IN THE HIGH COURT OF MADHYA PRADESH

AT JABALPUR

BEFORE

HON'BLE SHRI JUSTICE DWARKA DHISH BANSAL

FIRST APPEAL NO.918 OF 2006

BETWEEN:-

VIJENDRA SINGH YADAV, SON OF LATE D.S. YADAV, AGED 54 YEARS, BUSINESSMAN, R/O E-7-730, ARERA COLONY, BHOPAL.

.....APPELLANT

(BY SHRI ANKIT SAXENA - ADVOCATE)

AND

LIEUT. COL. MAHENDRA SINGH YADAV, SONO F LATE D.S. YADAV, AGED 50 YEARS, R/O A-17, MACHNA COLONY, NEW BUS STOP NO.5, BHOPAL

....RESPONDENT

(SHRI AMIT KHATRI - ADVOCATE)

……..

Reserved on : 05.07.2023

Pronounced on : 19.07.2023

This appeal having been heard and reserved for judgment, coming on for pronouncement this day, the Court pronounced the following:

JUDGMENT

This first appeal has been preferred by the appellant/plaintiff challenging the judgment and decree dated 31.08.2006 passed by Additional Judge to the Court of 10th Additional District Judge (Fast Track),

Bhopal in civil suit no.47-A/2005, whereby appellant/plaintiff's suit for declaration of title and joint possession over ½ share and permanent injunction has been dismissed filed in respect of plot no.132-C, situated in Scheme no.13, M.P. Nagar, Bhopal.

2. The plaintiff filed the suit with the averments that the suit plot was developed by the Bhopal Development Authority (in short 'the BDA'). In the year 1980, the plaintiff/appellant was engaged in the business but the defendant/respondent though completed M.B.B.S., was doing house job and was getting only stipend. Father of the parties namely Shri Datar Singh (D.S. Yadav) got the suit plot allotted in the name of Shri Munnasingh vide order dated 22.05.1980 (Ex.P/1) by the BDA and in pursuance thereof, a sum of Rs.2000/- and Rs.8348/- was paid to the BDA vide receipt dated 16.05.1980 & 31.05.1980 (Ex. P/2 & P/3) by father Shri D.S. Yadav as well the plaintiff. Father was Karta of joint Hindu family and was in Government Service. Smt. Raj Kumari is mother of the parties and her brother's son Munna Singh was also living with the family.

Thereafter, on 05.08.1980, upon application of Munna Singh, who had no source of income and as per letter dated 19.08.1980 (Ex.P/4) the name of respondent was also jointly recorded and later on lease deed (Ex.P/5) was also executed on 18.06.1982 in their joint names. Since the amount was paid by Shri D.S.Yadav and the plaintiff, hence Shri Munna Singh after obtaining permission from the BDA vide (Ex.P/6) executed the deed relinquishing his rights in the plot in favour of the respondent without any consideration, as mentioned in the said deed dated 15.10.1984 (Ex.P/7) and as a consequence name of Shri Munna Singh was deleted. The suit

property was always treated as property of the family and a panch faisla (Ex.P/9) was reduced in writing on 06.11.1996 with consent of plaintiff and defendant, acknowledging the said plot to be their joint property. All these documents were given to the plaintiff by the father, who expired on 06.04.1998. On coming to know that the respondent has declined to follow the terms of panch faisla and is claiming himself to be exclusive owner of the plot, the plaintiff instituted the suit for declaration of title and joint possession over ½ share and permanent injunction.

3. The respondent/defendant appeared and filed written statement claiming himself to be exclusive owner of the plot, however admitted execution of the panch faisla dated 06.11.1996 (Ex.P/9) but denied that funds were provided by the father or the plaintiff. It is also contended that as the plaintiff had threatened to commit suicide, in case he is not given half share in the suit plot, the deed (Ex.P/9) was got executed by the father, who later on had given him a writing dated 21.11.1996 (Ex.D/1) disagreeing the panch faisla (Ex.P/9). It is also contended that in the year 1980 he was M.B.B.S. and was earning and the plot was acquired by him out of his own earnings and not by the funds allegedly provided by the father and the plaintiff. On inter alia contentions the suit was prayed to be dismissed.

4. On the basis of pleadings of the parties, learned trial Court framed as many as 8 issues and recorded evidence of the parties. The plaintiff-Vijendra Singh Yadav (PW1) examined himself and the witnesses Shashibhan (PW2), Ranveer Singh Bhadoriya (PW3), Ramesh Singh Bhadoriya (PW4) were examined and also produced documents (Ex.P/1 to

P/9). The defendant-Mahendra Singh (DW1) examined himself and witnesses Smt. Shashi Singh (DW2), Dr. Satendra Singh (DW3), Smt. Rajkumari (DW4) were also examined and also produced documents (Ex.D/1 to D/8).

5. Upon consideration of oral and documentary evidence available on record, learned trial Court vide its judgment and decree dated 31.08.2006 dismissed the suit holding the panch faisla (Ex.P/9) to be inadmissible in evidence, against which instant appeal has been filed by the plaintiff/appellant. An application u/o 41 rule 27 CPC has also been filed by the plaintiff annexing certified copies of a notarized Will dtd. 28.03.1998 and a judgement dtd. 30.11.2006 passed by 1st Addl. District Judge, Gwalior in Civil Suit no. 16-A/2003, which has been opposed by the respondent by filing reply.

6. It is pertinent to mention here and as has been observed by this Court in its order dated 10.08.2022, the original documents (Ex.P/8 and P/9) are missing from the record and as has been observed in the interim order dated 13.02.2023, the photocopies of the aforesaid documents have been filed, out of which, main dispute is in respect of the panch faisla (Ex.P/9) and with a view to understand real nature of the document, the same is reproduced as under:-

श्री

"//पंचफैसला//

प्रथम पक्षकार :– :: महेन्द्र सिंह यादव पुत्र श्री डी.एस. यादव उम्र 40 वर्ष निवासी : पूना हाल मुकाम ई–7 /730 शाहपुरा, भोपाल

द्वितीय पक्षकार :– :: विजेन्द्र सिंह यादव पुत्र श्री डी.एस. यादव उम्र 44 वर्ष निवासी : एच. 31 बघीरा अपार्टमेन्ट अरेरा कालोनी भोपाल ।

दोनों पक्ष आपस में सगे भाई हैं तथा अभी तक अपने माता पिता के साथ सम्मिलित परिवार में निवास करते आ रहे हैं। दोनों पक्ष के पिता श्री ने एक प्लाट क्रं0 132 सी जोन एक महाराणा प्रताप नगर भोपाल में भोपाल विकास प्राधिकरण से तीस वर्ष की लीज पर प्राप्त किया जिसका पंजीयन उप पंजीयक भोपाल के पु0 क्रं0 अ–1 ग्रंथ क्रं0 3230 के पंजीयन क्रं0 2690 दिनांक 12.07.92 पर किया गया है। उक्त प्लाट क्रय करते समय एक अन्य व्यक्ति भी भागीदार था किनतु उक्त भागीदार ने उसका भाग प्रथम पक्ष के हक में त्याग दिया तथा त्याग पत्र का पंजीयन भी उसने प्रथम पक्ष के हक में उप पंजीयक भोपाल के पु0 क्रं0 अ–1 ग्रंथ क्रं0 4028 के पंजीयन क्रं0 256 (क) पर कराया गया है। **इस प्रकार उक्त वर्णित प्लाट प्रथम पक्ष के नाम पर है चूँकि उक्त प्लाट दोनों पक्षकारों के पिता ने प्रथम पक्ष के नाम से क्रय किया है। और उक्त प्लाट पर दोनों पक्षकारों का आधा–आधा हक है।** दोनों पक्षकारों के अभी तक मधुर संबंध है भविष्य में उक्त प्लाट को लेकर दोनों पक्षों के या उनके वारसानों आदि के मध्य कोई मन मुटाव या विवाद उत्पन्न न हो इस कारण दोनों पक्षकारों ने हम पंचों के समक्ष प्रस्ताव रखा कि हम पंच गण उक्त वर्णित प्लाट की ऐसी व्यवस्था करा देवें कि दोनों पक्षों की सुख शांति बनी रहे इसे दृष्टिगत करते हुए हम पंच गणों ने सर्व सम्मति से निम्न बिन्दु तय कर पंच फैसला कर दिया है। जिनका पालन दोनों पक्षकारों को नैतिक रूप से एवं पूर्ण ईमानदारी से करना होगा।

यह कि उक्त वर्णित प्लाट क्रं0 132 सी जोन एक महाराणा प्रताप नगर भोपाल जिसका कुल क्षेत्रफल 1920 वर्गफिट है। आधा–आधा दोनों पक्षों का रहेगा।

यह कि उक्त वर्णित प्लाट का दोनों पक्षकार संयुक्त रूप से निर्माण करावेगे और उसमे लगने वाली समस्त राशि दोनों पक्षकार आधी आधी देवेंगे।

यह कि उक्त प्लाट पर निर्मित दुकानें बनाने के बाद एक–एक दुकान दोनों पक्षकार रखेंगे तथा शेष सभी दुकाने विक्रय कर देंगें विक्रय राशि से ऊपर की मंजिलों का निर्माण कराया जावेगा प्रत्येक मंजिल का निर्माण एक समान होगा और निर्माण उपरान्त दोनों पक्षकार एक–एक मंजिल अपने पास रखेगें। कौन सा पक्षकार कौनसी मंजिल रखेगा यह मंजिल बनने के बाद लाटरी पद्धति से तय किया जावेगा।

यह कि उक्त निर्माण कार्य चार वर्ष की अवधि में अर्थात् सन् 2000 के अन्त तक पूर्ण कराया जावेगा।

यह कि उक्त चार वर्ष की अवधि में दोनों पक्षकार समय–समय पर राशि की व्यवस्था समान रूप से करते रहेगे। और यदि कोई पक्षकार राशि न देवे या आनाकानी करे या किसी कारण से न दे सके तो उस पक्षकार की पूर्ण जिम्मेदारी होगी और वह बैंक में प्रचलित व्यवसायिक दर से ब्याज दूसरे पक्षकार को देने का भागी होगा।

यह कि उक्त वर्णित निर्माण कार्य यदि चार वर्ष में पूर्ण नहीं किया जाता तो प्रथम पक्षकार को यह अधिकार होगा कि वह उक्त निर्मित मकान विक्रय कर द्वितीय पक्ष को सम्पूर्ण राशि मय ब्याज (बैंक में प्रचलित व्यवसायिक दर से ब्याज) के दे देवे।

यह कि उक्त वर्णित प्लाट का स्ट्रेक्चर खड़ा करने के लिये दोनों पक्षकार प्रारंभिक रूप से दो–दो लाख रूपये लगावेगे तथा दोनों पक्षकारों की पैतृक सम्पत्ति जो ग्वालियर में है उसको विक्रय करने के उपरान्त उक्त राशि भी उक्त वर्णित निर्माण कार्य में लगाई जावेगी।

यह कि उक्त प्रारंभिक राशि रूपये दो–दो लाख दोनों पक्षकार पिता श्री को सौंप देगे और जैसे–जैसे निर्माण कार्य में राशि की आवश्यकता होगी द्वितीय पक्ष पिता श्री से राशि लेते रहेगे।

यह कि इसके उपरान्त दुकानों का विक्रय किया जावेगा और यदि दुकान नहीं बिकी तो ऐसी स्थिति में आगे के निर्माण कार्य के लिए जो भी पक्षकार पैसा लगायेगा उसे दूसरा पक्षकार बैंक मे प्रचलित व्यवसायिक दर का ब्याज देवेगा।

यह कि उक्त निर्माण कार्य हेतु बैंक से ऋण प्राप्त किया जा सकेगा।

यह कि उक्त वर्णित प्लाट पर निर्माण कार्य करने का लेखा जोखा द्वितीय पक्षकार स्वच्छ व स्पष्ट रखेगे ताकि प्रथम पक्षकार व्यय की गई राशि का ब्यौरा अपने आयकर रिर्टन में दर्शा सके।

अतएव यह पंच फैसला हम पंचगणों ने दोनों पक्षकारों के अनुरोध पर दोनों पक्षों की सुख शांति एवं समृद्धि के लिये कर दिया और दोनों पक्षकारों ने इस फैसले को मान्य कर सभी पक्षों एवं पंचों ने हस्ताक्षर कर दिये कि सनद रहे व वक्त जरूरत काम आवे। इति दिनांकः 6/11/96''

हस्ताक्षर–पंचगण

(01) (D.S.Yadav)
(02) (R.S.Bhadoria)
(03) (Rajkumari Singh)
(04) (Satyendra Singh)
(05) हस्ता

हस्ताक्षर–प्रथम पक्षकार

हस्ताक्षर–द्वितीय पक्षकार''

7. Learned counsel for the appellant/plaintiff submits that although the suit property is standing in the name of defendant, but at the relevant point of time, father of the parties namely Datar Singh was President of the BDA, who firstly got the plot allotted in the name of Munna Singh S/o Munendra Singh vide document dated 22.05.1980 (Ex.P/1) on payment of installments, which in fact were paid to the BDA in the name of Munna Singh under the signature of appellant/plaintiff vide receipts dated 16.05.1980 and 31.05.1980 (Ex.P/2 and P/3), thereafter upon issuance of a letter dated 19.08.1980 in the name of Munna Singh, the lease deed was executed and as a matter of caution, the name of defendant-Mahendra Singh was got mentioned along with Munna Singh in the lease deed dated

18.06.1982 (Ex.P/5) and with this background Mahendra Singh and Munna Singh became joint owner of the plot in question. Thereafter, vide regd. deed dated 15.10.1984 (Ex.P/7), Munna Singh relinquished his share in the name of defendant-Mahendra Singh without making any payment, as a result of which, the defendant became owner of the plot. He submits that as this plot was acquired by father of the plaintiff and defendant, therefore, in his life time a document 'panch faisla' (Ex.P/9) was executed under the signatures of plaintiff and defendant both, whereby it was acknowledged that the plot in question is of the joint ownership of the plaintiff and defendant having 1/2-1/2 share each. He submits that mother Smt. Rajkumari (DW-4) has clearly stated that the funds were provided by father Datar Singh and nothing was paid by Munna Singh, who is her brother's son. By placing reliance on the decisions of Supreme Court in the case of Korukonda Chalapathi Rao & anr. vs. Korukonda Annapurna Sampath Kumar **2021(11) SCALE 596;** K. Arumuga Velaiah vs. P.R. Ramasamy and another **(2022) 3 SCC 757;** and Ravinder Kaur Grewal and others vs. Manjit Kaur and others (**2019) 8 SCC 729,** learned counsel for the appellant submits that panch faisla (Ex.P/9) is admissible in evidence and being an admitted document ought to have been taken into consideration by learned trial Court, which has wrongly been ignored for want of registration. With the aforesaid submissions, he prays for allowing the first appeal.

8. Learned counsel appearing for the respondent/defendant submits that the defendant is exclusive owner and in possession of the plot which is clear from the documentary evidence existing in his favour and he himself

paid the requisite amount mentioned in the documents. He submits that panch faisla (Ex.P/9) was got executed under pressure and upon threatening of committing suicide given by the plaintiff, therefore, the same cannot be considered and further it being unregistered, is not admissible in evidence, which also does not confer any title on the plaintiff, because a document whereby title has been created, is compulsorily registrable. In support of his submissions, he placed reliance on the decisions of Supreme Court in the case of Korukonda Chalapathi Rao (**supra**); S. Kaladevi vs. V.R. Somasundaram and others **(2010) 5 SCC 401,** Balram Singh vs. Kelo Devi **2022(14) SCALE 148** and decision of a coordinate Bench of Punjab & Haryana High Court in the case of Jagdish vs. Rajwanti **AIR 2008 P&H 27**. With the aforesaid submissions he prays for dismissal of the first appeal.

9. Heard learned counsel for the parties and perused the record.

10. Following points for determination are arising in this appeal for consideration of this Court :

i) Whether panch faisla dtd. 06.11.1996 (Ex.P/9) acknowledging previous rights and being an admitted document, could be ignored for want of registration ?

ii) Whether the additional documents filed along with application under order 41 rule 27 CPC are relevant and necessary for deciding the controversy involved in the case ?

iii) Whether on the available evidence, the plaintiff is entitled for declaration of title and joint possession over ½ share ?

11. It has been specifically admitted by mother of parties to the suit, Smt. Rajkumari (DW-4) that Datar Singh had purchased the plot of Maharana Pratap Nagar in the name of Munna Singh. The respondent/defendant with a view to support the plea to the effect that he was earning, filed documents (Ex.D/2 to D/8) but the mother of the parties Smt. Rajkumari (DW4) who knew everything, has deposed against the defendant. Smt. Shashi Singh (DW-2) and her husband Shri Satendra Singh (DW-3) also have not deposed that the funds were provided by respondent himself and not by the father. Apparently, learned trial Court while deciding the issue no. 1 & 2, has not considered the statement of mother of parties namely Rajkumari (PW4) and placing the entire burden on the shoulders of the plaintiff, decided issue no. 1 & 2 in negative and against the plaintiff. In my considered opinion the defendant being beneficiary in the lease deed (Ex.P/5) and relinquishment deed (Ex.P/7), it was for him to prove these documents by producing Munna Singh in evidence and not by the plaintiff. Fact remains that even the originals of all the documents of title of the defendant, have been produced by the plaintiff, which is also one of the circumstance, to draw inference in favour of the plaintiff.

12. It is also apparent that while deciding the issue no. 1 & 2 learned Court below in presence of documentary evidence, has not considered oral evidence, which looking to the case of both the parties was admissible in evidence, especially in the circumstances when all the original title documents were produced by the plaintiff himself, which has not been given any weightage by learned trial Court while considering this aspect in

para 14 of the impugned judgment, whereas the said fact further proves jointness of the family and its properties.

13. The defendant has tried to discard the panch faisla (Ex.P/9) saying that it was got executed by the father under pressure, and the father had later on given him a writing dated 21.11.1996 (Ex.D/1) (photocopy of which has been filed on record). Upon due consideration, the said writing dtd. 21.11.1996 has been discarded by learned Court below for want of proof. Further, while deciding issue no.4(b) learned Court below has discussed evidence of the parties and clearly held that the defendant has failed to establish that the deed (Ex.P/9) was executed under pressure due to threatening of committing suicide given by the plaintiff and decided this issue as not proved. However, at the same time learned trial Court has without recording any finding regarding proof of the panch faisla (Ex.P/9) held the issue no.4(a) not proved, whereas the findings recorded in para 22 shows that learned trial Court has impliedly held the panch faisla (Ex.P/9) to be a proven document, which has been discarded only on the basis of it being unregistered. Just contrary to discussion made in para 19 to 22, learned trial Court in half sentence of next paragraph 23, has held that panch faisla is not proved, whereas the issue no.5 was not in relation to proof of panch faisla (Ex.P/9).

14. The defendant Mahendra Singh who is a doctor and retired from Army service, in para 25 of his statement admitted that the document (Ex.P/1) bears signature of his father, as a president of BDA. Further, in para 27 he admits that all the original documents are not in his possession, because they were in possession of his father. In para 29 he says that he

became separate when his father was in service, who had a house in Gwalior, 7-8 acres land in Bhind and agriculture land near Bhopal. In para 31 he says that application dtd. 05.08.1980 was filed by Munna Singh with the contention that because of non-availability of fund for construction of house, he wants to make Mahendra Singh his partner. In para 33 he has categorically admitted execution of panch faisla (Ex.P/9) and also admitted that he never made any complaint to the police. In para 34 he admits possession of original of Ex.D/1 with him, however, the same has been discarded by learned trial Court from the evidence. In para 34 he admits his signature on the reverse of stamp of document (Ex.P/9) regarding its purchase. It is well settled that if a party possesses original document but does not produce before the Court, an adverse inference shall be drawn against him. If photocopy of Ex.D/1 is considered as it exists, then it further proves the execution of panch faisla (Ex.P/9).

15. Although, in para 14 of the statement of plaintiff – Vijendra Singh, to some extent cross-examination has been done in respect of the panch faisla (Ex.P/9) but no cross-examination has been done with respect to the contention of the defendant about its execution under pressure and because of threatening of committing suicide given by the plaintiff-Vijendra Singh.

16. Admittedly, panch faisla was executed on 06.11.1996 and father of the parties to the suit, died in the year 1998 and in his life time, the defendant neither objected to panch faisla nor made any complaint to the police and now in the Court's statement has admitted execution of panch faisla and further failed to prove execution of the document (Ex.D/1). It is

well settled that an admission is a best piece of evidence and a fact which is admitted, need not be proved.

17. The Supreme Court in the case of S.R. Srinivasa & Ors. Vs. S. Padmavathamma (2010) 5 SCC 274, has held as under :

> "44. It is undoubtedly correct that a true and clear admission would provide the best proof of the facts admitted. It may prove to be decisive unless successfully withdrawn or proved to be erroneous. The legal position with regard to admissions and their evidentiary value has been dilated upon by this Court in many cases. We may notice some of them.
>
> 45. In the case of Narayan Bhagwantrao Gosavi Balajiwale v. Gopal Vinayak Gosavi (1960) 1 SCR 773 it was observed as follows:
>
> > "An admission is the best evidence that an opposing party can rely upon, and though not conclusive, is decisive of the matter, unless successfully withdrawn or proved erroneous."
>
> 46. In the case of Nagindas Ramdas v. Dalpatram Ichharam, (1974) 1 SCC 242, it has been observed:
>
> > "Admissions, if true and clear are by far the best proof of the facts admitted. Admissions in pleadings or judicial admissions, admissible under Section 58 of the Evidence Act, made by the parties or their agents at or before the hearing of the case, stand on a higher footing than evidentiary admissions. The former class of admissions are fully binding on the party that makes them and constitute a waiver of proof. They by themselves can be made the foundation of the rights of the parties. On the other hand, evidentiary admissions which are receivable at the trial as evidence, are by themselves, not conclusive. They can be shown to be wrong."
>
> 47. The aforesaid two judgments along with some other earlier judgments of this Court were considered by this Court in the case of Gautam Sarup v. Leela Jetly,(2008) 7 SCC 85 wherein it was observed as follows:
>
> > "16.A thing admitted in view of Section 58 of the Evidence Act need not be proved. Order 8 Rule 5 of the Code of Civil Procedure provides that even a vague or evasive denial may be treated to be an admission in which event the court may pass a decree in favour of the plaintiff. Relying on or on the basis thereof a suit, having regard to the provisions of Order 12 Rule 6 of the Code of Civil Procedure may also be decreed on admission. It is one thing to say that without resiling from an admission, it would be permissible to explain under what circumstances the same had been made or it was made under a mistaken belief or to clarify one's stand inter alia in regard to the extent or effect of such admission, but it is another thing to say that a person can be permitted to totally resile there from."

****

"28. What, therefore, emerges from the discussions made hereinbefore is that a categorical admission cannot be resiled from but, in a given case, it may be explained or clarified. Offering explanation in regard to an admission or explaining away the same, however, would depend upon the nature and character thereof. It may be that a defendant is entitled to take an alternative plea. Such alternative pleas, however, cannot be mutually destructive of each other."

18. Further, in the case of Vathsala Manickavasagam & Ors.Vs. N. Ganesan & Anr. (2013) 9 SCC 152, the Supreme Court has held as under :

"24. While examining the contents of the said letter, the Trial Court concluded that the three house properties, referred to therein, only related to the suit scheduled properties. Going by the statements made by the first respondent himself in the said letter Ex.A-17, it was explicit and apparent that the first respondent was fully aware that even though the properties were in his name, he was not responsible for purchasing the same in his name and that he was not interested in having all the three properties for himself.

25. When we examine the said document, we find that the conclusions arrived at by the trial Court based on the contents of Ex.A-17, cannot be found fault with. In fact, Ex.A-17, came into existence only on 24.06.1974. It is not as if the first respondent disowned the said document. The contents of the said document were also not disputed by the first respondent. It is not the case of the first respondent that the three houses referred to in the said document, related to any other properties other than the suit- scheduled properties. It is also not his case that the name and persons mentioned therein, related to somebody else other than his own brother, the second plaintiff and his mother. The first respondent had also not lead any evidence to disprove Ex.A-17.

26. Keeping the above factors in mind, when we apply Section 17 of the Evidence Act, we find that Ex.A-17 is a statement and the details contained therein, which pertains to the suit scheduled properties, constituted a tacit admission at the instance of the first respondent. If after Ex.A- 3, release deed of 1959 and the partition deed, Ex.A-28 of 1973, in 1974, the first respondent on his own, came forward with the said letter to the third plaintiff admitting in so many words as to the status of the suit scheduled properties, vis-à-vis the concerned parties themselves, we fail to understand as to what wrong was committed by the Trial Court in placing reliance upon the same to decree the suit. If in reality, the first respondent had his own reservations as to the ownership of the suit scheduled properties, in particular items 1 and 2, no one prevented him from stating so in uncontroverted terms, while communicating the same in the form of writing, to one of his own brothers. In fact, the grievance of the second plaintiff Saravanamurthi, was that since the properties were purchased in the name of the first respondent and he being the eldest son of the family, was having an upper hand

over all the others and was trying to snatch away the properties. The tone and tenor of the letter viz., Ex.A- 17, authored by the first respondent, discloses that he too was not very keen to grab all the three properties, simply because those properties were purchased in his name. He went to the extent of stating that he was not responsible for purchasing all the three house properties in his name. He went one step further and stated that he did not want to possess all the three properties all time to come. If, such a clear-cut mindset was expressed by the first respondent though Ex.A-17, it was futile on his part to have come forward with any other story after the suit came to be filed by the plaintiffs.

****

35. Having regard to such a prevaricating stand taken by the first respondent, as compared to his tacit admission made in Ex.A-17, we are of the considered view that the Trial Court was fully justified in holding that all the three items of the suit scheduled properties, were joint family properties, in which the plaintiffs and the first respondent were entitled for equal share."

19. The supreme court in its recent decision in the case of Korukonda Chalapathi Rao (supra) has followed its earlier decision in the case of Kale Vs. Dy. Director of Consolidation **AIR 1976 SC 807** and held as under :

"14. There is a long line of judgments of this court dealing with the question as to whether a family arrangement is compulsorily registrable. We need only refer to the case of Kale v. Dy. Director of Consolidation, AIR 1976 SC 807. This Court has summed up the essentials of the family settlement in the following proposition:

> "10. In other words to put the binding effect and the essentials of a family settlement in a concretised form, the matter may be reduced into the form of the following propositions:
>
> "(1) The family settlement must be a bona fide one so as to resolve family disputes and rival claims by a fair and equitable division or allotment of properties between the various members of the family;
>
> (2) The said settlement must be voluntary and should not be induced by fraud, coercion or undue influence;
>
> (3) The family arrangement may be even oral in which case no registration is necessary;
>
> (4) It is well settled that registration would be necessary only if the terms of the family arrangement are reduced into writing. Here also, a distinction should be made between a document containing the terms and recitals of a family arrangement made under the document and a mere memorandum prepared after the family arrangement had already been made either for the purpose of the record

> or for information of the court for making necessary mutation. In such a case the memorandum itself does not create or extinguish any rights in immovable properties and therefore does not fall within the mischief of Section 17(2) of the Registration Act and is, therefore, not compulsorily registrable;
>
> (5) The members who may be parties to the family arrangement must have some antecedent title, claim or interest even a possible claim in the property which is acknowledged by the parties to the settlement. Even if one of the parties to the settlement has no title but under the arrangement the other party relinquishes all its claims or titles in favour of such a person and acknowledges him to be the sole owner, then the antecedent title must be assumed and the family arrangement will be upheld and the courts will find no difficulty in giving assent to the same;
>
> (6) Even if bona fide disputes, present or possible, which may not involve legal claims are settled by a bona fide family arrangement which is fair and equitable the family arrangement is final and binding on the parties to the settlement." (Emphasis supplied)

20. In view of the aforesaid settled legal position and in the facts of this case, contention of the appellant to the effect that panch faisla (Ex.P/9) dated 06.11.1996 merely sets out the arrangement arrived at between the brothers, which is the family arrangement and it was a mere record of the past transaction and therefore by itself it did not create or extinguish any right over immovable property, appears to be correct. Resultantly, since the document is only a record of what had already happened in the past, it did not attract Section 17(1)(e) of the Registration Act and the law did not mandate registration.

21. While deciding issue no.3 learned Court below has taken into consideration the evidence about separate living of the parties but has not considered that till now there is no partition of the joint family properties and accordingly held that the plaintiff and defendant are not in possession of the suit plot as members of the joint family. Admittedly, the parties are still in possession of the joint family property, which has not been

partitioned till now. It is well settled that merely because of separate living, separation of joint family property cannot be presumed.

22. It has been observed long back by the Apex Court in the case of Mudigowda Gowdappa Sankh and Ors. v. Ramchandra Revgowda Sankh (dead) by his legal representatives and Anr. AIR 1969 SC 1076 :

> ".....6. The law on this aspect of the case is well settled. Of course there is no presumption that a Hindu family merely because it is joint, possesses any joint property. The burden of proving that any particular property is joint family property, is, therefore, in the first instance upon the person who claims it a coparcenery property. But if the possession of a nucleus of the joint family property is either admitted or proved, any acquisition made by a member of the joint family is presumed to be joint family property. This is however subject to the limitation that the joint family property must be such as with its aid the property in question could have been acquired. It is only after the possession of an adequate nucleus is shown, that the onus shifts on to the person who claims the property as self-acquisition to affirmatively make out that the property was acquired without any aid from the family estate.

23. In presence of oral and documentary evidence available on record, it is apparent that the suit plot was acquired by the funds provided by the father and the panch faisla (Ex.P/9) came in existence with consent of all concerned. The Apex Court in the case of K.V. Narayanaswami Iyer v. K.V. Ramakrishna Iyer and Ors. AIR 1965 SC 289, has held as under :

> "15. The legal position is well settled that if in fact at the date of acquisition of a particular property the joint family had sufficient nucleus for acquiring it, the property in the name of any member of the joint family should be presumed to be acquired from out of family funds and so to form part of the joint family property, unless the contrary is shown."

Therefore, in my considered opinion the suit property is joint property of the plaintiff and defendant, but learned trial Court has by ignoring the admissible evidence and on wrong assumptions held that the issues are not proved and dismissed the suit wrongly.

24. For the simple reason that the veracity of judgment and decree dtd. 30.11.2006 and will dtd. 28.03.1998, is under consideration in another

pending appeal, in which subject matter is also different, therefore, the documents filed along with the application u/order 41 rule 27 CPC do not appear to be relevant or necessary for deciding real controversy involved in this appeal, as such the application under order 41 rule 27 CPC stands dismissed.

25. Resultantly, by setting aside the impugned judgement and decree of trial Court, the suit filed for declaration of title and joint possession over ½ share of the suit plot stands decreed. However, the plaintiff is not entitled for decree of permanent injunction as prayed for in the suit.

26. Both the parties shall bear their own cost.

27. Registry is directed to prepare decree accordingly.

(DWARKA DHISH BANSAL)
JUDGE

pb