex. A-16. Ex. A-16 is dated 2-2-1976. In the written statement filed by D-1, D-2, D-3, D-5 and D-10 it is stated that Purandas during his lifetime settled the properties long before his death. It is stated that some time in 1942 Purandas migrated to Berahanpur. Thus Purandas has settled the business and properties among his sons long prior to migration to Berahanpur. Later Purandas executed the settlement deed on 1-3-1957. Thus, in the written statement filed after long lapse of time, it is mentioned that there was settlement long before 1942 made by Purandas. This theory of settlement earlier to 1942 is specifically introduced to defeat the plaintiffs' claim as some of the suit properties were purchased earlier to 1957 in the name of the firm or in the name of Purandas. Therefore, the fact that there was a settlement long before 1942 was never stated in the reply notice. If really there was such a settlement the same could not have missed a mention as it is one of the important factors dealing with the settlement of the business on the parties.

21. The settlement deed is alleged to have been executed on 1-3-1957. First of all, it does not contain the signature of Dwarakadas, though contains the signatures of all others. It is an unregistered instrument. Except the 1st defendant deposing about this, no independent connected with Ex. B-3 settlement deed is examined to prove Ex. B-3. There is no mention in Ex. A-16 reply given by the defendants stating that the settlement deed was executed by late Purandas in 1957. It is equally to be borne in mind that the settlement deed was executed at Berahanpur on 1-3-57. D.W. I in his cross-examination stated that he wrote Ex. B-25 entry at

Hyderabad. The entry is dated 1-3-57. Therefore, the person who wrote the katha (Ex. B-25) at Hyderabad on 1-3-57 cannot be equally present on the same day at Berahanpur in Madhya Pradesh, which is a far off place, and sign Ex. B-3.

22. Another notable feature is, in the written statement filed by D-6, D-7 and D-8 it is mentioned that in or about 1943 Purandas left Hyderabad. He orally partitioned and settled the entire business both at Secun-derabad and Hyderabad among his four sons. In the written statement filed by D-1, D-2, D-3, D-5 and others it is stated that long prior to 1942 there was a settlement. Thus, there is considerable contradictions in the pleadings itself of the defendants themselves. When there was a settlement long before 1942, there cannot be any settlement in or about the year 1943. There is a lot of difference between 'long before 1942' and 'in or about 1943'. These inconsistencies and contradictions falsify the fact alleged that there was a settlement long before 1942 or in 1943 or in 1957 as alleged by the defendants.

23. Another important aspect is that this document, Ex. B-3, did not see the light of the day earlier to the filing of the written statement nor it was filed before any statutory authorities like Income-tax authorities. Therefore, for all these reasons, it has to be held that there was no settlement or partition or division of the properties at Hyderabad by late Purandas.

24. Now coming to the Will, Ex. B-4, though it is registered the attestations thereto are not proved. It is not the case that all the attestors happened to die. On the other hand, Gopinath (the husband of D-9) is one of the attestors and he is very much alive. Still, he is not examined. The contention advanced by Mr. Gururaja Rao is that P.W. 2 himself had admitted that the signature on Ex. B-1 is that of Dwarakadas and therefore the admission extends even to the execution of Ex. B-4 Will, thereby calling for no proof of the same. Ex. B-1 is a letter filed before the Income-tax Authorities in Madhya Pradesh. In Ex. B-1 it is stated that Purandas expired on 21-10-1962, that his status was 'individual' that he had executed a Will on 9-3-1960 and that the authorities thereto distributed the moveables left by him after his death. Ex. B-1 is signed by D-1, Dwaraka Das, D-6, D-10 and D-9. During the course of cross-examination of P.W.2 the signature of Dwaraka Das on EX. B-

1 was shown to him and he admitted it to be that of Dwaraka Das. The contention is that since the signature on Ex. B-1 is admitted to be that of Dwaraka Das by P.W. 2 himself, it has to be inferred that P.W. 2 has also admitted the execution of Will Es. B-4, by Purandas. Therefore, according to the learned counsel, when once the execution is admitted by P.W. 2, there is no need to prove the instrument, Ex. B-4, since according to Section 58 of the Evidence Act admitted facts need not be proved. For this proposition of law, the learned counsel sought to place reliance upon the decision in *Javer Chand v. Pukhraj Surana*, : [1962]2SCR333 , *Dewan Chand v. Jay Pee Finance Corpn.*, AIR 1977 J & K 61, *G. Narayana Raju v. Chamaraju*, : [1968]3SCR464 , *C. Sundaram v. Rukmani Ammal*, : AIR1975 Mad83 , *Narayan v. Gopal*, : [1960]1SCR773 , *Nagubai v. Shama Rao*, : [1956]1SCR451 , and *Ajodhya Prasad v. Bhawani Shanker*, : AIR1957 All1 (FB). There is absolutely no dispute with the proposition of law that no proof is required in the face of an admission. But the question is whether the admission of execution of a particular document extends to the execution of another document recited in the former document. Firstly in the case on hand there is no evidence except that of D.W. 1 to show that Ex. B-1 was filed before the Income-tax Authorities in Madhya Pradesh. Even taking that it was so filed, still the admission of the signature on Ex. B-1 by P.W, 2 cannot be said to be extending even to Ex. B-4, the Will referred to in Ex, B-1. As already commented supra, the attestations to the Will Ex. B-4 are not proved. In *Girijadutt v. Gangori Dutt*, AIR 1955 SC 347, it is held that in order to prove due attestation of the Will the propounder of the Will has to prove that the two witnesses saw the testator signing the Will and that they themselves signed the Will in the presence of the testator. Inasmuch as the attestation is not proved and that the admission cannot extend to the execution of the Will, the Court below has rightly exchequed the Ex. B-4 Will from consideration.

25. The learned counsel for the respondents referring to several partnership deeds, Ex. B-6, B-7 and B-8, wherein the partners were changing, sought to contend that the doing of business under partnership and proprietorship since 1966 onwards is itself a proof to show that there was no joint family between the plaintiffs and the defendants, obviously, consequent upon the execution of the settlement deed and therefore it must be held that there was already a settlement

between the parties. In this respect the learned counsel sought to place reliance upon a decision in *Biyalla Chinna Narasamma v. Venkata Narasi*, : AIR1954 Mad282 , wherein it is held that a Joint Hindu family as such cannot enter into a partnership. On the other hand, the learned counsel for the plaintiffs contended that there was no partition or settlement and that the alleged settlement whether in or earlier to 1942 or in 1957 is concocted and created for the purpose of the suit. Dwaraka Das died on 3-5-66. By then the 3rd plaintiff was a minor and the 1st plaintiff was an uneducated lady and the 2nd plaintiff was not so mentally effective person. The learned counsel submitted that when once the property is the joint family property, unless there is specific exclusion of any member of the family from the enjoyment of the joint family property, it cannot be said that the properties seized to be joint family properties merely because the other members of the joint family are managing the property by forming themselves into partnerships or proprietorships. It must be noted that we have already held that Purandas and his sons have carried on the business, developed it and from the earnings therefrom they acquired the. properties covered by the plaint schedules. We have further held that there is no settlement or partition. Exs. B-9 to B-13 are the assessment orders or certificates issued by the income-tax authorities in respect of the business at Gulzara house. Ex. B-26 is the entry made in the account books relating to the business in Gulzara House. It shows that the premium for the year 1951-52 was paid by the 1st defendant for Purandas. Ex. B-27 is the entry covering the sale-proceeds from the Secunderabad shop made in the accounts books of Gulazara House Shop. Exs. B-23 and R-24 are the credit entries made in the account books in relation to the shop at Gulzara House reflecting the amounts received from Insurance Companies in respect of the policies of Purandas. If really there was a partition or settlement as alleged, there seems to be obviously no need for these entries, more particularly of the sale proceeds from the Secunderabad Shop. As regards the contention with respect to exclusion from the joint family business, we shall deal with the same while discussing the issue in regard to limitation. For all these reasons, we hold that the family is continuing as joint Hindu family and that there was no settlement or partition brought in among the plaintiff and the defendants.

26. It is next contended by Mr. H. S. Gururaja Rao that Ex. B-14 is a letter written by Gopinath on 6-6-66 stating therein that he has distributed the amounts as stated in the Will. In that it is shown that Dwaraka Das was paid Rs. 15,000/-. Gopinath is not examined to prove this payment or Ex. B-14. Except D.W. 1, no one else is examined to prove Ex. B-14. In the cross-examination of P.W. 2 it is suggested that Dwaraka Das was paid Rs. 25,000/- in pursuance of the Will. The suggestion, thus, is not in accordance with the contents of Ex. B-14. Ex. B-14 is dated 6-6-66 i.e., after the death of Dwaraka Das. Further, Ex. B-14 was not put to P.W. 1 or P.W. 2 during their cross-examination. Therefore, there is any amount of doubt as regards the contents of this Ex. B-14. Further, it is to be noted that it is in the evidence of P.Ws. 1 and 2 that D-1 used to pay them Rs. 1,500/- per month for their maintenance after the death of Dwaraka Das. There were also occasions when D-2 and D-6 paid to the plaintiffs. They stopped payment only some time earlier to the filing of the suit. As held supra, the evidence of D.W. 1 is not trustworthy as regards the fact that there was a partition or settlement in 1942 or 1957. It is very difficult to believe his evidence even in respect of this aspect of the case also. No doubt, he denied having made payments at the rate of Rs. 1,500/- to the plaintiffs. But having regard to the circumstances and other evidence adduced, it seems to be true as deposed to by P.Ws. 1 and 2 that they were being paid by the defendants at the rate of Rs. 1,500/- per month for their maintenance. This fact, further, supports the case of the plaintiffs that the family was a joint family and the properties were joint. For all these reasons we hold that there was no division or settlement of the family properties as alleged by the defendants and that the family continues to be joint. It is a fact that P.Ws. 1 and 2, both, deposed that the families of the plaintiffs and D-1, D-6 and other defendants are living separately since 20 to 25 years. Merely because the families are living separately the nature of the joint family property will not be changed unless there is partition, division or settlement. Therefore, the properties continue to be joint family properties only.

27. The third point to be considered is, whether the suit is barred by limitation. In the plaint it is alleged that the plaint schedule properties are joint family properties and when the plaintiff demanded for partition the defendants refused it. The plaintiffs served the suit notice, Ex. A-15 dated 14-1-1976 and the defendants

issued a reply, Ex. A-16 denying that the properties are joint family properties. Therefore the suit was filed. In the written statement filed by D-1, D-2, D-3, D-5 and D-10 in paragraph 6 it is stated that the business was carried on independently even long before 1943, late Dwarakadas at Secunderabad and D-1, Motilal, at Gulzara House as partners of the shop. Thus, according to the written statement the business was so carried on independently by the sons even during the lifetime of Purandas. In view of this, it is pleaded, the suit for partition is wholly untenable and time barred. Except this allegation that the suit is time-barred, there is no specific plea in the written statement that Dwaraka Das was excluded from enjoyment of the joint family properties to the knowledge of Dwaraka Das and his sons. Since there is no plea of exclusion, there is also no issue and consequently no evidence or finding. It is a settled principle of law that when there is no plea, there will be no issue and therefore there cannot be any finding. What amounts to exclusion is a question depending upon the particular facts of each case. The exclusion must be to the knowledge of the person excluded and there should be sufficient (material) to prove the said exclusion. Merely because the members of the joint family are living separately with the consent of each other and managing the joint business, it cannot be said that there is exclusion. For this proposition of law, it is relevant to refer to the decision of the Privy Council in *Radhobav. Aburao*, AIR 1929 PC 231. The Privy Council held :

'There is no definition of the word 'exclusion', in the Limitation Act and the question whether a person has been excluded from joint family must depend upon the facts of the particular case. An intention to exclude is an essential element. It is necessary, therefore, for the Court to be satisfied that there was an intention on the part of those in control and possession of the joint family property to exclude the person and that exclusion was to his knowledge.'

In so far as the question of limitation is concerned, it is raised for the first time in this appeal. Since it is not raised before the trial Court, the learned counsel for the plaintiffs contended that in view of the decision of the Privy Council in *Virayya v. Adenna*, AIR 1930 PC 18, the same cannot be entertained in this appeal. The Privy Council laid down that although the plea of limitation may have been mentioned in the written statement and also in the grounds of appeal, if no issue is

directed to bear upon the question before the trial Judge and the point has not been taken at the Bar during the trial, it cannot be allowed in appeal. The learned counsel further submitted that the question of limitation is a mixed one of law and fact and that unless there is an issue and evidence, the same cannot be considered in appeal. In the present case, though there was a plea in the written statement no issue is framed and no evidence was let in and no finding is given by the trial Court. On the other hand, the learned counsel Sri H. S. Gururaja Rao, contended that the plea of limitation is a pure question of law and therefore even though it is not raised before the trial Court it can be raised at the appellate stage. For this proposition of law, the learned counsel sought to place reliance upon a decision of the Federal Court in *Ratnesliwari Nandan v. Bhagwati Saran*, AIR 1950 FC 142 and also of this High Court in *Sambhasiva Rao v. Kanakamma*, : AIR 1960 AP213 . He further contended that the documentary evidence i.e., the partnership deeds between the defendants and their sons, the income-tax assessment orders and the certificates issued by the Income-tax Authorities show that since 1957 onwards the defendants are doing business exclusively and therefore the suit filed in the year 1976 is barred by limitation as per Art. 110 of the Limitation Act. First of all, there was no issue, evidence or finding on this point. We have also held that once there is a joint family and the properties are joint family properties managed by some members of the joint family, the said properties will not cease to be joint family properties merely because the other members have not managed the said properties, unless it is proved that the other members to their knowledge have been excluded from the joint family. As held by us, the properties are still joint family properties as the alleged settlement or partition pleaded was held to be false. The evidence of D.W, 1 on this point was held to be not believable. The case of the plaintiffs is that though the two shops are there--one at Gulzara House and the other in Secunderabad -- managed by the defendants and Dwaraka Das, the entire profits were enjoyed by all the members jointly and this is even spoken to by D.W. 1 in the cross-examination that earlier to the division they were all enjoying the fruits jointly. We have held that there is no settlement either in 1942 or 1957. Therefore, the joint family properties continue to be joint. Even the evidence of P. Ws. 1 and 2 is that the defendants used to pay Rs. 1,500/- per month for their maintenance from the income of Gulzara House Shop. All these

facts show that there was no exclusion of Dwaraka Das from enjoyment of the joint family properties. Even otherwise once the property is the joint family property, unless there is exclusion of one member to his knowledge from the joint family for over a period of twelve years, it cannot be said that the said member has ceased to have any right in the joint family properties. Mr. Mohan Rao, the learned counsel for the 4th respondent submitting that P.W. 1 herself has in evidence deposed that they were living separately since 30 years, that the house in which she is living is in her name having been purchased some 30 to 35 years back, that Motilal has got a separate business in a separate shop, that since 1957 the business was carried on in partnership, while P.W. 2 also admitted that himself, the 2nd plaintiff as well their mother was carrying on business in the shop at Sultan Bazar in a partnership till the end of 1972, sought to contend that these admissions and portions in their evidence indicate that they were not only living separately since more than two decades but the businesses were run on partnership basis to the exclusion of others and, therefore, the suit brought in after twelve long years is barred by limitation. All these contentions have been in fact adverted to earlier and held that simple separate living is no indication to conclude either exclusion or division and that the plaintiffs were even paid at the rate of Rs. 1,500/- per month for their maintenance from out of the earnings of the shop at Gulzara House by the defendants. Further at the time of death of Dwaraka Das, the 3rd plaintiff was a minor in 1966 and he attained majority only thereafter. As held by the Madras High Court in *Marudanayagam v. Sola Pillai*, : AIR1965 Mad200 , a suit filed by the minor after attaining majority within twelve years thereof (i.e. from the date of attaining majority) is within the period of limitation. For all these reasons we hold that the suit is not barred by limitation and that there is no exclusion of the plaintiffs also as contended.

28. The next question for consideration is, what are the properties available for partition. In so far as plaint 'A' schedule is concerned it is a geneological tree and has nothing to do with the properties. Plaint 'B' schedule consists of 'B' items. Item No. 1 is in the name of Ranchhod Das. Items Nos. 2 and 3 are in the name of Madan Lal, son of Ranchhod Das. Item No. 4 is in the name of Surender Prasad, son of Ramchand Das. Item No. 5 is in the name of Motilal, son of Purandas. Item No. 6 is in the name of D-1 and D-6. Item No. 7 is in the name of 'Purandas

Ranchhoddas and Sons'. Item No. 8 is in the name of the plaintiff. All these items 1 to 8 are houses. It is in the evidence of P.Ws. 1 and 2 that these are all properties purchased from out of the income of the joint family and therefore they are all joint family properties. D. W. 1 in his evidence stated that item No. 1 was purchased by himself and D-6 Babulal with their own earnings. Item No. 2 was purchased by D.W. 1 with his own earnings. He stated that item No. 3 belongs to D-3 and his son. According to D.W. 1 item No. 4 is purchased by D-4 with his own earnings. Item No. 5 as purchased by D-6 with his own money. He stated that item No. 6 was purchased by himself and D-6 about twelve years back. As regards item No. 7 he stated that it was purchased by him and his sons in the name of Purandas Ranchhod Das and Sons. Item No. 8 was purchased by late Dwaraka Das with his own money in the name of the first plaintiff. He further stated that his father, Purandas, did not leave any properties covered by plaint 'D' schedule and that Purandas did not purchase any immove-able property in Hyderabad. In the cross-examination he slated that he did not remember in what year the property covered by 'C' schedule was purchased. But it was four or five years before the police action. Since there was plague in Hyderabad in those days, they purchased the plaint 'C' schedule property. He further stated that this property was not purchased with the income from the business but by selling ornaments belonging to himself and 6th defendant. The sale deed however, is in the narne of D-I and his father Purandas. The land is not mutated in the name of D-6 or Babulal after the death of Purandas. He denied the suggestion that the plaint 'C' schedule property is the joint family property having been purchased by Purandas. He further stated that item No. 1 was purchased in 1945 and in the Municipal Records it stands in the name of Purandas and Ranchhoddas. Item No. 2 was purchased in the year 1949 and it stands in the name of Ranchhodas. In 1945-49 he was running the shop. He had no separate earnings except the income from the shop. There was no separate bank account in his name in 1945 to 1949. He further stated that he purchased this property with the 'money realised from the sale of ornaments. But he has no record to show that. Item No. 1 of plaint 'B' schedule was purchased with the funds of the shop of the three brothers. At the time of purchase of item No. 3 of plaint 'B' schedule, the 3rd respondent was working in the shop at Begum Bazar. He purchased the property from the amount credited to his account in the

books of the shop. The 4th defendant purchased item No. 4 of the plaint 'B' schedule from out of the account credited to his accounts in the books of Begum Bazar shop, of which he was a partner. Item No. 7 was purchased in 1973 with the funds of the shop. He denied the suggestion that the business and the properties were the self-acquired properties of his father Purandas and that he blended them with the joint family properties and himself and that all of them enjoyed the properties and the business as joint family properties. It is suggested to him that Ex. B-28, registered partition deed, was brought into existence for purposes of income-tax. No doubt, he denied the suggestion. Except the evidence of D-1, there is no other evidence on record to show that the properties are the self-acquired properties. Ex. A-1 is the Municipal Assessment Order for the year 1975-76 in respect of item No. 1 of plaint 'B' schedule. The house is shown in the name of Purandas. Ex. A-2 is the extract from the Assessment Register of property of the Municipal Corporation of Hyderabad in respect of item No. 2 of plaint B schedule. It stands in the name of the 1st defendant. Ex. A-3 is the extract from the assessment register for 1975-76 in respect of item No. 3 of plaint 'B' schedule. It is in the name of Madanlal. It shows that mutation has been effected. Ex. A-4 is the extract from the assessment register in respect of item No. 4 of the plaint 'B'schedule, which is in the name of Surender Prasad. There is mutation effected. Ex. A-5 is the extract from the assessment register in respect of item No. 5 of the plaint 'B' schedule, which is in the name of Ramanlal son of Motilal. Ex. A-6 is with regard to item No. 6 and it is in the name of Motilal Ranchhoddas. Ex. A-8 is in respect of item No. 8, which is in the name of the 1st plaintiff. These orders show that the properties are in the names of the defendants, except item No. 8, which is in the name of the 1st plaintiff. Though D.W. 1 deposed and other defendants pleaded in their written statements that the properties are purchased with their own incomes, no sale-deeds are filed and no witnesses are examined, except D.W. 1. In the cross-examination D.W. 1 stated that in the years 1945 to 1949 he did not have any other income than from the business. Thus, the properties purchased in 1945 to 1949 and also the other properties purchased thereafter have to be held to have been purchased from the income of the joint family business. Though all the coparceners are made parties none of them appeared and examined and no sale-deed is filed and no witness connected with the sale-

deed is examined to show that the properties were purchased with the self-earned amounts of the defendants. In view of this conduct of the defendants in not adducing required evidence, it has to be held that the properties covered by the plaint 'B' schedule and by plaint 'C' schedule land at Ramananthapur are the joint family properties. D.W. 1 admitted that the plaint 'C' schedule property was purchased by Purandas some time during four or five years before the police action. In so far as the plaint 'D' schedule properties are concerned, there is no evidence to prove that they are in existence. In the absence of any evidence, it cannot be held that the properties covered by the plaint 'D' schedule are liable to be partitioned among the parties.

29. We have elaborately considered the evidence of P.Ws. 1, 2 and D.W. 1. P.W. 1 is an illiterate and uneducated lady. Though there are some inconsistencies in her evidence, by and large her evidence seems to be trustworthy. Similarly, P.W. 2 who was a minor at the time of death of his father, Purandas, deposed to the facts which were in his knowledge. The evidence of P.Ws. 1 and 2 is more reliable as against that of D.W. 1, whom we have already found to be not trustworthy in the earlier paragraphs of the judgment since it was contrary to pleadings and documentary evidence.

30. In the result, for the foregoing reasons, the decree and judgment under appeals are set aside and the plaintiffs are declared to be entitled to one-fifth share while the 9th defendant to one-fifth share in the one-fifth share of late Purandas in the joint family properties covered by plaint 'B' and 'C' schedules. A preliminary decree for partition shall accordingly follow. Both the appeals are, thus, allowed with the costs.

31. Appeals allowed.