Reportable

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NOS.4731-4732 OF 2010

T. Ravi & Anr. … Appellants

Vs.

B. Chinna Narasimha & Ors. etc. … Respondents

With

[Civil Appeal Nos.4733 of 2010, 4734-35 of 2010, 4736 of 2010, 4837-38 of 2010, 6536-37 of 2010, 4276-77 of 2011, Civil Appeal Nos…4319-4320 of 2017 (@ SLP(C) Nos.23864-23865 of 2011), Civil Appeal Nos.1196-97 of 2012 and Civil Appeal Nos.7105-06 of 2010.]

J U D G M E N T

ARUN MISHRA, J.

1. Leave granted in S.L.P. (C) Nos. 23864-23865 of 2011.

2. In the appeals, the final decree which has been drawn up in a partition suit with respect to item No.6 of Schedule 'B' pertaining to land admeasuring 68 acres 10 guntas comprised in survey Nos. 63, 68, 69 and 70 situated at village Madhapur, District Ranga Reddy, Hyderabad is in question.

3. The property was matruka property of Late Mohd. Nawab Jung who passed away on 25.4.1935. Civil Suit No.82/1935 was instituted by Mohd. Hashim Ali Khan, son of Mohd. Nawab, in Darul Qaza City Court, Hyderabad, for partition of matruka properties of Late Nawab comprised in Schedules ‘A’, ‘B’ and ‘C’. The suit was contested, *inter alia*, by defendant No. 1. Darul Qaza Court was abolished in the year 1951. On abolition of original jurisdiction of the High Court, the case was assigned to the City Civil Court. It appears that later on as the file was not received by the City Civil Court from the Custodian, it passed order dated 8.1.1955 to the effect that the file of the case was not yet received, the plaintiff was also absent, as such the case be closed for the time being and be revived only on receipt of the file and on an application to be filed by the plaintiff. The city civil court understood the order to be of dismissal of suit in default. The plaintiff moved an application for revival of the suit. The city civil court directed the plaintiff vide order dated 1.12.1955 to deposit Rs.50 towards costs and if the costs were not paid by 15.12.1955, the suit shall stand dismissed. The plaintiff could not pay the cost within the stipulated time and prayed for extension of time which was not extended. The order was questioned by the plaintiff in the High Court by way of filing an appeal. The High Court decided the appeal vide order dated 23.1.1962 and held that vide order dated 8.1.1955, the suit was not dismissed for default. It was an order adjourning the suit with a direction that it may be revived only on receipt of the file from the Custodian, therefore, there was no necessity for the plaintiff to file an application

under Order 9 Rule 9 CPC for restoration. Thus the trial court had no jurisdiction to direct the plaintiff vide order dated 1.12.1955 to pay the cost of Rs.50 to the defendants on or before 15.12.1955 as a condition precedent. The appeal was allowed and the order dated 1.12.1955 was set aside. The order passed by the High Court attained finality. Thereafter, the suit was re-numbered as Civil Suit No.42/1962 in the city civil court. Hamid Ali Khan, defendant No.1 sold Item No.6 of Schedule 'B' property in area 68 acres 10 guntas on 23.11.1959 to Bala Mallaiah vide registered sale deed. He sold the share inherited by other co-heirs also to Bala Mallaiah. It was found in the preliminary decree for partition dated 24.11.1970 that defendant No.1, Hamid Ali Khan, was having only 14/104th share in matruka properties. The plaintiff, and defendant Nos.2, 3 and 12 were also having 14/104th share each. Defendant Nos.4 to 6, daughters of Nawab had 7/104th share in matruka properties. Nurunnisa Begum, widow of Late Nawab, defendant No.7 was entitled to 13/104th share in matruka properties.

4. Aggrieved by the preliminary decree for partition determining the shares to the aforesaid extent, the plaintiff and legal heirs of defendant No.1 i.e. defendant Nos.23 to 25 and defendant No.27 preferred appeal in the year 1972 before the High Court. Cross-objections were also preferred by defendant No.6 – Shareefunnisa Begum. The High Court dismissed the appeals and allowed the cross-objections of defendant No.6 with respect to item No.4 of Schedule 'A' property. The plaintiff questioned the decision

by way of filing LPA No.199/1977 and the same was dismissed vide order dated 12.11.1976, the decision with respect to preliminary decree has attained finality.

5. Defendant No.25 – daughter of defendant No.1 – filed IA No.854/1984 for passing a final decree in terms of the preliminary decree passed in the partition suit. During the pendency of the final decree proceedings, an Advocate-Commissioner was appointed to divide the suit schedule land by metes and bounds as per the preliminary decree passed on 24.11.1970 for which an application (IA No.31/1989) was filed on 16.1.1989. He submitted a report in December, 1993 in respect of item No.6 of Schedule 'B' of preliminary decree dated 24.11.1970. The Advocate-Commissioner divided the suit schedule property on 28.11.1993. He also noticed that third parties were in possession of the land and he had also seen a signboard of Surya Enclave Developers. The sale transaction took place during the pendency of the preliminary decree proceedings on 23.11.1959. The LRs. of Bala Mallaiah were entitled to the share of Hamid Ali Khan, defendant No.1. On 6.10.1997, pending final decree proceedings, plaintiff and defendant Nos.4 and 14 to 17 i.e. LRs. of defendant No.5 assigned their interest in item No. 6 of plaint 'B' schedule properties in favour of D.A.P. Containers Pvt. Ltd. The assignees were brought on record as defendant Nos.99 to 112 in the final decree proceedings vide order dated 22.4.1999 passed by the Senior Civil Judge, City Civil Court, Hyderabad.

6. On 16.7.2001, L.Rs. of Bala Mallaiah filed IA No.978/2001 and sought impleadment to contest the matter in respect of item No.6 of plaint 'B' Schedule properties. Vide order dated 14.10.2003, LRs. of Bala Mallaiah were impleaded. On 2.4.2004, subsequent purchasers of the disputed property filed an application (IA No. 544/2004) under Order VII Rule 11 CPC for rejection of the final decree proceedings. It was resisted by appellants and rejected by the court vide order dated 5.7.2005 and ultimately the final decree came to be passed on 7.7.2005 in terms of the preliminary decree dated 24.11.1970. In the final decree proceedings initiated by IA No.854/1984, share of each heir was recognized in the disputed property being Item No.6 of Schedule 'B' plaint. The rights of Hamid Ali, vendor of Bala Mallaiah and subsequent purchaser's share was recognized to the extent of 14/104th share. Rights of the assignees/appellants were also recognized in terms of the assignment deed and separate possession was given to them. The final decree was questioned in Appeal Nos.385 and 386 of 2006 which were filed by LRs. of Bala Mallaiah and purchasers from them with respect to item No.6 of plaint 'B' schedule property. The appeals were dismissed on 27.4.2007. Aggrieved thereby, Second Appeal No.410/2008 was preferred. Appeal had been allowed by the impugned judgment and decree dated 15.4.2010.

7. Before the final decree could be passed in the case, civil suit being OS No.294/1993 was filed for perpetual injunction by L.Rs. of Bala Mallaiah against Hashim Ali Khan and others on the basis of sale deed dated 23.11.1959. The suit was

dismissed by Junior Civil Judge, Hyderabad West & South vide judgment and decree dated 8.6.1998. It was held that the plaintiffs were not entitled to claim adverse possession over the suit schedule property and that their purchase and possession was subject to the result of the partition suit, O.S. No.42/1962. It was also held that the possession of the plaintiff could not be said to be rightful possession and they could claim only to the extent of their vendor's share and not over the entire property, and thus, they were not entitled to the relief of injunction against the defendants. As against the judgment and decree of the trial court, an appeal was preferred in the Court of Additional District Judge, NTR Nagar, Hyderabad and the same was dismissed on 20.7.2000. Second Appeal No.465/2001 preferred against the same in the High Court was dismissed vide judgment and order dated 26.9.2001.

8. Land grabbing proceedings under the Andhra Pradesh Land Grabbing (Prohibition) Act, 1982 initiated by the L.Rs. of Bala Mallaiah were dismissed by the Special Court in LGC No.148/1996 vide order dated 13.5.1997. It was held that the application was not maintainable. The court took cognizance of the preliminary decree proceedings, appointment of the Commissioner and also held that it was not open to contend that the doctrine of *lis pendens* had no application. The application was ultimately dismissed. The order was questioned by way of filing W.P. No.15577/2001 in the High Court of Andhra Pradesh. The High Court simply observed that the observations made by the special court would not come in the way of the petitioners to

work out their rights in accordance with law in the partition suit, that is to say in the final decree proceedings.

9. There was yet another litigation initiated by Boddam Narsimha, nephew of Bala Mallaiah. On 16.12.1998 an application was filed before the Tribunal, Ranga Reddy District, seeking declaration of protected tenancy under section 37A of the A.P. (Telangana Area) Tenancy and Agricultural Lands Act, 1950. The same was dismissed vide order dated 24.8.1999. The appeal preferred to the Joint Collector was also dismissed on 13.3.2000. CRP No.2229/2000 before the High Court of Judicature at Andhra Pradesh was dismissed by the Single Judge vide order dated 16.4.2001. Aggrieved thereby, C.A. No.3429/2002 - *Boddam Narsimha v. Hasan Ali Khan (dead) by LRs. & Ors*. - (2007) 11 SCC 410 was filed, and the same was also dismissed by this Court.

10. The High Court while passing the impugned judgment and decree under appeal has held that the sale deed dated 23.11.1959 was not hit by the principle of *lis pendens* under section 52 of the Transfer of Property Act. During the pendency of the suit, defendant No.1 had leased out the land to Bala Mallaiah and later on had alienated the same on 23.11.1959. The decision of this Court in *Boddam Narsimha* (supra) had been relied upon to hold that Bala Mallaiah was declared as Pattedar, that would bind all the parties. It was necessary for the plaintiff to take steps to get the sale deed dated 23.11.1959 cancelled in accordance with law. It has also been held that as the sale by

defendant No. 1 to Bala Mallaiah was not effected during *lis pendens*, in the absence of challenge to the sale deed and due to non-impleadment in the suit, by virtue of adverse possession, title has been perfected. At the same time, the High Court has held that till the final decree is passed the suit is said to be pending and the preliminary decree only determines the rights of the parties. Thus, the final decree which has been passed by the trial court with respect to item No.6 of plaint 'B' schedule property was impracticable.

11. It was submitted by learned senior counsel appearing on behalf of the appellants that in fact there was no dismissal of the suit in 1955 as held by the High Court in the year 1962. Thus, the sale deed dated 23.11.1959 was clearly during *lis pendens*. The suit was filed in the year 1935 and the preliminary decree for partition was passed in the year 1970 and final decree has been passed in 2005. It was further contended that it was not open to defendant No.1 to sell more than his share. He had no authority to sell the land belonging to the share of other co-heirs as Muslims inherit the property as tenants-in-common and not as joint tenants. It was further submitted that there was no necessity of questioning the sale deed as it was subject to the provisions of *lis pendens* contained in section 52 of T.P. Act. The High Court has gravely erred in law in holding that the title had been perfected by virtue of adverse possession. It was also contended that this Court in *Boddam Narsimha* (supra) did not adjudicate the question of title of Bala Mallaiah. Thus, the High Court has gravely erred in law in reversing the judgment and decree passed by the trial court as affirmed by the first appellate court. The High

Court has also erred in law in holding that it was impracticable to pass the decree with respect to item No.6 of schedule ‘B’ property.

Learned senior counsel appearing on behalf of the appellants submitted that the decision in Civil Suit No.289/1993 for permanent injunction which was based upon title, operates as *res judicata* on various issues. The plea of estoppel has also been raised on behalf of the appellants. It was further submitted that the plea of equity with respect to partition of property was not available to Bala Mallaiah or to the purchasers from him.

It was also submitted on behalf of the appellants that the final decree proceedings qua other item No.2 of schedule ‘B’ property have attained finality in which the order passed by the Division Bench of the High Court of Andhra Pradesh in LPA No.104/1997 has been affirmed by this Court by a speaking order passed in SLP [C] No.3558/1999 decided on 1.10.1999. Thus, the decision of this Court is binding upon the parties and the findings recorded by the High Court therein on questions of law in its judgment have attained finality. Thus, the High Court has erred in law in holding otherwise.

12. Learned senior counsel appearing on behalf of respondents have submitted that the sale deed dated 23.11.1959 in favour of Bala Mallaiah is valid and binding as disputed land could have been alienated even during the pendency of the suit for partition. It was strenuously submitted on behalf of the respondents that the sale in question could not be said to be during *lis pendens* as the suit in fact stood dismissed in 1955 and was later on revived by the High Court in 1962. The decision of this Court in

Boddam Narsimha (supra) is binding in which foundational basis for the judgment was the fact that Bala Mallaiah was a pattedar of the land, and it was necessary to avoid the sale deed in question by getting it cancelled in accordance with law within the period of limitation and that by virtue of adverse possession, the right and interest had been perfected by the purchasers. It was also submitted that even otherwise, the equities available to a purchaser ought to have been applied in the present case as the principle of equitable adjustment is applicable to Mohammedan Law and the disputed property ought to have been allotted to the share of defendant No.1 in order to adjust the equities without affecting the rights of other co-heirs.

It was further urged that in view of the decision in Civil Suit No. 294/1993, various questions were left open to be agitated in the final decree proceedings. It was also submitted that in the judgment dated 24.11.1970 with regard to preliminary decree in para 93, purchasers were given the liberty to raise the question of equity in the final decree proceedings. Thus, the High Court has rightly interfered with the final decree with respect to the disputed property. Even if section 52 of the T.P. Act is applicable, the transactions hit by *lis pendens* are not void. Bala Mallaiah had acquired the rights of a pattedar, no decree could have been passed in favour of L.Rs. of Late Nawab Jung. Considering the conduct of the appellants, no case for interference is made out. They cannot approbate and reprobate.

13. Following questions arise for consideration under the appeals:-

(i) Whether the decision in Original Suit No.294 of 1993 operates as *res judicata*, if yes to what extent?

(ii) Whether the sale deed dated 23.11.1959 executed by defendant no.1 in favour of Bala Mallaiah is hit by doctrine of *lis pendens*?

(iii) Whether section 52 of T.P. Act renders a transfer *pendente lite* void ?

(iv) What is the effect of preliminary decree for partition and the extent to which it is binding ?

(v) Whether it was necessary to file a suit for cancellation of sale deed dated 23.11.1959?

(vi) Whether Bala Mallaiah, his heirs and purchasers had perfected their right, title and interest by virtue of adverse possession?

(vii) Whether under the Muslim law, defendant no.1 being a co-sharer could have alienated the share of other co-sharers in the disputed property?

(viii) Whether the purchaser has a right to claim equity for allotment of Item No.6 of Schedule 'B' property in final decree proceedings in suit for partition? If yes, to what extent ?

(ix) Whether sale was for legal necessity, and thus binding ?

(x) What is the effect of proceedings under the Tenancy Act, 1950 ?

(xi) What is the effect of decision of this Court and High Court with respect to final decree proceedings in Item No.2 of Schedule 'B' property ?

(xii) Whether there is waiver of right by appellants ?

(xiii) Whether appellants are guilty of delay or laches ?

(xiv) What is the effect of the decision of the Court under the Urban Land Ceiling Act?

(i) In re : whether the decision in Original Suit No.294 of 1993 operates as *res judicata*, if yes, to what extent?

14. Twelve LRs. of Bala Mallaiah filed the aforesaid suit against Mohd. Hasim Ali Khan and 13 other heirs of Late Nawab Jung. The suit was with respect to Item No.6 of Schedule 'B' that is with respect to survey Nos.63 and 68 to 70 comprised in area 68 acres 10 guntas situated at village Madhapur in erstwhile West Taluk, Hyderabad district now known as Serilingampally Mandal.

15. It was averred in the plaint that Hamid Ali Khan had sold the land to Bala Mallaiah by sale deed dated 23.11.1959 after obtaining due permission under the Andhra Pradesh Tenancy and Agricultural Lands Act, 1950 (hereinafter referred to as 'the Act of 1950'). Though the land was purchased in the name of Bala Mallaiah but it was his joint family property along with two brothers, namely, Komaraiah and Agaiah. Bala Mallaiah died in the year 1975. His undivided 1/3rd share devolved upon plaintiff Nos.1 and 2. Plaintiff Nos.3 and 4 are sons of plaintiff No.1 and plaintiff No.5 is the son of plaintiff No.2. Komaraiah, brother of Bala Mallaiah also died and his 1/3rd interest had devolved upon plaintiff Nos.6 and 7.

Agaiah – plaintiff No.8 is the brother of Bala Mallaiah and plaintiff Nos.9 to 12 are his sons.

It was further averred that the plaintiff entered into a developer's agreement with respect to residential plots with M/s. Surya Land Developers & Promoters with respect to 13 acres 17 guntas forming part of survey No.68 and 12 acres 31 guntas in survey No.69. Another agreement was entered into with Bapuji Estates with respect to 6 acres of area out of survey No.69. Plots comprised in survey Nos.68 & 69 were also sold to various persons. Survey No.69 was also sold in entirety. A preliminary decree for partition was passed in O.S. No. 42/1962 in the year 1970 which comprised of disputed property also. Bala Mallaiah or the plaintiffs and other heirs were not impleaded as parties in the aforesaid suit for partition and under the guise of decree the defendants were claiming ownership and threatening to dispossess the plaintiffs forcibly. In the suit for partition, during final decree proceedings, an Advocate-Commissioner had been appointed who visited the disputed property on 15.8.1993. Hence, suit No.294/1993 was filed for perpetual injunction.

16. The defendants in their written statement contended that the suit was not maintainable. The preliminary decree for partition dated 24.11.1970 was binding in which shares of respective parties had been declared. Suit for partition was filed in the year 1935. The sale transaction between Hamid Ali Khan and Bala Mallaiah was void and conferred no right, title or interest upon the plaintiffs. Plaintiffs had no right

to interfere in the shares allotted to other co-heirs in the suit for partition. The property in question was ancestral property. The findings recorded in preliminary decree against defendant No.1, vendor of Bala Mallaiah are binding upon the plaintiffs, and as such they are not entitled for any relief.

17. It is apparent that the suit for permanent injunction was filed by the plaintiffs on the basis of sale deed dated 23.11.1959 in which it was also submitted that it was not during *lis pendens*. Plea of adverse possession had also been raised which was negatived. They claimed injunction on the basis of possession under the sale deed dated 23.11.1959. The trial court in the aforesaid civil suit gave the following findings against the plaintiff : (i) that the purchase was hit by doctrine of *lis pendens* so that they are not entitled for relief of injunction against the defendants who are co-sharers as per the preliminary decree dated 24.11.1970 passed in the partition suit; (ii) it was also held that the possession of the plaintiff could not be said to be a rightful possession. It is not open to the plaintiff to claim right on the basis of sale deed on the ground that they were not parties to the partition suit. It was also held that whatever their vendors would get in the suit for partition, to that extent they would be entitled to and they could not claim rights over the entire property; (iii) the plea of adverse possession was also negatived by the trial court on the ground that the purchase was during *lis pendens* and there was no pleading or evidence regarding adverse possession.

18. The judgment was affirmed in the first appeal vide judgment and decree dated 8.6.1988 passed by the Court of II Additional District Judge, NTR Nagar, Hyderabad in A.S. No.72/1998. It was held that the sale deed was hit by doctrine of lis pendens. The first appellate court also held that the vendor of Bala Mallaiah namely, Hamid Ali Khan, defendant 1, had no right to sell the entire dispute property to Bala Malliah as absolute owner. The plaintiffs could claim right over the property to the extent of vendor of Bala Mallaiah. It was also held that the land grabbing case LGC No.148/1996 was dismissed which order had attained finality and barred the present suit. Injunction could not be granted in view of the preliminary decree for partition which had been passed as it would tantamount to granting injunction against the decree-holders for enforcing their lawful decree. Being a purchaser *lis pendens*, it is open to the plaintiff to approach the court where the final decree proceedings were pending to work out available equity to the extent of vendor's share. Against the said decision in first appeal, Second Appeal No.465/2011 was filed in the High Court of Andhra Pradesh at Hyderabad which was dismissed *in limine* vide order dated 26.9.2011 as no substantial question of law was found involved in the appeal. Judgment and decrees of courts below were thus affirmed.

19. In view of the categorical findings recorded by the trial court and first appellate court it is apparent that the sale deed dated 23.11.1959 was hit by doctrine of *lis pendens* and secondly on the basis of the said sale deed, L.Rs. of Bala Mallaiah

could have claimed only to the extent of the share of his vendor and not the entire land, i.e. only to the extent of 14/104th share of defendant No.1.

20. With respect to effect of suit for permanent injunction based upon title, effect of negativing title has been considered by this Court. In *Sajjadanashin Sayed Md. B.E. Edr. (D) by LRs. v. Musa Dadabhai Ummer & Ors.* (2000) 3 SCC 350, it has been held :

> "**24**. Before parting with this point, we would like to refer to two more rulings. In *Sulochana Amma v. Narayanan Nair* (1994) 2 SCC 14 this Court held that a finding as to title given in an earlier injunction suit would be res judicata in a subsequent suit on title. On the other hand, the Madras High Court, in *Vanagiri Sri Selliamman Ayyanar Uthirasomasundareswarar Temple v. Rajanga Asari* AIR 1965 Madras 355 held (see para 8 therein) that the previous suit was only for injunction relating to the crops. Maybe, the question of title was decided, though not raised in the plaint. In the latter suit on title, the finding in the earlier suit on title would not be res judicata as the earlier suit was concerned only with a possessory right. These two decisions, in our opinion, cannot be treated as being contrary to each other but should be understood in the context of the tests referred to above. Each of them can perhaps be treated as correct if they are understood in the light of the tests stated above. In the first case decided by this Court, *it is to be assumed that the tests above-referred to were satisfied for holding that the finding as to possession was substantially rested on title upon which a finding was felt necessary and in the latter case decided by the Madras High Court, it must be assumed that the tests were not satisfied. As stated in Mulla, it all depends on the facts of each case and whether the finding as to title was treated as necessary for grant of an injunction in the earlier suit and was also the substantive basis for grant of injunction.* In this context, we may refer to *Corpus Juris Secundum (Vol. 50, para 735, p. 229) where a similar aspect in regard to findings on possession and incidental findings on title were dealt with. It is stated:*
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> > *"Where title to property is the basis of the right of possession, a decision on the question of possession is res judicata on the*

question of title to the extent that adjudication of title was essential to the judgment; but where the question of the right to possession was the only issue actually or necessarily involved, the judgment is not conclusive on the question of ownership or title."

25. We have gone into the above aspects in some detail so that when a question arises before the Courts as to whether an issue was earlier decided only incidentally or collaterally, the Courts could deal with the question as a matter of legal principle rather than on vague grounds. Point 1 is decided accordingly." (emphasis added by us)

In *Commissioner of Endowments & Ors. v. Vittal Rao & Ors.* (2005) 4 SCC 120, it has been held thus :

"28. In support of his submission, the learned counsel for Respondent 1 contended that as long as an issue arises substantially in a litigation irrespective of the fact whether or not a formal issue has been framed or a formal relief has been claimed, a finding on the said issue would operate as res judicata, strongly relied on the decision of this Court in *Sajjadanashin Sayed Md. B.E. Edr. v. Musa Dadabhai Ummer* (supra). Paras 18 and 19 of the said judgment read : (SCC pp.359-60)

"18. In India, Mulla has referred to similar tests (*Mulla*, 15th Edn., p. 104). The learned author says: a matter in respect of which *relief* is claimed in an earlier suit can be said to be generally a matter 'directly and substantially' in issue but it does not mean that if the matter is one in respect of which *no relief* is sought it is not directly or substantially in issue. It may or may not be. It is possible that it was 'directly and substantially in issue and it may also be possible that it was only collaterally or incidentally in issue, depending upon the *facts of the case*. The question arises as to what is the *test* for deciding into which category a case falls? *One test is that if the issue was 'necessary' to be decided for adjudicating on the principal issue and was decided, it would have to be treated as 'directly and*

substantially' in issue and if it is clear that the judgment was in fact based upon that decision, then it would be res judicata in a latter case (*Mulla*, p. 104). One has to examine the plaint, the written statement, the issues and the judgment to find out if the matter was directly and substantially in issue (*Isher Singh v. Sarwan Singh* AIR 1965 SC 948 and *Syed Mohd. Salie Labbai v. Mohd. Hanifa* (1976) 4 SCC 780). We are of the view that the above summary in *Mulla* is a correct statement of the law.

19. We have here to advert to another principle of caution referred to by Mulla (p. 105):

> 'It is not to be assumed that matters in respect of which issues have been framed are all of them directly and substantially in issue. Nor is there any special significance to be attached to the fact that a particular issue is the first in the list of issues. *Which of the matters are directly in issue and which collaterally or incidentally, must be determined on the facts of each case. A material test to be applied is whether the court considers the adjudication of the issue material and essential for its decision.'*"

(emphasis in original and supplied)

29. In the light of what is stated above, in the case on hand, in our view, it was necessary for the Court in the earlier round of litigation to decide the nature and scope of gift deed Ext. A-1. Accordingly, the courts decided that the gift made in favour of ancestors of Respondent 1 of the land was absolute and it was not an endowment for a public or charitable purpose. On the facts of the case, it is clear that though an issue was not formally framed, the issue was material and essential for the decision of the case in the earlier proceeding. Hence, the bar of res judicata applies to the facts of the present case."

21. Reliance has been placed by learned senior counsel for the respondents on a decision in *Anathula Sudhakar v. P. Buchi Reddy (dead) by LRs. & Ors*. (2008) 4 SCC 594 wherein the Court had summarized the conclusions thus: :

> "**21.** To summarise, the position in regard to suits for prohibitory injunction relating to immovable property, is as under:
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> (*a*) Where a cloud is raised over the plaintiff's title and he does not have possession, a suit for declaration and possession, with or without a consequential injunction, is the remedy. Where the plaintiff's title is not in dispute or under a cloud, but he is out of possession, he has to sue for possession with a consequential injunction. Where there is merely an interference with the plaintiff's lawful possession or threat of dispossession, it is sufficient to sue for an injunction simpliciter.
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> (*b*) As a suit for injunction simpliciter is concerned only with possession, normally the issue of title will not be directly and substantially in issue. The prayer for injunction will be decided with reference to the finding on possession. But in cases where de jure possession has to be established on the basis of title to the property, as in the case of vacant sites, the issue of title may directly and substantially arise for consideration, as without a finding thereon, it will not be possible to decide the issue of possession.
>
> (*c*) But a finding on title cannot be recorded in a suit for injunction, unless there are necessary pleadings and appropriate issue regarding title (either specific, or implied as noticed in *Annaimuthu Thevar v. Alagammal* (2005) 6 SCC 202. Where the averments regarding title are absent in a plaint and where there is no issue relating to title, the court will not investigate or examine or render a finding on a question of title, in a suit for injunction. Even where there are necessary pleadings and issue, if the matter involves complicated questions of fact and law relating to title, the court will relegate the parties to the remedy by way of comprehensive suit for declaration of title, instead of deciding the issue in a suit for mere injunction.
>
> (*d*) Where there are necessary pleadings regarding title, and appropriate issue relating to title on which parties lead evidence, if the matter involved is simple and straightforward, the court may decide upon the issue regarding title, even in a suit for injunction. But such cases, are the exception to the normal rule that question of title will not be decided in suits for injunction. But persons having clear title and

> possession suing for injunction, should not be driven to the costlier and more cumbersome remedy of a suit for declaration, merely because some meddler vexatiously or wrongfully makes a claim or tries to encroach upon his property. The court should use its discretion carefully to identify cases where it will enquire into title and cases where it will refer to the plaintiff to a more comprehensive declaratory suit, depending upon the facts of the case."

22. It was submitted on behalf of respondents that the findings in O.S. No.294/1993 do not operate as *res judicata* as it was left ultimately to raise the objections in the final decree proceedings. We are unable to accept the aforesaid submission as there was clear inability to grant injunction and the submission of the plaintiffs that they were having title on entire land on the basis of sale deed dated 23.11.1959, had been negatived. It was found that Bala Mallaiah could have purchased only the share of his vendor Hamid Ali and not the entire disputed property and the purchase was affected by *lis pendens*. We are of the considered opinion that the finding with respect to purchase being made during *lis pendens* had attained finality and was not open to question in the present proceedings. Besides, the validity of the sale deed to the extent of the share of the vendor which was sought to be re-agitated in the final decree proceedings, was also not open to be raised in view of clear findings recorded in the suit of 1993. Though we have held so, however nothing turns on the aforesaid finding as to *res judicata* as we propose to examine both aspects on merits afresh, in view of the conclusions which we propose to record hereinafter.

(ii) In re : Whether the sale deed dated 23.11.1959 executed by defendant No.1 in favour of Bala Mallaiah is hit by doctrine of *lis pendens*?

23. In the instant case, a suit for partition was filed in the year 1935. On abolition of Darul Qaza Court in 1951 the case was transferred to the High Court. On abolition of original jurisdiction of the High Court, file was sent to the city civil court. It appears that when the file from Custodian did not reach the city civil court, hence order dated 8.1.1955 was passed to the following effect :

> 8.1.1955 - "This file summoned by the Custodian is not yet received. As the plaintiff too is absent and the file not yet received the case be closed. It may be revived only on the receipt of the file and the application of the plaintiff."

It is apparent from the aforesaid order that it was clearly an order of keeping the case *sine die* to be taken up only on receipt of the file on being informed by filing an application by the plaintiff. The file was not before the court. Thus, there was no question of dismissal of the case in default nor was it so dismissed by the court. However the plaintiff laboured under wrong impression, as such filed application under Order 9 Rule 9 CPC and prayed for restoration of the suit. An order was passed on 1.12.1955 by the city civil court, restoring the suit on the basis of payment of Rs.50 as costs to be paid on or before 15.12.1955. Costs could not be deposited by the plaintiff by 15.12.1955. The prayer was made to accept the costs on 16.12.1955 by extending time under section 148 CPC. However, the city civil court dismissed the said application. The order was questioned in the High Court in appeal filed by the plaintiff in which the

Division Bench of the High Court vide order dated 5.2.1962 had held that the suit in fact was not dismissed for default on 8.1.1955 by the trial court. It was an order adjourning the suit with a direction to be revived only on the file being received from the Custodian. Therefore, there was no necessity for the plaintiff to file an application under Order 9 Rule 9 CPC. The High Court had set aside the order dated 8.1.1955 and also held that there was no jurisdiction with the city civil court to pass an order on 1.12.1955 to impose and pay costs of Rs.50. The following order was passed in the year 1962 by the Division Bench of the High Court :

> "It is clear from the order dated 8-1-55, that the suit was not dismissed for default. Virtually, it is an order adjourning the suit with a direction that it may be revived only on the receipt of the file from the Custodian. Therefore there was no necessity for the plaintiff to file the application under Or. 9, Rule 9, CPC, praying that the suit be restored to its original number after setting aside the order dated 8-1-55. The plaintiff could have merely asked the court to take up the suit and to proceed with the trial. The learned Judge has no jurisdiction to direct the plaintiff by his order dated 1-12-55 to pay day costs viz., Rs.50/- to the defendants on or before 15-12-55 as a condition precedent. This order is clearly illegal and has to be set aside.
>
> In the result, the appeal is allowed, and the order dated 1-12-55 directing the plaintiff to pay the defendants Rs.50/- on or before 15-12-55 as a condition precedent to restraining the suit is set aside. As a consequence, the order dated 7-1-56 is vacated. Since this is a suit of 1951 which has been pending for a long time, the lower court will dispose of the same as expeditiously as possible. The contesting respondents shall pay the costs of the appellant."

24. A preliminary objection has been raised on behalf of the respondents as to very applicability of doctrine of *lis pendens* to Mohammedan law based upon provisions contained in section 2 of T.P. Act. Section 2 is extracted hereunder :

"**2. Repeal of Acts.--Saving of certain enactments, incidents, rights, liabilities, etc.** --- In the territories to which this Act extends for the time being the enactments specified in the Schedule hereto annexed shall be repealed to the extent therein mentioned. But nothing herein contained shall be deemed to affect---

(a) the provisions of any enactment not hereby expressly repealed;
(b) any terms or incidents of any contract or constitution of property which are consistent with the provisions of this Act, and are allowed by the law for the time being in force;
(c) any right or liability arising out of a legal relation constituted before this Act comes into force, or any relief in respect of any such right or liability; or
(d) save as provided by section 57 and Chapter IV of this Act, any transfer by operation of law or by, or in execution of, a decree or order of a Court of competent jurisdiction,

and nothing in the second Chapter of this Act shall be deemed to affect any rule of Muhammadan law."

No doubt about it that section 2 of T.P. Act protects rule of Mohammedan law by excluding the provisions of Chapter II containing sections 5 to 53A thereof. In our opinion, exclusion is conditional upon existence of rule of Mohammedan law in that regard, that is to say if principle/rule of Mohammedan law provides as to transfers *lis pendens*, the same would prevail and nothing in section 52 of T.P. Act shall be deemed to affect any such rule. However, we have not been shown any such rule of Mohammedan law containing provision as to *lis pendens* and thus, in the absence whereof the provisions of section 52 T.P. Act would be attracted. The submission as to non-applicability of section 52 of T.P. Act to Mohammedan law is hereby rejected.

25. It was submitted on behalf of the respondents that the sale deed had been executed after dismissal of the suit on 16.12.1955 in terms of the order dated 1.12.1955 as such doctrine of *lis pendens* was not attracted. Thus, it was submitted that between 15.12.1955 and 23.1.1962 no suit was pending. Reliance has been placed on a decision in *Bhutnath Das & Ors. v. Sahadeb Chandra Panja* AIR 1962 Cal. 485 :

> "4. … The real question, therefore, is whether in a case like this where an order has been made for the payment of certain money within a certain time for the purpose of getting specific performance and at the same time an order has also been made that if the money is not paid the suit will stand dismissed, the court retains jurisdiction. Though not without hesitation, I have reached the conclusion that in such a case it will be unrealistic and unjust to say that the court retains jurisdiction. Whether the court has retained jurisdiction or not will, in my view, depend very much on the substance of the directions given….. Where….. the court makes also an order that if the amount is not deposited within the time specified the suit will stand dismissed, I find it difficult to agree that the court retains any jurisdiction whatsoever.
>
> 6. …..the trial court lost jurisdiction in the suit as soon as it made the order directing the payment within a certain time and further directing that on failure of the deposit being made within the time limited the case should stand dismissed."

26. The decision of this Court in *Vareed Jacob v. Sosamma Geevarghese & Ors.* (2004) 6 SCC 378 has been relied upon in which it has been laid down thus :

> **"18.** In the case of *Saranatha Ayyangar* v. *Muthiah Moopanar* AIR 1934 Mad 49 it has been held that on restoration of the suit dismissed for default all interlocutory matters shall stand restored, unless the order of restoration says to the contrary. That as a matter of general rule on restoration of the suit dismissed for default, all interlocutory orders shall stand revived unless

during the interregnum between the dismissal of the suit and restoration, there is any alienation in favour of a third party.

Even the dissenting judgment of S.B. Sinha, J. had on this point noted:
62. It is also of some importance that there exists a view that an order of dismissal of a suit does not render an order of attachment void ab initio as a sale of property under order of attachment would be invalid even after the date of such sale and the order of attachment is withdrawn.
63. A converse case may arise when the property is sold after the suit is dismissed for default and before the same is restored. Is it possible to take a view that upon restoration of suit the sale of property under attachment before judgment becomes invalid? The answer to the said question must be rendered in the negative. By taking recourse to the interpretation of the provisions of the statute, the court cannot say that although such a sale shall be valid but the order of attachment shall revive. Such a conclusion by reason of a judge-made law may be an illogical one."

27. It was submitted on behalf of the appellants that the sale was subject to the doctrine of *lis pendens* under section 52 of the T.P. Act. It was further submitted that the said provision is clear and unambiguous and the statutory explanation to the provision makes it clear that the pendency of the suit or proceeding shall be deemed to commence from the date of presentation of the plaint or the institution of the proceeding in the court of competent jurisdiction, and to continue until the suit or proceeding has been disposed of by a decree or an order and complete satisfaction of order or discharge of such order or decree has been obtained or has become unobtainable by reason of the expiration of any period of limitation prescribed for the execution thereof. Thus, the transfer if any made in contravention of Section 52 renders it subservient to the rights of the parties in litigation so that the rights would eventually be determined in a suit. *Thomson Press*

(India) Ltd. v. Nanak Builders and Investors Pvt. Ltd. & Ors. (2013) 5 SCC 397, has been relied on in which this Court has laid down thus :

> **"26.** It would also be worth discussing some of the relevant laws in order to appreciate the case on hand. Section 52 of the Transfer of Property Act speaks about the doctrine of lis pendens. Section 52 reads as under:
>
> > "**52.** ***Transfer of property pending suit relating thereto***.—During the pendency in any court having authority within the limits of India excluding the State of Jammu and Kashmir or established beyond such limits by the Central Government of any suit or proceeding which is not collusive and in which any right to immovable property is directly and specifically in question, the property cannot be transferred or otherwise dealt with by any party to the suit or proceeding so as to affect the rights of any other party thereto under the decree or order which may be made therein, except under the authority of the court and on such terms as it may impose.
> >
> > *Explanation*.—For the purposes of this section, the pendency of a suit or proceeding shall be deemed to commence from the date of the presentation of the plaint or the institution of the proceeding in a court of competent jurisdiction, and to continue until the suit or proceeding has been disposed of by a final decree or order and complete satisfaction or discharge of such decree or order has been obtained, or has become unobtainable by reason of the expiration of any period of limitation prescribed for the execution thereof by any law for the time being in force."
>
> It is well settled that the doctrine of lis pendens is a doctrine based on the ground that it is necessary for the administration of justice that the decision of a court in a suit should be binding not only on the litigating parties but on those who derive title pendente lite. The provision of this section does not indeed annul the conveyance or the transfer otherwise, but to render it subservient to the rights of the parties to a litigation.
>
> **27.** Discussing the principles of lis pendens, the Privy Council in *Gouri Dutt Maharaj* v. *Sk. Sukur Mohammed* AIR 1948 PC 147 observed as under: (IA p. 170)
>
> > "… The broad purpose of Section 52 is to maintain the status quo unaffected by the act of any party to the litigation pending its determination. The applicability of the section cannot depend on

> matters of proof or the strength or weakness of the case on one side or the other in bona fide proceedings. To apply any such test is to misconceive the object of the enactment and, in the view of the Board, the learned Subordinate Judge was in error in this respect in laying stress, as he did, on the fact that the agreement of 8-6-1932, had not been registered."

28. In *Kedar Nath Lal* v. *Ganesh Ram* AIR 1970 SC 1717, this Court referred the earlier decision in *Samarendra Nath Sinha* v. *Krishna Kumar Nag* AIR 1967 SC 1440 and observed: (*Kedar Nath Lal case (supra)*, SCC p. 792, para 17)

> "*17.* … '*16.* … The purchaser pendente lite under this doctrine is bound by the result of the litigation on the principle that since the result must bind the party to it so must it bind the person deriving his right, title and interest from or through him. This principle is well illustrated in *Radhamadhub Holder* v. *Monohur Mookerji* (1887-88) 15 IA 97 where the facts were almost similar to those in the instant case. It is true that Section 52 strictly speaking does not apply to involuntary alienations such as court sales but it is well established that the principle of lis pendens applies to such alienations. (See *Nilakant Banerji* v. *Suresh Chunder Mullick* (1884-85) 12 IA 171 and *Moti Lal* v. *Karrab-ul-Din* (1896-97) 24 IA 170)' (*Samarendra Nath case (supra)*, AIR p. 1445, para 16)"

29. The aforesaid Section 52 of the Transfer of Property Act again came up for consideration before this Court in *Rajender Singh* v. *Santa Singh* AIR 1973 SC 2537 and Their Lordships with approval of the principles laid down in *Jayaram Mudaliar* v. *Ayyaswami* (1972) 2 SCC 200 reiterated: (*Rajender Singh case (supra)*, SCC p. 711, para 15)

> "*15.* The doctrine of lis pendens was intended to strike at attempts by parties to a litigation to circumvent the jurisdiction of a court, in which a dispute on rights or interests in immovable property is pending, by private dealings which may remove the subject-matter of litigation from the ambit of the court's power to decide a pending dispute or frustrate its decree. Alienees acquiring any immovable property during a litigation over it are held to be bound, by an application of the doctrine, by the decree passed in the suit even though they may not have been impleaded in it. The whole object of the doctrine of lis pendens is to subject parties to the litigation as

> well as others, who seek to acquire rights in immovable property, which are the subject-matter of a litigation, to the power and jurisdiction of the court so as to prevent the object of a pending action from being defeated.'"'

28. Reliance has been placed on *A. Nawab John v. V.N. Subramaniyam* (2012) 7 SCC 738, laying down thus :

> **"18.** It is settled legal position that the effect of Section 52 is not to render transfers effected during the pendency of a suit by a party to the suit void; but only to render such transfers subservient to the rights of the parties to such suit, as may be, eventually, determined in the suit. In other words, the transfer remains valid subject, of course, to the result of the suit. The pendente lite purchaser would be entitled to or suffer the same legal rights and obligations of his vendor as may be eventually determined by the court.
>
> > "*12.* … The mere pendency of a suit does not prevent one of the parties from dealing with the property constituting the subject-matter of the suit. The section only postulates a condition that the alienation will in no manner affect the rights of the other party under any decree which may be passed in the suit unless the property was alienated with the permission of the court." (*Sanjay Verma* v. *Manik Roy* (2006) 13 SCC 608, SCC p. 612, para 12.)""

29. Reliance has been placed on *Sanjay Verma v. Manik Roy and Ors.*, (2006) 13 SCC 608, in which this Court laid down :

> **"10.** *Bibi Zubaida Khatoon case* (2004) 1 SCC 191 on which learned counsel for the respondents had placed reliance in fact goes against the stand of the respondents. Though a casual reading of para 9 supports the stand taken by the respondents, it is to be noted that the factual position was entirely different. In fact a cross-suit had been filed in the suit in that case. The respondents being transferees pendente lite without leave of the court cannot as of right seek impleadment in the suit which was in the instant case pending for a very long time. In fact in para 10 of the judgment this Court has held that there is absolutely no rule that the transferee pendente

lite without leave of the court should in all cases contest the pending suit. In *Sarvinder Singh* v. *Dalip Singh* (1996) 5 SCC 539 it was observed in para 6 as follows: (SCC pp. 541-42, para 6)

"*6*. Section 52 of the Transfer of Property Act envisages that:

'During the pendency in any court having authority within the limits of India … of any suit or proceeding which is not collusive and in which any right to immovable property is directly and specifically in question, the property cannot be transferred or otherwise dealt with by any party to the suit or proceeding so as to affect the rights of any other party thereto under the decree or order which may be made therein, except under the authority of the court and on such terms as it may impose.'

It would, therefore, be clear that the defendants in the suit were prohibited by operation of Section 52 to deal with the property and could not transfer or otherwise deal with it in any way affecting the rights of the appellant except with the order or authority of the court. Admittedly, the authority or order of the court had not been obtained for alienation of those properties. Therefore, the alienation obviously would be hit by the doctrine of lis pendens by operation of Section 52. Under these circumstances, the respondents cannot be considered to be either necessary or proper parties to the suit."

12. The principles specified in Section 52 of the TP Act are in accordance with equity, good conscience or justice because they rest upon an equitable and just foundation that it will be impossible to bring an action or suit to a successful termination if alienations are permitted to prevail. A transferee pendente lite is bound by the decree just as much as he was a party to the suit. The principle of lis pendens embodied in Section 52 of the TP Act being a principle of public policy, no question of good faith or bona fide arises. The principle underlying Section 52 is that a litigating party is exempted from taking notice of a title acquired during the pendency of the litigation. The mere pendency of a suit does not prevent one of the parties from dealing with the property constituting the subject-matter of the suit. The section only postulates a condition that the alienation will in no manner affect the rights of the other party under any decree which may be passed in the suit unless the property was alienated with the permission of the court."

30. It was also submitted on behalf of the appellants that the expression in section 52 of the T.P. Act "suit or proceedings" is also applicable to the applications. An application

seeking extension of time is also a proceeding within the meaning of the said provision and appeal filed is also continuation of the suit or proceedings but comes within the meaning of the proceedings. The legislative intent behind the amendment of section 52 was not only to cover the suit but also to cover appeals and proceedings and same would include all applications/appeals under the CPC. An application under Order 9 Rule 9 would also be covered within the meaning of the expression suit or other proceedings to which the doctrine of *lis pendens* would apply. It was also submitted that section 52 prior to amendment prohibited transfer made during the "active prosecution" of a suit. Section 52 of the Transfer of Property Act, embodies the rule of *lis pendens*, which prior to its amendment only prohibited a transfer made during the "active prosecution" of a suit or a proceeding in which any right to immoveable property was directly and specifically in question. The expression "active prosecution", which existed in the section before its amendment in 1929, led to much uncertainty in the application of the rule, and caused a divergence of judicial opinion. It was felt that the standard of diligence, which would constitute "active prosecution", could not be defined with precision. To remove this uncertainty, the law was amended in 1929, and the Amending Act XX of 1929 substituted the word "pendency" for the phrase "active prosecution"; and there can now be no difficulty in deciding whether the transfer was made during the pendency of a suit or proceeding. In *Parmeshari Din v. Ram Charan & Ors*. AIR 1937 PC 260, it was held :

> "2. It is clear that the question of the active prosecution of a suit is one of fact, but it was not suggested in either of the Courts in India that the plaintiffs had not actively prosecuted the suit, and were consequently debarred from availing themselves of the rule of *lis pendens*. The learned Judges of the Court of Appeal had, therefore, no opportunity to express their opinion on this point; and their Lordships cannot entertain an objection, which depends upon a question of fact not dealt with below. Upon the record before them, there is no indication of any delay or remissness in the prosecution of the suit, for which the plaintiffs can be held responsible. Their Lordships, therefore, agree with the High Court that the transfer relied upon by the appellant cannot prejudice the rights of the decree-holders, and that he cannot resist the decree obtained by them."

The abovesaid principle of law settled in the year 1937 by the Privy Council is still valid as discerned from the latest judgment of this Court rendered in the case of *Kirpal Kaur v. Jitender Pal Singh & Ors.* (2015) 9 SCC 356 :

> "21. The execution of the alleged gift deed by the deceased first defendant in favour of the second defendant is also hit by Section 52 of the Transfer of Property Act, 1882, as the said deed was executed during the pendency of the proceedings and before the expiry of the period of limitation for filing SLP. Further, during the pendency of these proceedings, the second defendant, who has claimed to be the alleged beneficiary of the suit Schedule "B" property on the basis of alleged gift deed should have sought leave of this Court as the donee and brought the aforesaid fact of execution of the alleged gift deed in respect of "B" schedule property by the deceased first defendant, which property has been devolved in his favour, to the notice of this Court as provided under Order 22 Rule 10 of the CPC and defended his right as required under the law as laid down by this Court in a catena of cases.
>
> x x x x x
>
> 26. The legality of the alleged gift deed executed in favour of the second defendant by the deceased first defendant in respect of the Schedule 'B' property has been further examined by us and the same is hit by Section 52 of the Transfer of Property Act, 1882, in the light of the decision of this Court in the case of *Jagan Singh v. Dhanwanti* (2012) 2 SCC 628, wherein this Court has laid down the legal principle that under Section 52 of the Transfer of Property Act, 1882, the 'lis' continues so long as a final decree or order has not been obtained from the Court and a

complete satisfaction thereof has not been rendered to the aggrieved party contesting the civil suit. It has been further held by this Court that it would be plainly impossible that any action or suit could be brought to a successful termination if alienations *pendente lite* were permitted to prevail."

wherein the factum of the alleged gift deed was not made known to the Court.

This has been extrapolated in the case of *Jagan Singh (dead) through LRs. v. Dhanwanti & Anr.* (2012) 2 SCC 628 thus :

"32. The broad principle underlying Section 52 of the TP Act is to maintain the status quo unaffected by the act of any party to the litigation pending its determination. Even after the dismissal of a suit, a purchaser is subject to lis pendens, if an appeal is afterwards filed, as held in *Krishanaji Pandharinath v. Anusayabai* AIR (1959) Bom 475. In that matter the respondent (original plaintiff) had filed a suit for maintenance against her husband and claimed a charge on his house. The suit was dismissed on 15.7.1952 under Order 9 Rule 2, of the Code of Civil Procedure 1908, for non-payment of process fee. The husband sold the house immediately on 17.7.1952. The respondent applied for restoration on 29.7.1952, and the suit was restored leading to a decree for maintenance and a charge was declared on the house. The plaintiff impleaded the appellant to the darkhast as purchaser. The Appellant resisted the same by contending that the sale was affected when the suit was dismissed. Rejecting the contention the High Court held in para 4 as follows:

> "..In Section 52 of the Transfer of Property Act, as it stood before it was amended by Act 20 of 1929, *the expression 'active prosecution of any suit or proceeding' was used. That expression has now been omitted, and the Explanation makes it abundantly clear that the 'lis'* continues so long as a final decree or order has not been obtained and complete satisfaction thereof has not been rendered. At p. 228 in Sir Dinshah Mulla's "*Transfer of Property Act*", 4th Edn., after referring to several authorities, the law is stated thus:
>
> > "Even after the dismissal of a suit a purchaser is subject to 'lis pendens', if an appeal is afterwards filed."
>
> If after the dismissal of a suit and before an appeal is presented, the 'lis' continues so as to prevent the defendant from transferring the property to the prejudice of the plaintiff, I fail to see any reason for holding that between the date of dismissal of the suit

under Order 9 Rule 2 of the Civil Procedure Code and the date of its restoration, the 'lis' does not continue."

33. It is relevant to note that even when Section 52 of TP Act was not so amended, a Division Bench of Allahabad High Court had following to say in *Moti Chand v. British India Corpn. Ltd.* AIR (1932) All 210:

'10, ….The provision of law which has been relied upon by the appellants is contained in Section 52, TP Act. The active prosecution in this section must be deemed to continue so long as the suit is pending in appeal, since the proceedings in the appellate court are merely continuation of those in the suit …'(see *Gobind Chunder Roy v. Guru Churn Kurmokar* ILR 1988 15 Cal. 94)."

34. If such a view is not taken, it would plainly be impossible that any action or suit could be brought to a successful termination if alienations pendente lite were permitted to prevail. The Explanation to this section lays down that the pendency of a suit or a proceeding shall be deemed to continue until the suit or a proceeding is disposed of by final decree or order, and complete satisfaction or discharge of such decree or order has been obtained or has become unobtainable by reason of the expiration of any period of limitation prescribed for the execution thereof by any law for the time being in force.

35. In the present case, it would be canvassed on behalf of the respondent and the applicant that the sale has taken place in favour of the applicant at a time when there was no stay operating against such sale, and in fact when the second appeal had not been filed. We would however, prefer to follow the dicta in *Krishanaji Pandharinath* AIR 1959 Bom 475 to cover the present situation under the principle of lis pendens since the sale was executed at a time when the second appeal had not been filed but which came to be filed afterwards within the period of limitation. The doctrine of lis pendens is founded in public policy and equity, and if it has to be read meaningfully such a sale as in the present case until the period of limitation for second appeal is over will have to be held as covered under Section 52 of the TP Act."

31. The doctrine of *lis pendens* would be applicable even to the proceedings in the nature of an appeal as has been emphasized in the case of *Krishanaji Pandharinath v. Anusayabai* AIR 1959 Bom 475 thus :

"3. It is true that in this case the sale effected by Sidram was after the

dismissal of the suit filed by Anusayabai and before the suit was restored, but the alienation being before, the final decree or order was passed and complete satisfaction or discharge of the decree was obtained, it must be regarded as pendente lite. In s. 52 of the Transfer of Property Act, as it stood before it was amended by Act XX of 1929, the expression "active prosecution of any suit or proceeding" was used. That expression has now been omitted, and the Explanation makes it abundantly clear that the lis continues so long as a final decree or order has not been obtained and complete satisfaction thereof has not been rendered. At page 228 in Sir Dinshah Mulla's "Transfer of Property Act", 4th edn., after referring to several authorities, the law is stated thus:

> "... Even after the dismissal of a suit a purchaser is subject to lis pendens, if an appeal is afterwards filed."

32. We are unable to accept the submissions raised on behalf of the respondents that there was hiatus between 10.12.1955 and 1962 till the order was passed by the High Court as it was misunderstood by the parties that the suit had been dismissed. In our opinion, when the suit itself had not been dismissed vide order dated 8.1.1955, the events subsequent thereto i.e. the trial court vide order dated 1.12.1955 treated it as having been dismissed or that the plaintiff also was left under a wrong impression that the suit had been dismissed in default and cost was imposed on 1.12.1955 and it was not paid up to 15.12.1955, would make no difference. Due to non-payment of costs, by order dated 1.12.1955 the suit stood dismissed, cannot be accepted, as the order was *non est* in the eye of law. It was an illegal order of treating a pending suit as having been dismissed. No legal fiction can be created so as to treat the suit as having been dismissed when in fact it had not been dismissed at all and as a matter of fact suit had not been dismissed on 8.1.1955. Subsequent order or imposition of costs for its restoration was

non est and illegal and was rightly set aside by the High Court. When suit had not been dismissed at all in the eye of law, it is to be treated as pending only. No legal fiction can be created in favour of the respondents that the suit itself had been dismissed on 15.12.1955 due to non-payment of costs for restoration; whereas it was not dismissed at all and the High Court has also held that the order dated 1.12.1955 was without jurisdiction. The said order has to be ignored and was in fact set aside by the High Court. Thus the suit was in fact pending and was wrongly treated as having been dismissed. The High Court has rightly held that it was never dismissed. Thus, in our opinion, the sale deed in question dated 23.11.1959 was executed during *lis pendens* and the High Court has erred in law in holding otherwise in the judgment impugned herein.

(iii) In re: whether section 52 of T.P. Act renders a transfer *pendente lite* void?

33. Reliance has been placed by learned senior counsel for the respondents on *Vinod Seth v. Devinder Bajaj* (2010) 8 SCC 1 in which this Court has laid down that the doctrine of *lis pendens* does not affect the conveyance by a party to the suit but only renders it subservient to the rights of other parties to the litigation. Section 52 will not therefore render a transaction void. This Court has laid down thus :

> "**42.** It is well settled that the doctrine of lis pendens does not annul the conveyance by a party to the suit, but only renders it subservient to the rights of the other parties to the litigation. Section 52 will not therefore render a transaction relating to the suit property during the pendency of the suit void but render the transfer inoperative insofar as the other parties to the suit. Transfer of any right, title or interest in the suit property or the

consequential acquisition of any right, title or interest, during the pendency of the suit will be subject to the decision in the suit.
43. The principle underlying Section 52 of the TP Act is based on justice and equity. The operation of the bar under Section 52 is however subject to the power of the court to exempt the suit property from the operation of Section 52 subject to such conditions it may impose. That means that the court in which the suit is pending, has the power, in appropriate cases, to permit a party to transfer the property which is the subject-matter of the suit without being subjected to the rights of any part to the suit, by imposing such terms as it deems fit. Having regard to the facts and circumstances, we are of the view that this is a fit case where the suit property should be exempted from the operation of Section 52 of the TP Act, subject to a condition relating to reasonable security, so that the defendants will have the liberty to deal with the property in any manner they may deem fit, in spite of the pendency of the suit."

34. Reliance has also been placed on *A. Nawab John v. V.N. Subramaniyam* (2012) 7 SCC 738 in which this Court has laid down thus :

"**18.** It is settled legal position that the effect of Section 52 is not to render transfers effected during the pendency of a suit by a party to the suit void; but only to render such transfers subservient to the rights of the parties to such suit, as may be, eventually, determined in the suit. In other words, the transfer remains valid subject, of course, to the result of the suit. The pendente lite purchaser would be entitled to or suffer the same legal rights and obligations of his vendor as may be eventually determined by the court.

"*12. …* The mere pendency of a suit does not prevent one of the parties from dealing with the property constituting the subject-matter of the suit. The section only postulates a condition that the alienation will in no manner affect the rights of the other party under any decree which may be passed in the suit unless the property was alienated with the permission of the court." (*Sanjay Verma* v. *Manik Roy*, (2006) 13 SCC 608, SCC p. 612, para 12.)"

35. In *Thomson Press (India) Ltd. v. Nanak Builders & Investors (P) Ltd.* (2013) 5 SCC 397, this Court has laid down thus :

"**53.** There is, therefore, little room for any doubt that the transfer of the suit property pendente lite is not void ab initio and that the purchaser of any

> such property takes the bargain subject to the rights of the plaintiff in the pending suit. Although the above decisions do not deal with a fact situation where the sale deed is executed in breach of an injunction issued by a competent court, we do not see any reason why the breach of any such injunction should render the transfer whether by way of an absolute sale or otherwise ineffective. The party committing the breach may doubtless incur the liability to be punished for the breach committed by it but the sale by itself may remain valid as between the parties to the transaction subject only to any directions which the competent court may issue in the suit against the vendor."

36. In our opinion the sale deed is not void but only valid to the extent of the share of vendor of Bala Mallaiah i.e. it is valid to the extent of 14/104th share which has been found in the preliminary decree and affirmed in the final decree. The sale deed was subject to the outcome of the suit which was to the aforesaid effect.

(iv) In re : What is the effect of preliminary decree for partition and the extent to which it is binding :

37. In the instant case preliminary decree was passed in the year 1970 and the shares were declared to the aforesaid extent of the respective parties therein who were the heirs of Late Nawab Jung. Hamid Ali Khan, defendant No.1, had only 14/104th share in the disputed property. Preliminary decree dated 24.11.1970 has attained finality which was questioned in appeal on limited extent in the High Court which has attained finality by dismissal of LPA on 12.10.1977. Thus the determination of shares as per preliminary decree has attained finality, shares of the parties had been crystallised in each and every property. Purchaser *pendente lite* is bound by the preliminary decree with respect to the shares so determined and it cannot be re-opened and whatever equity could have been

claimed in the final decree proceedings to the extent of vendor's share has already been extended to the purchasers.

38. In *Venkata Reddy & Ors. v. Pethi Reddy* AIR 1963 SC 992, it has been laid down that the preliminary decree for partition is final. It also embodies the final decision of the court. The question of finality has been discussed thus :

> "6. The new provision makes it clear that the law is and has always been that upon the father's insolvency his disposing power over the interest of his undivided sons in the joint family property vests in the Official Receiver and that consequently the latter has a right to sell that interest. The provision is thus declaratory of the law and was intended to apply to all cases except those covered by the two provisos. We are concerned here only with the first proviso. This proviso excepts from the operation of the Act a transaction such as a sale by an Official Receiver which has been the subject of a final decision by a competent Court. The short question, therefore, is whether the preliminary decree for partition passed in this case which was affirmed finally in second appeal by the High Court of Madras can be regarded as a final decision. The competence of the court is not in question here. What is, however, contended is that in a partition suit the only decision which can be said to be a final decision is the final decree passed in the case and that since final decree proceedings were still going on when the Amending Act came into force the first proviso was not available to the appellants. It is contended on behalf of the appellants that since the rights of the parties are adjudicated upon by the court before a preliminary decree is passed that decree must, in so far as rights adjudicated upon are concerned, be deemed to be a final decision. The word 'decision' even in its popular sense means a concluded opinion (see Stroud's Judicial Dictionary - 3rd ed. Vol. I, p. 743). Where, therefore, the decision is embodied in the judgment which is followed by a decree finality must naturally attach itself to it in the sense that it is no longer open to question by either party except in an appeal, review or revision petition as provided for by law. The High Court has, however, observed :
>
>> "The mere declaration of the rights of the plaintiff by the preliminary decree, would, in our opinion not amount to a final decision for it is well known that even if a preliminary decree is passed either in a mortgage suit or in a partition suit, there are certain contingencies in

which such a preliminary decree can be modified or amended and therefore would not become final."

It is not clear from the judgment what the contingencies referred to by the High Court are in which a preliminary decree can be modified or amended unless what the learned Judges meant was modified or amended in appeal or in review or in revision or in exceptional circumstances by resorting to the powers conferred by Sections 151 and 152 of the Code of Civil Procedure. If that is what the High Court meant then every decree passed by a Court including decrees passed in cases which do not contemplate making of a preliminary decree are liable to be modified and amended. Therefore, if the reason given by the High Court is accepted it would mean that no finality attaches to decree at all. That is not the law. A decision is said to be final when, so far as the Court rendering it is concerned, it is unalterable except by resort to such provisions of the Code of Civil Procedure as permit its reversal, modification or amendment. Similarly, a final decision would mean a decision which would operate as *res judicata* between the parties if it is not sought to be modified or reversed by preferring an appeal or a revision or a review application as is permitted by the Code. A preliminary decree passed, whether it is in a mortgage suit or a partition suit, is not a tentative decree but must, in so far as the matters dealt with by it are concerned, be regarded as conclusive. No doubt, in suits which contemplate the making of two decrees - a preliminary decree and a final decree - the decree which would be executable would be the final decree. But the finality of a decree or a decision does not necessarily depend upon its being executable. The legislature in its wisdom has thought that suits of certain types should be decided in stages and though the suit in such cases can be regarded as fully and completely decided only after a final decree is made the decision of the court arrived at the earlier stage also has a finality attached to it. It would be relevant to refer to S. 97 of the Code of Civil Procedure which provides that where a party aggrieved by a preliminary decree does not appeal from it, he is precluded from disputing its correctness in any appeal which may be preferred from the final decree. This provision thus clearly indicates that as to the matters covered by it, a preliminary decree is regarded as embodying the final decision of the court passing that decree."

39. Moreover, it is provided in section 97 of the C.P.C. as under :

"**97. Appeal from final decree where no appeal from preliminary decree.—**Where any party aggrieved by a preliminary decree passed after

> the commencement of this Code does not appeal from such decree, he shall be precluded from disputing its correctness in any appeal which may be preferred from the final decree."

It is apparent from the aforesaid Section that the matters which are concluded by preliminary decree cannot be re-agitated in an appeal against the final decree. No appeal was preferred by the purchasers or by defendant No.1 as against the preliminary decree.

(v) In re : whether it was necessary to file a suit for cancellation of sale deed dated 23.11.1959 ?

40. In our opinion, when the sale deed had been executed during the pendency of suit the purchaser *pendente lite* is bound by the outcome of the suit. The provisions of section 52 prevent multiplicity of the proceedings. It was not at all necessary to file a suit for cancellation of the sale deed as the vendor had no authority to sell land of other co-sharers. He had right to alienate his own share only which he had in the property to the extent of $14/104^{th}$. As such the right, title and interest of Bala Mallaiah were subject to the pending suit for partition in which a preliminary decree was passed in the year 1970 which had attained finality in which vendor of Bala Mallaiah, defendant No.1 was found to be having share only to the extent of $14/104^{th}$. The preliminary decree was not based upon fraud or collusion. The sale deed was not under the authority of the court and the pendency of the suit under section 52 commenced from the date of presentation of the plaint and continued until the suit or proceedings were disposed of by a final decree, and on a complete satisfaction of the discharge of such decree, an order had been

obtained. The *lis pendens* operates during execution also. Bala Mallaiah, his L.Rs. and purchasers from them are bound by the decision of the case. They cannot circumvent the jurisdiction of the court and wriggle out of the decree. The transfer remained valid subject to the result of the suit and *pendente lite* purchaser is subject to the legal rights and obligations of his vendor as decided by the court. Our conclusion is buttressed by decision in *K.N. Aswathnarayana Setty (dead) through LRs. & Ors. v. State of Karnataka & Ors.* (2014) 15 SCC 394, question has been discussed by this Court thus :

> "**11.** The doctrine of lis pendens is based on legal maxim *ut lite pendente nihil innovetur* (during a litigation nothing new should be introduced). This doctrine stood embodied in Section 52 of the Transfer of Property Act, 1882. The principle of "lis pendens" is in accordance with the equity, good conscience or justice because they rest upon an equitable and just foundation that it will be impossible to bring an action or suit to a successful termination if alienations are permitted to prevail. A transferee pendente lite is bound by the decree just as much as he was a party to the suit. A litigating party is exempted from taking notice of a title acquired during the pendency of the litigation. However, it must be clear that mere pendency of a suit does not prevent one of the parties from dealing with the property constituting the subject-matter of the suit. The law simply postulates a condition that the alienation will, in no manner, affect the rights of the other party under any decree which may be passed in the suit unless the property was alienated with the permission of the court. The transferee cannot deprive the successful plaintiff of the fruits of the decree if he purchased the property pendente lite. (Vide *K. Adivi Naidu* v. *E. Duruvasulu Naidu* (1995) 6 SCC 150, *Venkatrao Anantdeo Joshi* v. *Malatibai* (2003) 1 SCC 722, *Raj Kumar* v. *Sardari Lal (2004) 2 SCC 601* and *Sanjay Verma* v. *Manik Roy* (2006) 13 SCC 608.)"

(vi) In re: whether Bala Mallaiah, his heirs and purchasers had perfected their right, title and interest by virtue of adverse possession ?

41. The High Court has held that there was no lis pendens, and as such it was necessary to question the sale deed and for want of questioning the sale deed, the plaintiffs had perfected their title by virtue of adverse possession. The same is clearly a perverse finding. Firstly, in the earlier civil suit of 1993 submission was raised with respect to adverse possession which was negatived. Secondly, in our opinion as we have held that the sale deed was hit by the doctrine of *lis pendens*, the purchasers were bound by the result of the suit. Thus there was no question of perfecting the title by adverse possession during pendency of suit. Section 52 negates the very plea of adverse possession. Trial court and first appellate court have rightly held that there was no question of adverse possession. The High Court has simply without any discussion held that the title was perfected by adverse possession. Merely a bald statement that there was adverse possession is not enough to set up a plea of adverse possession. It has to be clearly set out from which date it commenced, and became hostile when there was repudiation of the title. No such plea has been raised. There are 3 classic requirements of plea of adverse possession i.e. "*nec vi, nec clam, nec precario*" i.e., peaceful, open and continuous. No such pleading has been raised much less there is question of any proof and moreover, this plea was not available to be raised in view of doctrine of *lis pendens*. Possession never became adverse in the instant case as the property was purchased subject to the outcome of the litigation. In *Karnataka Board of Wakf v. Government of India & Ors*. (2004) 10 SCC 779 it was held that when litigation was pending it could

not be said that the possession was peaceful or hostile in any view of the matter. It was held thus :

> **"11.** In the eye of the law, an owner would be deemed to be in possession of a property so long as there is no intrusion. Non-use of the property by the owner even for a long time won't affect his title. But the position will be altered when another person takes possession of the property and asserts a right over it. Adverse possession is a hostile possession by clearly asserting hostile title in denial of the title of the true owner. It is a well-settled principle that a party claiming adverse possession must prove that his possession is "*nec vi, nec clam, nec precario*", that is, peaceful, open and continuous. The possession must be adequate in continuity, in publicity and in extent to show that their possession is adverse to the true owner. It must start with a wrongful disposition of the rightful owner and be actual, visible, exclusive, hostile and continued over the statutory period. (See *S.M. Karim* v. *Bibi Sakina* AIR 1964 SC 1254, *Parsinni* v. *Sukhi* (1993) 4 SCC 375 and *D.N. Venkatarayappa* v. *State of Karnataka* (1997) 7 SCC 567.) Physical fact of exclusive possession and the *animus possidendi* to hold as owner in exclusion to the actual owner are the most important factors that are to be accounted in cases of this nature. Plea of adverse possession is not a pure question of law but a blended one of fact and law. Therefore, a person who claims adverse possession should show: (*a*) on what date he came into possession, (*b*) what was the nature of his possession, (*c*) whether the factum of possession was known to the other party, (*d*) how long his possession has continued, and (*e*) his possession was open and undisturbed. A person pleading adverse possession has no equities in his favour. Since he is trying to defeat the rights of the true owner, it is for him to clearly plead and establish all facts necessary to establish his adverse possession. [*Mahesh Chand Sharma (Dr.)* v. *Raj Kumari Sharma* (1996) 8 SCC 128.]
>
> **12.** A plaintiff filing a title suit should be very clear about the origin of title over the property. He must specifically plead it. (See *S.M. Karim* v. *Bibi Sakina* (Supra).) In *P. Periasami* v. *P. Periathambi* (1995) 6 SCC 523 this Court ruled that: (SCC p. 527, para 5)
>
> > "Whenever the plea of adverse possession is projected, inherent in the plea is that someone else was the owner of the property."

> The pleas on title and adverse possession are mutually inconsistent and the latter does not begin to operate until the former is renounced. Dealing with *Mohan Lal* v. *Mirza Abdul Gaffar* (1996) 1 SCC 639 that is similar to the case in hand, this Court held: (SCC pp. 640-41, para 4)
>
> > "*4*. As regards the first plea, it is inconsistent with the second plea. Having come into possession under the agreement, he must disclaim his right thereunder and plead and prove assertion of his independent hostile adverse possession to the knowledge of the transferor or his successor in title or interest and that the latter had acquiesced to his illegal possession during the entire period of 12 years i.e. up to completing the period his title by prescription *nec vi, nec clam, nec precario*. Since the appellant's claim is founded on Section 53-A, it goes without saying that he admits by implication that he came into possession of land lawfully under the agreement and continued to remain in possession till date of the suit. Thereby the plea of adverse possession is not available to the appellant.""

42. In our opinion, the High Court has erred in law in holding that the plaintiffs perfected their title by virtue of adverse possession. The finding is perverse and has no foundational basis.

(vii) In re: whether under the Muslim Law, defendant No.1 being a co-sharer could have alienated the share of other co-sharers in the disputed property ?

43. In the instant case, the property was ancestral property of Late Nawab Jung. It is not in dispute that Nawab Jung died intestate. The legal heirs of Late Nawab Jung succeeded to the estate as tenants in common and not as joint-tenants. The heirs succeeded to the estate in specific shares. In Outlines of Muhammadan Law by Asaf A.A. Fyzee, 4th Edn, it has been observed that general principles of Islamic

jurisprudence do not contemplate administration, but a mere distribution of the estate as per the principles laid down in Sirajiyyah. As per the Sunni law, a testator can leave a legacy to an heir only to the extent of 1/3rd of estate and not exceeding that. After death of a person the first step is to make payment of funeral expenses, debts and legacies. Thereafter, distribution of estate among legal heirs, firstly to sharers, in the absence thereof, to residuaries, and in case of absence of both to distant kindred. As per Mulla, distribution takes place in the following manner :

> **"61. Classes of heirs** There are three classes of heirs, namely, (1) Sharers, (2) Residuaries, and (3) Distant Kindred:
>
> (1) "Sharers" are those who are entitled to a prescribed share of the inheritance;
> (2) "Residuaries" are those who take no prescribed share, but succeed to the "residue" after the claims of the sharers are satisfied;
> (3) "Distant Kindred" are all those relations by blood who are neither Sharers nor Residuaries."

Sharers take in the following manner :

> **"63. Sharers** After payment of funeral expenses, debts, and legacies, the first step in the distribution of the estate, of a deceased Mahomedan is to ascertain which of the surviving relations belong to the class of sharers, and which again of these are entitled to a share of the inheritance, and, after this is done, to proceed to assign their respective shares to such of the sharers as are, under the circumstances of the case, entitled to succeed to a share. The first column in the accompanying table (p.66A) contains a list of Sharers; the second column specifies the normal share of each sharer; the third column specifies the conditions which determine the right of each sharer to a share, and the fourth column sets out the shares as varied by special circumstances."

44. Residuaries take if there are no sharers or if there are sharers, after satisfying their claims. As per Mulla, they will take in the following manner :

> "**65. Residuaries** If there are no Sharers, or if there are Sharers, but there is a residue left after satisfying their claims, the whole inheritance or the residue, as the case may be, devolves upon Residuaries in the order set forth in the annexed table (p.74A).
>
> The Residuaries or Agnatic heirs were the principal heirs before Islam; they continue to remain the principal heirs in Sunni law. Their premier position is, in Islam, always subject to the claims of near relations mentioned as the Koranic heirs. First they are satisfied by giving them their Koranic shares. Residuaries are the relations whose rights were also recognized by tribal laws in Saudi Arabia before Islam.
>
> The rights of residuaries are recognized by the Holy Quran (by implication) and by the traditions of the prophet (PBUH) in very specific terms.
>
> The Holy Quran declares:
>
> > "from what is left by parents and near kindred, there is a share for men and a share for woman, whether the property be small or large-a determinate share".
> >
> > "To (benefit) every one, we have appointed shares and heirs to property left by parents and near relatives…"
> >
> > "Allah directs you concerning your children (their inheritance), to the male a portion equal to that of two females.."
> >
> > "They ask thee for a legal decision. Say: Allah directs (thus) about those who leave no descendants or ascendants as heir. If it is a man that dies, leaving a sister but no child, she shall have half the inheritance. If (such a deceased was) a woman who left no child, her brother takes her inheritance... If they are brothers and sisters, (they share), the male having twice the share of the female."
>
> The first two verses are clear proof that blood relations are entitled to inherit. Blood relations definitely include residuaries (the male agnates)."

[see, Mohammad Mustafa Ali Khan, *Islamic Law of Inheritance,* 1st edition.]"

45. The "distant kindred" is dealt with in section 67 in Mulla's Principles of Mahomedan Law thus :

> "**67. Distant Kindred** (1) If there be no shares or Residuaries, the inheritance is divided amongst Distant Kindred.
>
> (2) If the only sharer be a husband or wife, and there be no relation belonging to the class of Residuaries, the husband or wife will take his or her full share, and the remainder of the estate will be divided among Distant Kindred."

46. Incidents of tenancy in common have been cited from *Halsbury's Laws of England*, 5th Edn., vol. 87 in which nature of such tenancy has been discussed before 1925 in para 220. In para 221 nature of such tenancy since 1925 has been discussed. It has been observed that tenants in common have several interests, where joint tenants, whether at law or in equity, have one interest. The tenants in common may be entitled to equitable shares in the land in unequal shares and for interests which may be unequal in duration; different shares would be subject to different limitations and the limitations may include entailed interests. No new entailed interests can be created either in real or personal property, but this does not affect any entailed interests created before 1.1.1997 considering the provisions of the Trusts of Land and Appointment of Trustees Act, 1996 as applicable in the area for which it has been enacted. There is no right of survivorship and on the death of a tenant-in-common, his share passes according to its own limitation. In para 224 the modes of effecting partition of tenancies-in-common have been dealt

with in general and the position before 1925 and subsequent thereto has been taken into consideration considering the enactments which have been made applicable from time to time.

Thus, it is apparent that the incidents of such joint tenancy and tenants in common are further subject to the law by which parties are governed and in that context, we have to examine a case. There is no dispute with the general principles of joint tenancy and tenants in common but the same would also depend upon in their application with respect to the law by which the parties and the *lis* in question are governed. In a case belonging to Muslims, incidents of Muslim Law, their law of inheritance has to be considered, in particular with respect to rights of tenants in common. Right of disposition by a testament is also different in the Muslim law. There cannot be testamentary disposition for more than 1/3rd of the property held by testator. The power of alienation in Muslim law is different from Hindu law. In Hindu law, there is difference in Dayabhaga and Mitakshra school of law. Muslim law may be akin in some respect to Dayabhaga law but not with Mitakshara Law. However, in Mitakshra Law in Bombay School and in Banaras School, power of alenation is different. A co-parcener cannot alienate without consent of other co-parceners in Banaras School of Mitakshara Law. In Bombay School of Mitakshara Law, a co-parcener can alienate for value his undivided interest or his co-parcenery property without consent of other co-parceners. However in the area which is governed by the Banaras School of Mitakshara Law, sale

of his undivided share in a co-parcenery property without consent of other co-parceners is voidable at the instance of non-alienating co-parcener.

47. A Full Bench of the M.P. High Court in *Ramdayal v. Manaklal* AIR 1973 MP 222 has made certain observations with respect to applicability of Mitakshara law as administered in Bombay, Madras and M.P. A co-parcener may sell, mortgage or otherwise alienate for value his undivided interest in co-parcenery property without the consent of other co-parceners. Decision in *Ramdayal*'s case (supra) has been explained by a decision of another Full Bench of the M.P. High Court in *Diwan Singh v. Bhaiya Lal* AIR 1997 MP 210. It has been held that in Madhya Bharat, Vindhya Pradesh etc. of Madhya Pradesh, Banaras School of Hindu Law applies. Thus the applicability of the law at the place in question and certain customs which would be prevailing in certain areas are also relevant. As in certain parts of A.P. or elsewhere there may be different customs prevailing in Muslims which are to be taken into consideration while deciding a matter. In *Halsbury* also distinction has been made between the law which was applicable before 1925 and the law which is applicable after 1925 and the discussion of law is with respect to various Acts on the basis of which the decisions have been referred herein.

48. When we consider the incidents of disposition of property under different laws, we have to consider the personal law and then to apply the general principles of tenancy law to the permissible non-conflict zone to personal law which holds the field for the

parties to arrive at a decision. The Privy Council in the case of *Imambandi & Ors. v. Mutsaddi* & Ors. (1918) L.R. 45 I.A. 73 considering the distinction between the law which is applicable to Mohammedans, has held that there is a sharp distinction which has to be drawn with other laws with respect to its special nature. The Court cautioned to apply the foreign decisions which are on considerations and conditions totally differing from those applicable to or prevailing in India. The Privy Council has observed thus :

> "**45.** Their Lordships cannot help deprecating the practice which seems to be growing in some of the Indian Courts of referring largely to foreign decisions. However useful in the scientific study of comparative jurisprudence, reference to judgments of foreign Courts, to which Indian practitioners cannot be expected to have access, based often on considerations and conditions totally differing from those applicable to or prevailing in India, is only likely to confuse the administration of justice."

Thus, in our opinion, courts have to be careful to apply the decision of Muslim law to a case relating to Hindu law and the foreign decisions and *vice versa*. There cannot be universal application of principles of law on a particular subject. Special laws by which parties are governed are also to be taken into consideration so as to arrive at a just conclusion.

49. Keeping in view aforesaid principle we proceed to consider the question further. In *Syed Shah Ghulam Ghouse Mohiuddin & Ors. v. Syed Shah Ahmed Mohiuddin Kamisul Quadri (died) by l.rs. & Ors.* (1971) 1 SCC 597, this Court has laid down that Muslim heirs are tenants in common and they succeed to their definite fraction of every part of estate of the deceased. The shares of the heirs are definite and known before

actual partition. Therefore, on partition of the properties there is division by metes and bounds in accordance with specific shares of each sharer which have already been determined by law. This Court has observed thus :

> **“20.** The cause of action for partition of properties is said to be a “perpetually recurring one” (See *Monsharam Chakravarty and Others* v. *Ganesh Chandra Chakravarty & Ors.,* 17 CWN 521. In Mohammedan law the doctrine of partial partition is not applicable because the heirs are tenants-in-common and the heirs of the deceased Muslim succeed to the definite fraction of every part of his estate. The shares of heirs under Mohammedan law are definite and known before actual partition. Therefore on partition of properties belonging to a deceased Muslim there is division by metes and bounds in accordance with the specific share of each heir being already determined by the law.”

50. In *P.N. Veetil Narayani v. Pathumma Beevi & Ors.* (1990) 4 SCC 672, it was reiterated that since heirs succeed to the estate as tenants in common, thus, the liability of heirs of a Muslim dying intestate or that of the deceased is to the extent of his share of debt proportionate to his share of estate. If that is proportionate to share of the deceased as inheritance is as tenants-in-common and as independent debtors, not co-debtors or joint debtors. Co-sharers can hardly be classified as joint contractors, partners, executors or mortgagees. They are independent debtors and the debt having been split by operation of law. This Court has laid down thus :

> **“10.** These observations in *Jafri Begam case* ILR (1885) 7 All 822 are prime roots of the theory as to the divisibility of the debt in the hands of heirs of a Muslim intestate. *S*o it would be right to treat it settled that Muslim heirs are independent owners of their specific shares simultaneously in the estate and debts of the deceased, their liability fixed under the personal law proportionate to the extent of their shares. In this

state of law it would be unnecessary to refer to other decisions of various High Courts touching the subject. So we proceed on the footing that as many heirs as are defending this cause, there are debts in that number.

14. The heirs of a Muslim dying intestate on whom falls the liability to discharge the debt, proportionate to their respective shares in the estate devolved, can hardly be classified as joint contractors, partners, executors or mortgagees. As held above they are by themselves independent debtors; the debt having been split by operation of law. Inter se they have no jural relationship as co-debtors or joint debtors so as to fall within the shadow of contractors, partners, executors or mortgagees or in a class akin to them. They succeed to the estate as tenants-in-common in specific shares. Even a signed written acknowledgment by the principal or through his agent would bind the principal and not anyone else standing in jural relationship with the principal in accordance with Section 20(2). The Muslim heirs inter se have no such relationship. In this view of the matter, we take the view that the High Court was right in confining the acknowledgment of the debts only to respondent 2 and not extending the acknowledgment to the other co-heirs for their independent position.

16. In the context, if the debt is one and indivisible, payment by one will interrupt limitation against all the debtors unless they come within the exception laid down in Section 20(2) which has been taken note of earlier. And if the debt is susceptible of division and though seemingly one consists really of several distinct debts each one of which is payable by one of the obligors separately and not by the rest, Section 20 keeps alive his part of the debt which has got to be discharged by the person who has made payment of interest. It cannot affect separate shares of the other debtors unless on the principal (*sic* principle) of agency, express or implied, the payment can be said to be a payment on their behalf also. See in this connection *Abheswari Dasya* v. *Baburali Shaikh* AIR 1937 Cal 191. The payment made on account of debt by defendant-respondent 2 as an independent debtor, and not as an agent, express or implied, on behalf of other co-heirs could hardly, in the facts established, here be said to be a payment on behalf of all so as to extend period of limitation as against all. We are thus of the considered view that the High Court was right in confining the extension of limitation on payment of a part of debt only against defendant-respondent 2, proportionate to his share of the estate devolved on him which was one-fourth. We are further of the view that the High Court was right in

> holding the suit against other co-heirs to be barred by limitation relating to their shares of the debt."

This Court has also laid down that in that case payment made on account of debt by defendant-respondent 2 as an independent debtor, and not as an agent, express or implied, on behalf of other co-heirs, in the facts established, could not be said to be a payment on behalf of all.

51. This Court again in *Kasambhai Sheikh v. Abdulla Kasambhai Sheikh* (2004) 13 SCC 385 has held that succession in Mohammedan Law is in specific shares as tenants in common.

52. It was observed in *Ram Awalamb v. Jata Shankar* AIR 1969 All. 526 that a joint tenancy connotes unity of title, possession, interest and commencement of title; in tenancy in common there may be unity of possession and commencement of title but the other two features as to unity of title and interest are missing.

53. In *Mansab Ali Khan v. Mt. Nabiunnisa & Ors.* AIR 1934 All 702, a suit was filed by the plaintiffs who had acquired rights in 12/24 sihams in the property in dispute. They claimed possession over the share of the whole property on the ground that one of the defendant-respondents, Mt. Nabiunnissa, had sold certain property to the defendant-respondents Nos.2 and 3. There was an agreement that Mt. Nabiunnisa should remain in possession on the condition that she became liable to pay all the debts due from the deceased. Though the agreement was not proved, the trial court found that certain debts were paid by Mt. Nabiunnisa. It was held that one of the heirs of a

deceased Mohamedan was perfectly entitled to alienate his share of the property without getting it partitioned provided he had paid the proportionate share of debt on assessment of property.

54. Muhammadan Law does not recognize the right of any one of the shareholders being tenants-in-common, for acting on behalf of co-heirs as laid down in *Abdul Majeeth Khan Sahib v. C .Krishnamachariar* AIR 1918 Mad 1049 (FB). It has been laid down that one heir has no authority in law to deal with the share of his co-heirs. Relevant portion is extracted hereunder :

> “This is absolutely clear authority in proof of the position that one heir has no authority, in law, to deal with the shares of his co-heirs. In face of it, it is not necessary to refer to other original text-books. It is stated, however, in *Pathummabi v. Vittil Ummachabi* I.L.R. 26 Mad. 734 that, "if the creditor of the deceased can seek his relief against one of several co-heirs in a case where all the effects of the deceased are in the hands of that heir, it can make no difference whether the heir meets the demand by a bona fide voluntary sale, or the property is brought to sale in execution of a decree obtained against him." To the same effect is a decision of the Allahabad High Court in *Hasan Ali v. Medhi Husain* I.L.R. 1 All. 533. The statement in *Pathummabi v. Vittil Ummachabi* I.L.R. (supra) was purely by way of *obiter dictum* and with all respect to the learned Judges, they failed to bear in mind that, the provision of the Muhammadan Law, that a decree against one heir in possession of all the effects of the deceased, is binding on all if obtained after contest, is part of the processual law of that system and is not based on the ground that a single heir, if he happens to be in possession of the estate of the deceased, represents the rest of the heirs for the purposes of administration generally. The ground on which a decree against one of the heirs, in such circumstances, is treated as *res judicata* is, as stated in the books, that the decree in such cases is, in law, against the deceased and not against the particular heir who is made defendant in the suit.
>
> xxx xxx xxx

So far as voluntary alienations are concerned, which alone form the subject-matter of reference, the Muhammadan Law is clear that one of the heirs of a deceased person is not competent to bind the other heirs by his acts,

Spencer, J. **--** I agree with the judgment of Mr. Justice Abdur Rahim just now pronounced.

Srinivasa Aiyangar, J.-- I agree. In the absence of any right in one of the heirs to represent the co-heirs, one of several co-heirs can only deal with his or her interest in the ancestor's property inherited by them. My learned brother has shown that there is nothing in the Muhammadan Law giving such a right to one of the co-heirs who may happen to be in actual possession of the whole of the ancestor's estate; such possession, it must be remembered, is presumably on behalf of all the co-heirs. He is not constituted the representative of the deceased and cannot administer his property even for the limited purpose of paying off his debts. In *Khiarajmal v. Daim* L.R., 32 Ind. App., 23, Lord Davey referring to a sale by one of the heirs of a Muhammadan for discharging the debt due by the ancestor said "prima facie his conveyance would pass only his share", See. p.37. Representation in a suit may conceivably stand on a different footing for as stated by their Lordships in the same judgment at page 35, "The Indian Courts have exercised a wide discretion in allowing the estate of a deceased debtor to be represented by one member of the family, and in refusing to disturb judicial sales on the mere ground that some members of the family, who were minors, were not made parties to the proceedings, if it appears that there was a debt justly due from the deceased, and no prejudice is shown to the absent minors. But these are usually cases where the person named as defendant is *de facto* manager of a Hindu family property, or has the assets out of which the decree is to be satisfied under his control;" and they applied this principle in that very case to the estate of Nabibaksh. However, that is not the question here."

55. In *Mohammad Afzal Khan, Haji v. Abdul Rahman, Malik & Ors.* AIR 1932 PC 235, the Privy Council has held that in case one of two or more co-sharers had mortgaged an undivided share, the mortgagee takes the security subject to rights of other co-sharers, and the partition if effected, the mortgaged properties are allotted to the other

co-sharers, they take those properties in the absence of fraud, free from the mortgage and the mortgagee can proceed only against the properties allotted to the mortgagor in substitution of his undivided share. The principle that emanates from the aforesaid decision is that co-sharer can bind his property and cannot create charge on the property of other co-sharers. The Privy Council had relied upon the decision in the case of *Byjnath Lall v. Ramoodeen Chowdry* (1874) L R 1 Ind. App. 106, the relevant portion of *Mohammad Afzal Khan, Haji* (supra) is extracted hereunder:

> "As regards the first point, their Lordships are of opinion that where one of two or more co-sharers mortgages his undivided share in some of the properties held jointly by them, the mortgagee takes the security subject to the right of the other co-sharers to enforce a partition and thereby to convert what was an undivided share of the whole into a defined portion held in severalty. If the mortgage, therefore, is followed by a partition and the mortgaged properties are allotted to the other co-sharers, they take those properties, in the absence of fraud, free from the mortgage, and the mortgagee can proceed only against the properties allotted to the mortgagor in substitution of his undivided share. This was the view taken by the Board in *Byjnath Lall v. Ramoodeen Chowdry* (1874) LR 1 Ind. App. 106. In that case the partition was made by the Collector under Regulation XIX of 1814 (Bengal), and the mortgagee was seeking to enforce his remedy not against the properties mortgaged to him, but against the properties which had been allotted to the mortgagor in lieu of his undivided share; but the Board held that not only he had a right to do so, but that it was in the circumstances of the case his sole right, and that he could not successfully have sought to charge any other parcel of the estate in the hands of any of the former co-sharers. Their Lordships think that the principle enunciated in that case applies equally to a partition by arbitration such as the one in the present case. Their Lordships are therefore of opinion that the appellant is not entitled to enforce his charge against the properties allotted to the first and second respondents. The third respondent (the mortgagor) has not appeared before their Lordships, and their Lordships express no opinion as to any other rights which the appellant may have in respect of his mortgage."

56. It was submitted on behalf of the appellants that in Mohammedan law the doctrine of partial partition is not applicable because the heirs are tenants-in-common. Reliance has been placed upon the decision of this Court in *Syed Shah Ghulam Ghouse Mohiuddin v. Syed Shah Ahmed Mohiuddin Kamisul* (supra). In *S.M.A. Samad & Ors. v. Shahid Hussain & Ors.* AIR 1963 Patna 375, the Patna High Court referring to the various decisions indicated that it would be inexpedient to allow suits for partition of a portion of the properties, because it would lead to a multiplicity of suits. It is merely a rule of procedural law. Mohammedans are never joint in estate but only tenants-in-common. It has been observed that the rule with respect to the partial partition is not so rigid, it can be allowed in certain circumstances. Reliance has also been placed on a decision of the High Court of Madhya Pradesh in *Abdul Karim & Ors. v. Hafij Mohammad & Ors. (*1989) MP LJ 178, in which it had been held that suit for partial partition was maintainable. Reference has also been made to the case of *A.J. Pinto & Anr. v. Smt. Sahebbi Kom Muktum Saheb (Dead) by LRs & Ors.* (1972) 4 SCC 238, wherein this Court has left open the question whether partial partition is possible under Muslim Law and no opinion was expressed. The aforesaid decision as to the partial partition had been cited to emphasize that when Muslims inherit in specific share, their share is determined. However, the question of partial partition is not involved in the instant case, as such, we need not go into the aforesaid question as to the

permissibility of the partial partition, as the suit in the instant case was filed for partition of the entire matruka property.

57. A Full Bench decision of the High Court of Sind in *Vazir alias Dino & Anr. v. Dwarkamal & Ors.* AIR 1922 Sind 41 has also been referred to, wherein referring to the case of *Mangaldas v. Abdul Razak* (1916) 16 Bombay L.R. 224, it has been observed that the notions of joint family, joint family property and joint family business are utterly unknown to Mohammedan Law.

58. A decision in *Jan Mahomed v. Dattu Jaffer* (1913) 38 Bombay 449 has also been referred to and it has been held that Mohammedans under their own law are never joint in estate whether they live together or whether they do not. On death of a Muslim his heirs at once become vested with the shares to which the Islamic Law entitles them. They have not to wait until the property is divided by metes and bounds. It has also been observed that sometime an error is caused by application of Hindu law to the case of Mohammedan law. It has also been further observed that a Mohammedan heir is not a co-parcener. He has not merely a right to a defined and immediate share in each portion of the estate but if any portion of the estate is in any case marked off and divided from the rest of the estate, he has a right to an immediate share in that portion.

59. Reliance has also been placed upon the decision in *Ghumanmal Lokumal & Ors. v. Faiz Muhammad Haji Khan & Ors.* AIR 1948 Sind 83 in which it has been observed thus:

> "15. It may be conceded that the question of adjustment of equities between the vendor and vendee upon a suit by a Muslim co-sharer for partition of the entire property held in co-ownership might properly arise, but we cannot accept the position that, while a Muslim co-sharer elects to sue for partition of some of the properties only held in co-ownership, a vendee can compel him to sue for a general partition, for the purpose of adjusting equities between the co-sharer- vendor and himself. If Mr. Kimatrai's contention were to prevail, it would put fetters upon what this Court in second Appeal No. 64 of 1942 has held to be an unfettered right of a Muslim co-sharer to claim partition of some of the properties only held in co-ownership, while retaining his co-ownership in the remaining properties.
>
> 16. If, then, a vendee cannot require a Muslim co-sharer to sue for a general partition, much less can he institute a suit for the sole purpose of adjusting equities between himself and his Muslim co-sharer-vendor in regard to property which has not been alienated to him, as is sought to be done in the case before us."

It has been observed that a vendee cannot compel a Muslim to sue for a general partition for the purpose of adjusting equities between the co-sharer-vendor and himself. The logic behind this is that specific share is inherited by a co-sharer in a specific property.

60. Right of pre-emption under Mohammedan Law has been relied upon to invalidate the sale to stranger even to the extent of vendor's share. A Full Bench of the Allahabad High Court in *Inayatullah v. Gobind Dayal* (1885) ILR 7 All 775 has observed that right of pre-emption is closely connected with the Mohammedan law of inheritance. The following is the observation made with respect to the right of pre-emption in the aforesaid decision:

> "7. Upon the present occasion it is unnecessary to consider whether "gift" can properly be described as a "religious usage or institution" within the meaning of Section 24. I am here concerned only with the question whether preemption can be so described. My own opinion is that it can, and although I cannot add much to the reasons given by SPANKIB, J., I may observe that preemption is closely connected with the Muhammadan Law of inheritance. That law was founded by the Prophet upon republican principles, at a time when the modern democratic conception of equality and division of property was unknown even in the most advanced countries of Europe. It provides that, upon the death of an owner, his property is to be divided into numerous fractions, according to extremely rigid rules, so rigid as to practically exclude all power of testamentary disposition, and to prevent any diversion of the property made even with the consent of the heirs, unless that consent is given after the owner's death, when the reason is, not that the testator had power to defeat the law of inheritance, but that the heirs, having become owners of the property, could deal with it as they liked, and could therefore ratify the act of their ancestor. No Muhammadan is allowed to make a will in favour of any of his heirs, and a bequest to a stranger is allowed only to the extent of one-third of the property. Under these circumstances, to allow the Muhammadan Law of inheritance, and to disallow the Muhammadan Law of pre-emption, would be to carry-out the law in an imperfect manner; for the latter is in reality the proper complement of the former, and one department of the law cannot be administered without taking cognizance of the other….."

It has also been observed that under the Mohammedan law, the rule of pre-emption proceeds upon a principle analogous to the maxim "*sic utere tuo ut alienum non leadas*". The right of preemption is based upon the fact that there can be large number of co-sharers, the preference has to be given to pre-emptor as a right of substitution, but not as a re-purchase in Mohammedan law to cut short the litigation.

61. For the purpose of pre-emption, reliance has also been placed on the decision in *Zamir Ahmad v. S. Haidar Nazar & Ors.* AIR 1952 All 541, in which it has been observed that where there is a custom relating to pre-emption, the rule of Mohammedan

law of pre-emption is not to be applied even on the ground of equity and good conscience. In view of the entry in Wajibularz the custom is complete by itself and can be enforced. The plaintiff being a relative and a co-sharer, accordingly, had a preferential right of pre-emption as against the vendees and was entitled to pre-empt.

62. The decision in *Nagammal & Ors. v. Nanjammal & Anr.* (1970) 1 MLJ 358 has also been referred to, wherein it has been observed that the preferential right to acquire the share of a co-heir who proposes to transfer his interest in the property or business of the propositus is limited to cases of simultaneous succession and devolution of property upon two or more heirs belonging to Class I. Obviously, the section has been aimed at reducing to some extent at least the inconvenient effects of simultaneous succession by several persons at one and the same time as members of Class I leading to fragmentation and parcelling up, of even small holdings of property. To a degree the section enables a co-heir to retain the property in the family and avoid the introduction of a stranger in the enjoyment of family property if he so desired. Relying upon *Inayatullah* (supra), it has been observed that it is not lawful for anyone to sell his own share till he has informed his co-sharer who may take or leave it as he wishes; and if he has sold without such information, the co-sharer has a preferential right to the share. It has also been observed that the existence of right of pre-emption is patent and the burden is on the purchaser to establish that other co-heirs declare or waive their preferential right when occasion arose. It is not pretended that purchaser made any reference to non-alienating co-heirs

before his purchase. It follows that plaintiffs have not lost their preferential right of purchase by sale and are entitled to have property conveyed to them.

63. On the basis of the aforesaid decisions with respect to the preferential right it is sought to be contended on behalf of the appellants that there is no equity in favour of the purchaser, but under Muslim law co-heirs have the right of preferential purchase and in this case even it is not pretended by the purchaser that he had offered to the co-heirs before purchasing the same vide sale deed dated 23.11.1959. We decline to accept the submission as the property in question is capable of division and it is not a small fraction of property, but partition is of huge property, and as the property admittedly has exchanged several hands by now, we are not inclined to invalidate the sale deed executed by defendant No. 1 in favour of Bala Mallaiah even to the extent of his share i.e. 14/104th on the basis of principle of pre-emption of Muslim law. It would be too late and iniquitous to invoke the principle of pre-emption in such a case, particularly when no such plea was raised at the relevant time and in the courts below. In case heirs were desirous of raising it, they should have raised their plea timely.

64. In *Shaik Mohd. Ali Ansari v. Shaik Abdul Samed (Died) per LRs* (2012) 4 ALD 680 (DB), the question of fiduciary relationship has been discussed, but in the instant case it is not the case set up by the objectors/purchasers that the sale deed was the outcome of fiduciary relationship.

65. The parties have been litigating since 1935 for partition of property. In the instant case sale by Hamid Ali Khan, defendant No.1 is not of undivided share but that of a specific property i.e. 68 acres 10 guntas in which he had only 14/104th share. Thus being a tenant in common he had no authority or right to sell the share of other co-owners. The vendor had the right to sell to the extent of his own share considering the nature of succession amongst Mohammedans. Thus the sale of property of other co-sharers was illegal and void.

66. Similar question arose in *Mansab Ali Khan* (supra) in which it has been laid down that if partition has not been effected the heir can only sell his undivided share and cannot sell a particular plot. It was submitted that though the specific plot has been alienated but in the whole undivided property it would amount to less than the share of an alienating co-sharer i.e. defendant No.1. He had share of approximately 250 acres in the matruka properties left by Late Nawab Jung. Similar submission was repelled by the Allahabad High Court and it was held that to the extent of the share of vendor only in the specific property, the sale could be enforced and the vendor had no right to sell the specific property which belonged to other co-sharers. The sale of a specific part of the property which was not in the vendor's exclusive ownership, was set aside. Allahabad High Court has laid down thus :

> "3. The simple question that I have to decide is whether in these circumstances the plaintiff-appellants are entitled to a decree for possession of their share in the property in suit, including that portion of it which was transferred in 1920 and 1922 by Mt. Nabiunnissa to defendants Nos. 2 and

3, or to any other relief. It is not quite clear what the lower appellate Court meant by saying that the sale deed was not challenged by the plaintiffs in the plaint on the ground that it dealt with one specific plot, or in expressing the opinion that such a sale deed is only voidable at the opinion of a joint owner within six years of the transfer. The whole of the plaint shows that the plaintiffs claimed to be owners of 12 out of 24 sihams in the property which had been left by Mt. Wasiunnisa. They also claim to have been in joint possession with Mt. Nabiunnissa although the latter's name alone had been recorded in the revenue papers. *Their cause of action was that Mt. Nabiunnissa had transferred part of the property and whether their grievance was that she had transferred more than her proper share or that she had transferred a specific part of the property which was not in her own exclusive ownership*, it is quite clear that the plaintiffs' object was to dispel the cloud on their title to 12/24 sihams of the whole property which had arisen owing to the sale deeds of 1920 and 1922. It has not been clearly proved that the plaintiffs have been in joint possession of the whole of the property and they have therefore paid the Court fees necessary for a decree for possession. What is wanted, however, is a declaration that they are entitled to joint possession, and in the circumstances it appears to me that they ought to obtain such a decree. In the case of *Jafri Begam v. Amir Mohammad Khan* (1885) 7 All. 822, it was held that in somewhat similar circumstances a plaintiff could recover from the auction purchaser his share in the property sold on condition that he paid a proportionate share of the ancestor's debt for which the decree (in execution of which the property had been sold) was passed.

4. As regards the question of the amount which is said to have been paid by Mt. Nabiunnissa in liquidation of her mother's debts, the trial Court found that she paid a sum of Rs.1,800 and that the plaintiffs were liable to pay a proportionate amount viz. Rs. 853-14-0. The lower appellate Court has found that so far as Rs.1,000 is concerned it has not been proved that the debt was due or that Mt. Nabiunnissa has liquidated it. There is, however no finding as regards the balance of Rs.800. Mr. Mohd. Husain, who appeared in this Court on behalf of Mt. Nabiunnissa, has argued that he is not bound by the findings of the lower appellate Court with regard to these debts at all, because the decree of the lower appellate Court was in his favour and these findings were therefore irrelevant. Mt. Nabiunnissa was however one of the parties to the appeal in the lower appellate Court where these questions as to the debts were agitated and decided, and so far as the

> findings of the lower appellate Court are findings of fact they must be held to be binding on Mt. Nabiunnissa."

67. In *Abdul Majeeth Khan Sahib v. C. Krishnamachariar* (1917) 5 LW 767, a Full Bench of the Privy Council was faced with the issue that if one of the co-heirs of a deceased Muhammadan in possession of the whole estate of the deceased or of any part of it sells the property in his possession forming part of the estate for discharging the debts of the deceased, is such sale binding on other co-heirs or creditors of the deceased, and if so, to what extent ? It was held that property of a deceased Muhammadan vests in his heir upon his death in specified share. Heirs of the deceased take their shares in severalty, as tenants-in-common and under Muhammadan Law one heir of the deceased cannot bind shares to his co-heirs.

68. In our opinion, sale beyond 14/104th share by Hamid Ali to Bala Malliah was void. The Mohammedan Law does not recognize the right of one of shareholders being tenants-in-common for acting on behalf of others. While discharging debt also they act as independent debtors. A co-sharer cannot create charge on property of co-heir. The right of Muslim heir is immediately defined in each fraction of estate. Notion of joint family property is unknown to Muslim law. Co-heir does not act as agent while discharging debt but is an independent debtor not as co-debtor or joint debtor. Co-sharers are not defined as joint contractors, partners, executors or mortgagees.

<u>(viii) In re: whether the purchaser has a right to claim equity for allotment of Item No. 6 of Schedule 'B' property in final decree proceedings in suit for partition ? If yes, to what extent ?</u>

69. It was contended on behalf of the respondents that in respect of transactions which are hit by section 52 can be looked into at the time of final decree proceedings. However, preliminary decree in the instant case identifies different modes and manners under which equities could be adjusted at the time of final decree proceedings. Reliance has been placed upon following paragraphs 81 and 93 of the judgment of the trial court while passing the preliminary decree in the year 1970 :

> "81. It is fact established that the deceased had gifted the land to D-1 but the next point for consideration is, whether the entire land measuring 24 bigas and 10 bams was gifted to him or a portion of it for the construction of the house. The learned counsel for D-25 argued that the entire land was given to D-1 and even including S. No.22/2 another item about which I will deal later. The learned counsels for D-6 and plaintiff contended that the house of D-1 was only on portion of land and that it cannot be presumed that the entire land of more than 18 acres would be given for the construction of the house. As already observed the house of D-1 around the house. There is no evidence on record to show the extent of land within the compound. One of the witness stated that it was 4 or 5 acres and another stated that it was about 15 acres. The plan of the compound and the area of the house is not made the record of the suit. Of course Ex. Alif 2 while giving permission for the construction of the compound mentioned about the plan but it did not give the area covered by it. Subsequently, i.e. after the institution of the suit D-1 had built a cinema house and the hotel and malgi. Another witness said that there was no open land between the compound and the road. There is no clear picture about the location for want of sufficient material on record. The principles can be worked out in the final decree proceedings. In my view the deceased did not gift the entire land situated in Asifnagar but only such portion of land on which D-1 had built the house and the compound. As already stated by me that the land was given for purpose of constructing residential house. It is a fact that in Ex. Alif 4 he gave the boundaries and stated that a plan was also prepared after survey and settlement but it is not filed and nothing can be made out from the boundaries given in Ex. Alif 4 and also Ex. Alif. I am not inclined to believe that only that portion of land was gifted to him on which

> the house stands excluding the compound but in my view all that portion of land was given to D-1 on which the house stands and the land was given for the purpose of construction the house and if more land was given to him he could have enclosed it with the compound or with some fence. My conclusion is that the land covered by the residential house and the compound wall was gifted to D-1 and the remaining land outside the compound is matruka property. If the cinema house was built on the land outside the compound, it can be adjusted towards the share of D-1 in the final decree proceedings.
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> x x x x x
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> 93. It is a fact and also admitted in some cases that D-1 had sold some lands in some villages. Ex.B-2 to B-9 are such sale deeds executed by D-1. It was explained by D-1 that he was to pay the land revenue to the Government and for that purpose he had to sell the lands. I need not go into the question about the lands sold by D-1 and about the sale amounts realized. In the final decree proceedings these facts can be taken into consideration. D-1 would be liable to account for the monies realized."

It is apparent that the sale deed in question was not referred to in para 93. Even if the aforesaid observations had not been made, it was open to the executing court to adjust equity of purchasers to the permissible extent as purchasers *pendente lite* can work out the equities in accordance with law in the final decree proceedings.

70. Reliance has been placed by the respondents on a decision in *Jayaram Mudaliar v. Ayyaswami & Ors.* (1972) 2 SCC 200 :

> "**47**. It is evident that the doctrine, as stated in Section 52, applies not merely to actual transfers or rights which are subject-matter of litigation but to other dealings with it "by any party to the suit or proceeding, so as to affect the right of any other party thereto". Hence, it could be urged that where it is not a party to the litigation but an outside agency, such as the tax collecting authorities of the Government, which proceeds against the subject-matter of litigation, without anything done by a litigating party, the resulting transaction will not be hit by Section 52. Again, where all the parties which could be affected by a pending litigation are themselves parties to a transfer or dealings with property in such a way that they cannot

resile from or disown the transaction impugned before the Court dealing with the litigation, the Court may bind them to their own acts. All these are matters which the Court could have properly considered. *The purpose of Section 52 of the Transfer of Property Act is not to defeat any just and equitable claim but only to subject them to the authority of the Court which is dealing with the property to which claims are put forward*." (emphasis added by us)

Reliance has also been placed on *Vinodan v. Vishwanathan* (2009) 4 SCC 66 thus :

"**11.** In the facts and circumstances of the case, while balancing the equities and for keeping peace and happiness in the family, we think it would be just and proper to direct the appellant to pay Rs 5,50,000 to the respondent within a period of four months. On receiving the said amount, the respondent may construct a suitable house in his portion of the land and for that purpose we grant one year's time from the date of payment of Rs 5,50,000 to the respondent to vacate the portion of the building which is presently in his possession and give vacant and peaceful possession of his portion of the building to the appellant in lieu of payment of Rs 5,50,000. We are granting a long time to the respondent to vacate the portion of the building in his possession to avoid any inconvenience to the respondent."

Decision in *Dhanlakshmi & Ors. v. P. Mohan & Ors.,* (2007) 10 SCC 719 has been referred laying down that :

"**5.** Section 52 deals with a transfer of property pending suit. In the instant case, the appellants have admittedly purchased the undivided shares of Respondents 2, 3, 4 and 6. It is not in dispute that the first respondent P. Mohan has got an undivided share in the said suit property. Because of the purchase by the appellants of the undivided share in the suit property, the rights of the first respondent herein in the suit or proceeding will not affect his right in the suit property by enforcing a partition. Admittedly, the appellants, having purchased the property from the other co-sharers, in our opinion, are entitled to come on record in order to work out the equity in their favour in the final decree proceedings. In our opinion, the appellants are necessary and proper parties to the suit, which is now pending before the trial court. We also make it clear that we are not concerned with the

other suit filed by the mortgagee in these proceedings."

71. Though it is true that purchasers can work out the equity in the final decree proceedings but it is only to the legally permissible extent and not beyond that. The preliminary decree declared the shares in item No.6 of Schedule 'B' property in specified shares. The preliminary decree is binding and even otherwise the sale was valid only to the extent of the share of defendant No.1 i.e. 14/104th share in the specific property and not beyond it. This Court in *K. Adivi Naidu & Ors. v. E. Duruvasulu Naidu & Ors.* (1995) 6 SCC 150, has laid down that when a specific property comprising of undivided share in joint family properties is purchased by appellants from alienee of Karta of the joint family prior to partition suit and where the preliminary decree in partition suit directed that properties be divided by metes and bounds, taking the good and bad qualities thereof, then the preliminary decree was allowed to become final. This Court held that the trial court should give effect to the preliminary decree, and though the appellants had no equities, the restrictive share to which the principal alienator was entitled, should be allotted to them as a special case. In the instant case, preliminary decree has declared the share only to the extent of 14/104th in the disputed property in item No.6, schedule 'B'. Thus, by no equitable principle the purchaser can claim the entire property to be allotted to him.

72. The respondents have placed reliance on a decision of the High Court of Madras in *Khatoon Bibi v. Abdul Wahab Sahib & Ors.* AIR 1939 Mad. 306 so as to contend that

the sale deed in favour of Bala Mallaiah dated 23.11.1959 is valid and binding on defendant No.1, Hamid Ali Khan notwithstanding the pendency of the partition suit. In Muslim law property can be alienated by heir during the pendency of the suit for its partition. In *Khatoon Bibi* (supra) it has been observed that inheritance vests immediately, in Mohammedan law, in his heir and is not suspended by reason of debts being due from the estate of the deceased and against the other co-heirs, the claim of bona fide purchasers to have the share in the particular plot is not absolute. It is well recognized principle of law relating to co-owners or tenants in common that an alienation by a co-owner or a tenant in common of a share in any item of the property is subject to the rights and equities of the other co-owners or tenants in common. It has also been observed on the basis of *Cooper v. Fisher* (1841) 10 LJ Ch 221 that if persons deal in such interests as undivided shares, they do so with the liability of having something assigned to them different from what they might originally possess. The alienee of part of an undivided estate must take his interest subject to a bill of partition being filed against him. The court further observed that :

> "11. A co-owner or a tenant-in-common can always file a suit for partition and have his share defined and delivered to him. The Court in effecting a partition is bound to adjust all the equities existing between the parties and arising out of their relation to the property to be divided. The equities to be adjusted would involve every matter relating to the common property with reference to which one tenant-in-common may equitably demand anything of the other such as contribution for repairs or improvements to the common property, accounting for waste of the common property and the enforcement of any lien or charge which a tenant-in-common may claim against the other in respect of any matter concerning the common property.

In regard to the method of division the Court is not bound to allot an aliquot share of each species of property to each of the parties. It is enough if each tenant-in-common has an equal share of the whole. This is subject to the other equities which may have to be adjusted. In this case the plaintiff is admittedly entitled to a half share in the estate but she is not able to get her due and legitimate share by virtue of the fact that defendants 1 to 3 have dissipated a major portion of the estate consisting of the moveable property. The plaintiff is therefore justly entitled to demand that all the immovable property should be assigned to her and that no portion of the immovable property should be claimed by defendants 1 to 3. Freeman on "Co-tenancy and Partition" dealing with equities which may be enforced in a suit for partition observed at page 676 thus :

> If one of the co-tenants has wasted any part of the lands of the co-tenancy, the Court may take that fact into consideration and do justice between the parties by assigning to the wrongdoer the part which he has wasted.

x x x x x

13. The question now arises, should any portion of the property by virtue of the alienation by defendants 1 to 3 *pendente lite* be allotted to the share of the defendants in order to give effect to the alleged equitable right in favour of the alienees? Ordinarily it would be just and proper to allocate properties which have been alienated to the shares of the alienor. But where it is not practicable or equitable, the Court is not bound to allot those properties but might allot any other properties and the alienees' only right is to have recourse to the properties so allotted. It may be that the substituted property or security may prove worthless but it is a risk every alienee of an undivided interest of a tenant-in-common in a specific item of property takes as a necessary incident of the alienation. Therefore there is nothing to preclude a Court from awarding to the plaintiff the immovable properties and awarding to the defendants the moveable properties which have been wasted by them, the only remedy of the alienee being to proceed against the moveable properties in their hands. But what is alleged in this case is that the alienees are bona fide alienees and they have got therefore an equity in their favour. But it seems to me the equity of the plaintiff in this case is paramount to the equity in favour of the alienees. She has been unjustly deprived of her legitimate share in the property by the wrongful act of defendants 1 to 3 aided by defendant 4, and the property was converted and appropriated for their use during her minority. She lost no time in enforcing her claim as soon as she attained majority and the alienations were *pendente lite*. The alienees allege that they were ignorant of the institution

> of the suit but that fact is in my opinion immaterial as they cannot get higher rights than their alienors, i.e. an alienee from a co-tenant takes his interest subject to the equities of the other co-tenants. But this is a case in which, if the alienees were not parties, they will be affected by the doctrine of *lis pendens*. The title to the immovable property is specifically in question within the meaning of Section 52 of the Transfer of Property Act.
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> 14. A question of title has been raised, namely whether the property in the suit belonged solely to Abdul Rahiman or was the joint property of defendants 1 to 3 and Abdul Rahiman. This issue would be quite sufficient to attract the operation of *lis pendens*. No doubt a suit for administration has been held not to attract the operation of *lis pendens* until a preliminary decree for administration has been passed. But in this case the plaintiff has also prayed for partition and delivery of her share and for an account on the basis that defendants 1 to 3 have wrongfully possessed themselves of her father's property and misappropriated the bulk of it and this suit cannot therefore be viewed as a bare administration suit. But since the alienees are formally on record and they will be bound by any decree passed in the suit, there is no need to consider the applicability of Section 52 of the Transfer of Property Act. But the principle underlying the Section will have to be applied in favour of the plaintiff, i.e. the Court in making the adjustment of equities in giving relief to her ought to confine itself to the legal rights of the co-heirs on the date of the institution of the suit without reference to the equitable rights of persons who derived title from them *pendente lite* as her rights should not be prejudiced by any intervening equity in the alienees. The plaintiff is entitled to say that so far as she is concerned, she is not bound to take any notice of a title acquired since the filing of the suit and "as to them it is as if no such title existed."

The Court has reiterated the principle that an alienee from a co-tenant takes subject to the equities from other co-tenants and in case alienees were not parties they would be affected by the doctrine of *lis pendens*. The decision is of no application in the facts of the instant case as alienation made was beyond the interest in the property of alienating co-sharer and in the proceedings for final decree itself, no such equitable right has been claimed by purchaser as discussed hereinafter. To claim such an equity separate bundle of facts was required to be pleaded and established. Thus, in absence thereof, it is

not possible in the instant case to work out the equities of the purchasers in other properties allotted to the share of the vendor.

73. Reliance has been placed on a decision of the High Court of M.P. in *Abdul Rahman & Anr. v. Hamid Ali Shah & Ors.* AIR 1959 MP 190. The main question for consideration was with respect to maintainability of the suit for partial partition or the suit has to be filed for general partition of all the properties. It has been observed that an alienee of specific item of property has also to be given a right to sue for general partition so as to claim equitable right against his vendor. In the instant case the proposition has no application firstly for the reason that no such equity has been claimed by the purchasers in the objections filed in the final decree proceedings. The claim was to retain only the specific property which had been alienated by defendant No.1.

74. Reliance has also been placed on *Tikam Chand Lunia v. Rahim Khan Ishak Khan* & Ors. AIR 1971 MP 23. Following the aforesaid decision of the M.P. High Court in *Abdul Rahman* (supra), law to the similar effect has been laid down. In the latter decision it has been held that when specific property cannot be allotted to the share of the alienor, sale must be construed to be sale of so much portion as can justly be given to the share of the alienor. In the instant case the alienor had only 14/104th share and that has been rightly allotted to him.

75. Reliance has also been placed on *T.G. Ashok Kumar v. Govindammal & Anr.* (2010) 14 SCC 370 in which it has been laid down that in the case of *pendente lite*

transfer of property during the pendency of the partition suit held by the other co-owner, sale *pendente lite* is not void but subject to the decree in partition suit. The title of the vendee would depend upon the decision in the partition suit in regard to the title of vendor. If the vendor has title only in respect of a part of the property, vendee's title would be saved only to that extent. The sale of the remaining portion which fell to the share of other co-owner would be ineffective. On the basis of the aforesaid decision, Bala Mallaiah, his heirs and purchasers can get what can be allotted to vendor Hamid Ali Khan's share. That precisely is the preliminary as well as the final decree. This Court in *T.G. Ashok Kumar* (supra) has laid down thus and the relevant portion is extracted hereunder :

> "**14.** On the other hand, if the title of the pendente lite transferor is recognised or accepted only in regard to a part of the transferred property, then the transferee's title will be saved only in regard to that extent and the transfer in regard to the remaining portion of the transferred property to which the transferor is found not entitled, will be invalid and the transferee will not get any right, title or interest in that portion.
>
> **15.** If the property transferred pendente lite, is allotted in entirety to some other party or parties or if the transferor is held to have no right or title in that property, the transferee will not have any title to the property. Where a co-owner alienates a property or a portion of a property representing to be the absolute owner, equities can no doubt be adjusted while making the division during the final decree proceedings, if feasible and practical (that is, without causing loss or hardship or inconvenience to other parties) by allotting the property or portion of the property transferred pendente lite, to the share of the transferor, so that the bona fide transferee's right and title are saved fully or partially."

It is apparent from the aforesaid decision that a transferee may lose the entire property also though equities can be worked out by making allotment of property which

has been transferred *pendente lite* but in the instant case such equity is not permissible in view of the provisions of Mohammedan Law as well as the fact that no such equity has been claimed for allotment out of other properties fallen to the share of the vendor.

76. Reliance has also been placed on *Khemchand Shankar Chaudhari & Anr. v. Vishnu Hari Patil & Ors.* (1983) 1 SCC 18 in which this Court has laid down thus :

> "**6.** Section 52 of the Transfer of Property Act no doubt lays down that a transferee pendente lite of an interest in an immovable property which is the subject-matter of a suit from any of the parties to the suit will be bound insofar as that interest is concerned by the proceedings in the suit. Such a transferee is a representative in interest of the party from whom he has acquired that interest. Rule 10 of Order 22 of the Code of Civil Procedure clearly recognises the right of a transferee to be impleaded as a party to the proceedings and to be heard before any order is made. It may be that if he does not apply to be impleaded, he may suffer by default on account of any order passed in the proceedings. But if he applies to be impleaded as a party and to be heard, he has got to be so impleaded and heard. He can also prefer an appeal against an order made in the said proceedings but with the leave of the appellate court where he is not already brought on record. The position of a person on whom any interest has devolved on account of a transfer during the pendency of any suit or a proceeding is somewhat similar to the position of an heir or a legatee of a party who dies during the pendency of a suit or a proceeding, or an Official Receiver who takes over the assets of such a party on his insolvency. An heir or a legatee or an Official Receiver or a transferee can participate in the execution proceedings even though their names may not have been shown in the decree, preliminary or final. If they apply to the court to be impleaded as parties they cannot be turned out. The Collector who has to effect partition of an estate under Section 54 of the Code of Civil Procedure has no doubt to divide it in accordance with the decree sent to him. But if a party to such a decree dies leaving some heirs about whose interest there is no dispute should he fold up his hands and return the papers to the civil court? He need not do so. He may proceed to allot the share of the deceased party to his heirs. Similarly he may, when there is no dispute, allot the share of a deceased party in favour of his legatees. In the case of insolvency of a party, the Official Receiver may be allotted the share of the insolvent. In the

case of transferees pendente lite also, if there is no dispute, the Collector may proceed to make allotment of properties in an equitable manner instead of rejecting their claim for such equitable partition on the ground that they have no locus standi. A transferee from a party of a property which is the subject-matter of partition can exercise all the rights of the transferor. There is no dispute that a party can ask for an equitable partition. A transferee from him, therefore, can also do so. Such a construction of Section 54 of the Code of Civil Procedure advances the cause of justice. Otherwise in every case where a party dies, or where a party is adjudicated as an insolvent or where he transfers some interest in the suit property pendente lite the matter has got to be referred back to the civil court even though there may be no dispute about the succession, devolution or transfer of interest. In any such case where there is no dispute if the Collector makes an equitable partition taking into consideration the interests of all concerned including those on whom any interest in the subject-matter has devolved, he would neither be violating the decree nor transgressing any law. His action would not be ultra vires. On the other hand, it would be in conformity with the intention of the legislature which has placed the work of partition of lands subject to payment of assessment to the Government in his hands to be carried out "in accordance with the law (if any) for the time being in force relating to the partition or the separate possession of shares."

There is no dispute on the aforesaid principle. The aforesaid principle has been followed in the instant case and permissible share has been allotted. Thus the decision is of no further assistance to the cause espoused.

77. In *Jayaram Mudaliar v. Ayyaswami & Ors.* (1972) 2 SCC 200, it has been laid down thus :

"**47**. It is evident that the doctrine, as stated in Section 52, applies not merely to actual transfers or rights which are subject-matter of litigation but to other dealings with it "by any party to the suit or proceeding, so as to affect the right of any other party thereto". Hence, it could be urged that where it is not a party to the litigation but an outside agency, such as the tax collecting authorities of the Government, which proceeds against the subject-matter of litigation, without anything done by a litigating party, the resulting transaction will not be hit by Section 52. Again, where all the

parties which could be affected by a pending litigation are themselves parties to a transfer or dealings with property in such a way that they cannot resile from or disown the transaction impugned before the Court dealing with the litigation, the Court may bind them to their own acts. All these are matters which the Court could have properly considered. The purpose of Section 52 of the Transfer of Property Act is not to defeat any just and equitable claim but only to subject them to the authority of the Court which is dealing with the property to which claims are put forward.

48. In the case before us, the Courts had given directions to safeguard such just and equitable claims as the purchaser-appellant may have obtained without trespassing on the rights of the plaintiff-respondent in the joint property involved in the partition suit before the Court. Hence, the doctrine of lis pendens was correctly applied."

78. In *Marirudraiah & Ors. v. B. Sarojamma & Ors.* (2009) 12 SCC 710, a Constitution Bench of this Court set aside an order passed by the High Court directing allotment of Item No.9 sold *pendente lite* to purchaser and compensation to the co-sharers of his predecessor in interest in terms of money based on the market value of the property which was alienated to him. This Court has laid down that courts are not supposed to encourage *pendente lite* transactions, and regularizing their conduct by showing equity in their favour at the cost of co-sharers.

79. In *Kammana Sambamurthy (Dead) by LRs. v. Kalipatnapu Atchutamma (Dead) & Ors.* (2011) 11 SCC 153, this Court has laid down that when the vendor was having only ½ share in the property but executed the contract for sale of the entire property, the vendee would be entitled to decree for specific performance only to the extent of ½ share of the vendor and not beyond it.

80. In *Nova Ads v. Metropolitan Transport Corporation & Ors.* (2015) 13 SCC 257, this Court has considered various decisions like *Raja Ram Mahadev Paranjype v. Aba Maruti Mali* AIR 1962 SC 753, *P.M. Latha v. State of Kerala* (2003) 3 SCC 541, *Raghunath Raj Bareja v. Punjab National Bank* (2007) 2 SCC 230, *Madamanchi Ramappa* v. *Mothaluru Bojjappa* AIR 1963 SC 1633, *Laxminarayan R. Bhattad v. State of Maharashtra* (2003) 5 SCC 413, *Nasiruddin v. Sita Ram Agarwal* (2003) 2 SCC 577, *E. Palanisamy v. Palanisamy* (2003) 1 SCC 123, *India House v. Kishan N. Lalwani* (2003) 9 SCC 393 and has observed that law will prevail over the equity principle when they cannot be harmonized thus :

> "45. In *Raja Ram Mahadev Paranjype v. Aba Maruti Mali* AIR 1962 SC 753, a three-Judge Bench has opined that: (AIR p. 756, para 9)
>
> > "9. ... Equity does not operate to annul a statute. This appears to us to be well established but we may refer to *White and Tudor's Leading cases on Equity* (9th Edn., p. 238), where it is stated:
> >
> > 'Although, in cases of contract between parties, equity will often relieve against penalties and forfeitures, where compensation can be granted, relief can never be given against the provisions of a statute."
>
> 46. In *P.M. Latha v. State of Kerala* (2003) 3 SCC 541, it has been opined: (SCC p. 546, para 13)
>
> > "13. Equity and law are twin brothers and law should be applied and interpreted equitably but equity cannot override written or settled law."
>
> 47. In *Raghunath Raj Bareja v. Punjab National Bank* (2007) 2 SCC 230, the Court observed that it is well settled that when there is a conflict between law and equity, it is the law which has to prevail. The Court further ruled that equity can supplement the law, but it cannot supplant or override it. In this context, reliance was also placed upon *Madamanchi Ramappa v. Muthaluru Bojjappa* AIR 1963 SC 1633, *Laxminarayan R. Bhattad v. State of Maharashtra* (2003) 5 SCC 413, *Nasiruddin v. Sita Ram Agarwal* (2003) 2 SCC 577, *E. Palanisamy v. Palanisamy* (2003) 1 SCC

123, and *India House v. Kishan N. Lalwani (2003) 9 SCC 393.”*

81. Reliance has been placed on *Raghunath Rai Bareja & Anr. v. Punjab National Bank & Ors.* (2007) 2 SCC 230, in which the Latin maxim “dura lex sed lex” which means “the law is hard, but it is the law” was applied. Relying upon that it has been observed that equity can only supplement the law, but it cannot supplant or override it. But when there is a conflict between law and equity, it is the law which has to prevail.

82. In the instant case, equitable right of allotment of some land other than which was purchased out of some other properties allotted to the share of vendor Hamid Ali Khan, D-1 has not been claimed in the objections filed during the final decree proceedings filed by the purchasers. The property admittedly has exchanged hands a number of times during the pendency of suit from 1935 till date and how the equity is to be worked out is always a question of fact in every case, how much share has been allotted to the share of one vendor and how much property he had already alienated till that time and what are the debts or charges on the property that are legally permissible, would be some of the relevant considerations. Nothing of that sort has been pleaded by the purchasers in the objections filed in the final decree proceedings. Though in the absence of claiming equitable right in the share of vendor’s other properties, it cannot be worked out and it is doubtful when undivided share has not been sold and the specific property had been purchased, such equitable right can be enforced. Even assuming that the purchaser could work out the equity, however in the absence of pleadings and evidence required for the

purpose, it would amount to misadventure. We do not propose to give any finding on submission and its correctness, made on behalf of the appellants that defendant No.1 had gone on a selling spree like anything and before executing the sale deed on 23.11.1959 he had already sold more than 1000 acres of land which was in excess of his entitlement, in the absence of pleading by appellants or purchasers on the basis of oral submissions made before us. In the absence of requisite data, pleadings and evidence, question of working out equity in aforesaid manner, cannot be examined or gone into by this Court at this stage. The claim of equity is outcome of ingenuity of arguments made only in this Court like a drowning fish trying to catch last straw. We are not at all impressed by the submission, and consequently the same is repelled, more so considering the provisions of the Mohammedan Law that sale beyond the extent of the share of the vendor in specific property was void.

(ix) In re : whether sale was for legal necessity, and thus binding :

83. It was submitted that sale was for legal necessity for benefit of estate. It has been averred in the objections preferred by the purchasers that sale was made by Hamid Ali Khan, defendant No.1, for payment of land revenue. Thus it was contended that the payment of land revenue has enured for the benefit of the entire estate. Thus sale would be valid and binding on co-heirs. Except making the aforesaid bald statement, nothing has been placed on record to indicate that the sale was for payment of land revenue. On

the other hand, when we peruse the sale deed, recital of it makes it clear that the sale was effected by Hamid Ali Khan for his 'personal necessity'. He had not executed the sale deed for payment of land revenue as its recital is otherwise which would prevail. Nor the sale deed had been executed in the fiduciary capacity acting on behalf of co-sharers rather he has claimed in the sale deed that he was the exclusive owner of 68 acres 10 guntas area of property and was in possession thereof. He had sold the land for a consideration of Rs.2000 in view of his personal necessity. The sale was made after taking permission from the Deputy Collector Division, Distt. West, Hyderabad. Thus, the sale deed negates the aforesaid bald averment made in the objection petition. Even otherwise under the Mohammedan Law, it was not open to Hamid Ali Khan, defendant No.1 to act in fiduciary capacity to sell the property and bind shares of others. It is not mentioned in sale deed that Hamid Ali Khan had sold for any legal necessity or for the benefit of the entire estate. The recital in sale deed has the evidentiary value and Bala Mallaiah and his successors are bound by what has been mentioned therein. Thus, no case is made out on the basis of the aforesaid submission also to make an interference.

(x) In re : the effect of proceedings under the Tenancy Act, 1950 :

84. It was contended on behalf of the respondents that with respect to the disputed property the proceedings were initiated by Boddam Narsimha under the Act of 1950. Boddam Mallaiah was a lessee for 3 years. He was inducted in the aforesaid lands under

a koul dated 1.3.1953 executed by Hamid Ali Khan, who was defendant No.1 in the partition suit. Initially, it was for one year and was renewed each year later on. Hamid Ali Khan executed a sale deed in favour of Bala Mallaiah on 23.11.1959. After the sale deed, Bala Mallaiah became a pattedar in place of Hamid Ali Khan in respect of the suit land. Bala Mallaiah was the paternal uncle of Boddam Narsimha. An application was filed by Boddam Narsimha under section 37A of the Tenancy Act on the ground that Late Bala Mallaiah was a protected tenant and prayed for issuance of ownership certificate under section 38E of the Act of 1950. The tribunal vide order dated 24.8.1999 held that Bala Mallaiah never protested the omission of entry of tenancy from the revenue records as deemed tenant, and it was found that there were no protected tenants in Madhapur village. The order was questioned in the appeal under section 90 of the Act which was dismissed by the Joint Collector on 13.3.2000. Thereafter, Writ Petition No.2229/2000 was preferred before the High Court of Judicature at Andhra Pradesh which was also dismissed by the High Court on 16.4.2001 and the same was questioned before this Court which dismissed appeal in *Boddam Narsimha* (supra).

85. However, on behalf of the respondents it has been submitted that Bala Mallaiah has become pattedar vide conveyance deed dated 23.11.1959. The case set up by Bala Mallaiah that he was jointly cultivating the suit land along with his two brothers Komaraiah and Agaiah was found to be meritless and negatived for the period between 1952 and 1959. On 1.1.1973 when the notification came to be issued, Bala Mallaiah was

not the protected tenant. The case set up by Boddam Narsimha regarding protected tenancy and issuance of ownership certificate was negatived. This Court noted that even for the sake of arguments if it is accepted that Bala was a protected tenant on 12.2.1956, he still became a pattedar vide conveyance deed dated 23.11.1959, and in any event assumed protected tenancy did not continue up to 1.1.1973, and therefore, the appellant was not entitled to ownership certificate under section 38E. Section 38E of the Act of 1950 had no application to the facts of the case. This Court has discussed the matter thus :

> "**13.** Bala was a kaul who had taken an annual lease from Hamid Ali Khan. He was a tenant at will. This was during the pendency of the partition suit. He became a pattedar vide conveyance dated 23-11-1959. The kaul itself indicates, that Bala was to cultivate in his individual capacity; that at the end of the year, Bala had to return the lands to the owner; that Bala was not given the right to include any other cultivator. Therefore, there is no merit in the contention of the appellant that Bala was jointly cultivating the suit lands with his two brothers Agaiah (father of the appellant) and Komaraiah. Further, between tenancy and the conveyance, there was a time-gap. Hamid Ali Khan was a pattedar. His rights were purchased by Bala vide conveyance dated 23-11-1959, therefore, on 1-1-1973, when the notification came to be issued, Bala was not the tenant. He was a pattedar. Moreover, the appellant herein is not the LR of Bala. Bala was his paternal uncle. At no point of time, even the LRs of Bala had claimed that Bala was a protected tenant. It is evident from Section 38-E that the said section has been enacted for those protected tenants who are declared to be protected tenants and included in the register prepared for that purpose. A person becomes a protected tenant when he is a holder on the dates or for the periods mentioned in Sections 35, 37 and 37-A. Once a person becomes a protected tenant, he is entitled to an ownership certificate under Section 38-E. In *Sada v.Tahsildar* AIR 1988 AP 77 Full Bench of the Andhra Pradesh High Court held that a person "holds" the land as protected tenant if he is *still* a protected tenant on the notified date i.e. 1-1-1973,

though out of possession. As long as his right as protected tenant has not been determined by the date of notification in a manner known to the Act, he holds the land as a protected tenant, whether physically in possession or not. For the vesting of ownership of land held by a protected tenant under Section 38-E, it is not necessary that the protected tenant should be in physical possession on 1-1-1973. It is sufficient if he *continues* to hold the status of a protected tenant on the notified date, even if he is not in physical possession. The Act does not merely regulate the relationship of landlord and tenant but deals with the alienation of agricultural land and includes transfer of the landholder's interest to the protected tenants. Therefore, the grant of pattedari (ownership rights) also finds place in the Act.

14. On the facts and circumstances of the present case, Bala had become a pattedar (owner) under the conveyance deed dated 23-11-1959. His name was shown as a pattedar even prior to 1-1-1973. The benefit of Section 38-E is given to persons who hold the lands as protected tenants and who continue to hold the lands as protected tenants on 1-1-1973. The protected tenancy has to be enforced on 1-1-1973. Under Section 38-E, ownership rights are conferred only upon persons who continue to be protected tenants as on 1-1-1973. They form a special class. In the present case, as stated above, Bala became a pattedar in 1959. In *Sada* (supra) it has been held that protected tenants are covered by Chapter IV of the Act. They fall under a limited category. They are referred to in Sections 34, 37 and 37-A. In the said judgment, it has been held that Section 37-A, introduced by Act 3 of 1956 deals with a separate class of persons deemed to be protected tenants. This class of persons is different from the category of protected tenants who fall under Sections 34 and 37 respectively. Section 37-A refers to persons who are holders of the land at the commencement of amending Act of 1955 (12-3-1956). These persons were required to be tenants on 12-3-1956 and that they should continue to be tenants till 1-1-1973. Only such category of persons are entitled to ownership certificate under Section 38-E. In the present case, even for the sake of argument, if we were to proceed on the basis that Bala was a protected tenant on 12-3-1956, still Bala became a pattedar vide conveyance deed dated 23-11-1959, therefore, in any event, the assumed protected tenancy did not continue up to 1-1-1973. In our opinion, therefore, in any view of the matter, the appellant herein was not entitled to the ownership certificate under Section 38-E of the Act. Section 38-E has no application to the facts of the present case."

86. This Court in aforesaid case has only decided the question about protected tenancy which was claimed and issuance of ownership certificate by Boddam Narsimha under section 38E. No other question was involved for consideration in the proceedings under the Act of 1950. Thus, the decision cannot be taken to be an authority on a question which was not agitated. Boddam Narsimha who filed the said proceedings had lost up to this Court and in that there was a mere mention of the fact that by virtue of the conveyance deed, Bala Mallaiah became pattedar vide registered sale deed dated 23.11.1959. There was no adjudication on the various issues as to the legality or validity of the said rights which could be conferred by sale deed and to what extent Hamid Ali Khan could have alienated to Bala Mallaiah and issue about *lis pendens* etc. never came up for consideration. Thus, the decision is of no help and cannot be taken to be an adjudication by this Court with respect to the rights of Hamid Ali Khan or Bala Mallaiah in matruka properties which was not an issue in the aforesaid case. The scope of the proceedings and the issue involved were totally different. Thus, no sustenance can be derived by the respondents by relying upon the aforesaid decision in which Boddam Narsimha in fact had lost.

87. It was also contended that Hamid Ali Khan was recorded as pattedar after the death of Nawab Jung. The plaintiffs and other heirs of Late Nawab Jung were aware that the name of Hamid Ali Khan had been recorded in the revenue records. The transfer was made with the permission of the Collector under section 47 of the 1950 Act. Any

person affected by any entry in such record of rights under Regulation 4 of the Hyderabad Record of Rights in Land Regulations, 1948 was required to question the same within two years. Bala Mallaiah was in possession. Thus, the decree which has been passed ignoring the rights of the pattedar is bad in law. In our opinion, admittedly, it was a matruka property of Late Nawab Jung. The suit for partition was pending w.e.f. 1935 and mutation simpliciter in the name of Hamid Ali Khan conferred no right, title or interest. The mutation is only for the fiscal purpose and is not decisive of right, title or interest in the property which is within the domain of the civil court. The grant of patta from 1953 onwards by Hamid Ali Khan to Bala Mallaiah was on yearly basis and the execution of sale deed and the grant of land on yearly basis were during *lis pendens*. Thus, the transactions are covered by the doctrine of *lis pendens* and were clearly subject to the outcome of the pending partition proceedings. In *Venkatrao Anantdeo Joshi & Ors. v. Malatibai* & Ors. (2003) 1 SCC 722, a question came up for consideration assuming that pending suit for partition, a batai patra was executed on the basis of which tenancy rights were claimed. It was held that such batai patra would not confer any right on the person. It being hit by the principle of *lis pendens*. This Court has held thus :

> "**8.** At the time of hearing of this appeal, learned counsel for the appellants submitted that the plea of tenancy raised by Baburao is on the face of it, bogus so as to defeat the rights of the appellants which are crystallised at the time of passing of the preliminary decree. Presuming that pending the suit for partition, even if *batai patra* is executed, it would not confer any rights on Baburao as it is hit by principles of *lis pendens*. In any

case, as the preliminary decree becomes final, it was not open for Baburao to raise such contention at the time of passing of final decree for partition.

9. With regard to *lis pendens*, learned counsel for the appellants rightly referred to the judgment and decree passed in Regular Civil Suit No. 51 of 1973 and contended that presuming that the so-called *batai patra* was at all executed by Anantdeo, it was not open to him to execute the same pending disposal of the suit filed by Appellant 1 for partition of the property. In that suit, Appellant 1 and his mother had challenged the transfer of land out of Survey No. 60/A and also for partition of the suit property. By elaborate judgment and order, the suit filed by the appellants was decreed to the extent that they were entitled to 2/3rd share in the suit properties. The court had also directed mesne profits. Till the date of the decree, it was contended by Anantdeo that he was in possession of portion of the suit land and the remaining portion was in possession of Malatibai, in view of the sale deed in her favour. It has also been specifically contended that for some time, property was in possession of Baburao prior to marriage of Shakuntala Bai and then in possession of one Pandurang Saokar and lastly it was in possession of Malatibai and himself. The court specifically arrived at the conclusion that Anantdeo was in possession of the suit property and the so-called transfer was without any legal and family necessity as alleged and, therefore, the appellants were entitled to 2/3rd share in the suit property. In the revenue records also, there is no mutation in favour of Baburao. Further, the so-called compromise decree in Civil Suit No. 288 of 1981 against Anantdeo and Malatibai would not confer any title against the appellant.

10. Further, in a suit for partition where preliminary decree is passed, at the time of passing of the final decree it was not open to the respondent to raise the contention that he was a tenant of the suit premises. Section 97 CPC specifically provides that where any party aggrieved by the preliminary decree does not appeal from the said decree, he is precluded from disputing its correctness in any appeal which may be preferred from the final decree."

In view of the aforesaid, we find no force in the submissions raised on behalf of the respondents based upon pattedar rights as it was subject to section 52 of T.P. Act and the same is hereby rejected.

(xi) In re : what is the effect of decision of this Court and High Court with respect to final decree proceedings in Item No. 2 of Schedule 'B' property :

88. With respect to item No.2 of Plaint 'B' schedule property one Padmini Co-operative Housing Society Ltd. filed an objection in the final decree proceedings. The trial court vide order dated 29.3.1996 rejected the objection which was preferred. First appeal preferred was also dismissed by a Single Judge on 23.4.1997. LPA No.104/1997 was filed which was dismissed by a Division Bench of the High Court on 20.11.1998. Then SLP [C] No.3558/1999 was filed in this Court which has been dismissed by a speaking order affirming the judgment and order passed by the executing court and the High Court. A perusal of the judgment of the High Court in LPA indicates that the High Court had held that in Mohammedan Law there is no recognition for a sale by a co-sharer of the entire estate and that the other co-sharers are not bound by such sale and said decision even went to the extent of saying that even when the sale was meant for discharging the debts of ancestor, whose property had devolved upon the sharers, the said sale without the consent of other co-sharers is invalid and does not confer any right on the purchaser with regard to such co-sharers who do not join the said sale. The decision has been affirmed by this Court vide order dated 1.10.1999 in SLP [C] No.3558/1999. Following order was passed by this Court :

> "After hearing arguments exhaustively for more than two hours and after considering the preliminary decree dated 24.11.70, the modified preliminary decree passed by the High Court, the Commissioner's report dated 14.7.95, final decree passed by the City Civil Court dated 11.2.96, the judgment of the learned Single Judge dated 23.4.97, the judgment of the

> Division Bench dated 24.11.93 and the other passed by the High Court in CRP.No. 700/94 dated 30.8.94 and after considering the various rulings of the Courts cited before us by the learned senior counsel on both sides, we are not inclined to interfere with in SLP. The SLP is dismissed."

At least on point of law the decision of this Court being a reasoned order has relevance and the decision in the aforesaid matter in same case also supports the view which has been taken by us on merits.

(xii) In re : whether there is waiver of right by appellants :

89. It was also submitted that on behalf of the respondents that there is waiver of rights by the plaintiff and other heirs of Late Nawab Jung with respect to disputed property, and they cannot be permitted to approbate and reprobate. In *Boddam Narsimha* (supra), stand was taken that Bala Mallaiah was the pattedar, thus, they are bound by their said representation and cannot wriggle out of it. They have relied upon the decision in *C. Beepathuma v. Velasari Shankaranarayana Kadambolithaya* AIR 1965 SC 241 on the principle of approbate and reprobate as also the decision in *Mumbai International Airport (P) Ltd. v. Golden Chariot Airport* (2010) 10 SCC 422 in which it has been observed that the contesting respondent has blown hot and cold by taking inconsistent stands which is not permissible.

90. In fact, during the pendency of the partition suit with respect to ancestral property of Late Nawab Jang, Hamid Ali Khan – defendant No.1 – had alienated the property treating it as his own whereas it was obviously subject to the right of other co-shares

finally declared in the preliminary decree. Bala Mallaiah and his successors have filed several proceedings, civil suit of 1993 in which they have failed. Boddam Narsimha, nephew of Bala Mallaiah also filed proceedings under the Act of 1950 for issuance of ownership certificate by virtue of their being protected tenants which case was also dismissed. Thus, the stand which was taken by appellants under the protected Tenancy Act was not at all inconsistent and did not amount to approbation and reprobation on the part of the heirs of Late Nawab Jung. Land grabbing proceedings were also instituted by LRs. of Bala Mallaiah and his brothers. The proceedings were dismissed and W.P. No.15577/2001 filed before the High Court was also dismissed vide order dated 30.1.2002. After having lost in the aforesaid proceedings, belatedly the objection had been preferred in the final decree proceedings for partition. The conduct of purchasers makes it clear that they instituted multifarious proceedings, and took inconsistent stands which were not accepted by this Court in *Boddam Narsimha* (supra). The appellants or their predecessors had not taken inconsistent stands. They were clearly protected by doctrine of *lis pendens*.

(xiii) In re : whether appellants are guilty of delay or laches :

91. It was also submitted that a preliminary decree recognized the rights of the transferees to be adjudicated at the time of final decree proceedings and no steps were taken by the legal heirs after passing of the preliminary decree way-back in 1970 to

implead them. The proceedings for final decree were initiated in the year 1984. The appellants have not taken prompt steps, as such they are not entitled to any indulgence from this Court. Reliance has been placed upon *Municipal Council, Ahmednagar v. Shah Hyder Beig* (2000) 2 SCC 48 to contend that any delay on the part of the parties defeats the rights.

92. We are not impressed by any of the aforesaid submissions. The preliminary decree passed in 1970 was clearly against the interest of the purchasers as their vendor was not found to have the rights which was not assailed by them. The preliminary decree attained finality in the year 1976 and proceedings for final decree taken in 1984 were within the period of limitation. As a matter of fact, LRs. of Bala Mallaiah and his brother etc. took steps in the year 1993 and onwards by filing successive cases as enumerated above. There was no delay on the part of the appellants defeating their rights. It was the respondents who having lost in the three proceedings one after the other, raised objection in the year 2004 in the final decree proceedings. What prevented them from doing so in the year 1993, has not at all been explained. Thus, it is they who are responsible to delay in the final decree proceedings in a partition case instituted in the year 1935 and the matter is still pending in the shape of instant appeals before this Court.

(xiv) In re : the effect under the Urban Land Ceiling Act :

93. It was also submitted that under the Urban Land Ceiling Act proceedings, the land was not shown to be belonging to the heirs of Late Nawab Jung. The orders passed in urban land ceiling case have not been placed on record. That apart, it was stated that the proceedings lapsed due to repeal of Urban Land Ceiling Act. Be that as it may. The respondents are purchasers from branch of Bala Mallaiah whose vendor was defendant No.1. The property has further exchanged hands. Since the orders have not been placed on record, in the aforesaid factual scenario, we decline to examine the aforesaid proposition further and we were not apprised how the purchasers could claim a better right than the one possessed by their vendor. We leave it open to the State Government to examine the question of ceiling and effect of the decision.

94. A compromise petition has been filed with respect to area 18 acres 25 guntas. As per the compromise the division of the property has to take place between the appellants and the newly added respondent Nos.87 to 127. Same was objected to by one of heirs. It will involve transfer of the property, hence, we leave the parties to have resort to an appropriate remedy in this regard. It is found not to be recordable in the form of transaction in which it has been filed.

95. Resultantly, the appeals are allowed. Impugned judgment and decree passed by the High Court is set aside. The final decree of the Trial Court is restored. Costs of Rs.1,00,000/- to be paid within two months from today.

…………………………J.
(Arun Mishra)

New Delhi;
March 21, 2017.

…………………...……..J.
(Amitava Roy)

ITEM NO.1A COURT NO.11 SECTION XIIA
(For judgment)

S U P R E M E C O U R T O F I N D I A
RECORD OF PROCEEDINGS

Civil Appeal No(s). 4731-4732/2010

T.RAVI & ANR Appellant(s)

VERSUS

B.CHINNA NARASIMHA & ORS. ETC. Respondent(s)

WITH
C.A. No. 4733/2010

C.A. No. 4734-4735/2010

C.A. No. 4736/2010

C.A. No. 4837-4838/2010

C.A. No. 6536-6537/2010

C.A. No. 4276-4277/2011

CA. Nos. 4319-20 of 2017 @ SLP(C) Nos. 23864-23865/2011

C.A. No. 1196-1197/2012

C.A. No. 7105-7106/2010

Date : 21/03/2017 These appeals were called on for Judgment today.

For the parties:
M/s. Lawyer S Knit & Co,Adv.

Mr. A. Ramesh, Adv.
Mr. Syed Ahmad Naqvi, Adv.
Mr. Shilpi Gupta, Adv.
Mr. M.A. Mokheem, Adv.
Mr. R. Chandrachud,Adv.

Mr. Manoj Saxena, Adv.
Mr. Ram Krishna, Adv.
Mr. M.A. Mokheem, Adv.
Mr. Vipin Kumar Jai,Adv.

Mr. D. Bharat Kumar, Adv.
Mr. bala Subrahmanyam Kumar , Adv.
Mr. T. Baskar Gowtham, Adv.
Mr. Abhijit Sengupta,Adv.

Mr. C.A. Sundaram, Sr. Adv.
Ms. Ritu Bhalla, Adv.
Mr. Raghav Gupta, Adv.
Mr. Yajur Mittal, Adv.
Mr. S. Madhusudan Babu, adv.
Mr. Nipun Saxena, Adv.
Mr. Apoorv Tripathi, Adv.
Ms. Rohini Musa, Adv.
Mr. Madhusudan Babu, Adv.
Dr. Kailash Chand,Adv.

Mr. T. V. Ratnam,Adv.

Mr. Ejaz Maqbool,Adv.

Mr. Hemal Kirit Kumar Sheth, Adv.
Mr. A. Venayagam Balan,Adv.

Mr. Ravindra Kumar,Adv.

Ms. Rekha Pandey,Adv.

Mr. B. K. Satija,Adv.

Mrs. Anjani Aiyagari,Adv.
Mrs. M.V. Rama, Adv.

Mr. Abhijit Sengupta,Adv.

Mr. A. Venayagam Balan,Adv.

Ms. Uttara Babbar,Adv.

Mr. Ram Lal Roy,Adv.

Mr. Harish N. Salve, Sr. Adv.
Mr. Gopal Subramanium, Sr. Adv.
Mr. A.K. Ganguli, Sr. Adv.
Mr. Joseph Aristotle S.,Adv.
Ms. Priya Aristotle, Adv.
Mr. Chaitanya S., Adv.
Mr. Abhinav Agrawal, Adv.
Mr. Munjal Bhatt, Adv.
Mr. K. Priyadarshini, Adv.
Mr. Ashish Yadav, Adv.
Mr. R. Raj, Adv.

Mr. Amit K. Nain,Adv.

Ms. Rekha Pandey, Adv.

M/s. Lawyer S Knit & Co.

Ms. T. Anamika, Adv.

Mr. Ajay Choudhary, Adv.

Mr. Manoj C. Mishra, Adv.

Mr. Nikhil Swami, Adv.
Mrs. Prabha Swami, Adv.

Mr. Archana S., Adv.
Mr. B. Ramana Murthy, Adv.

Mr. Joseph Aristotle S.,Adv.

Hon'ble Mr. Justice Arun Mishra pronounced the judgment of the Bench comprising His Lordship and Hon'ble Mr. Justice Amitava Roy.

Leave granted in SLP (C) Nos. 23864-23865 of 2011.

The appeals are allowed. Impugned judgment and decree passed by the High Court is set aside. The final decree of the Trial Court is restored. Costs of Rs.1,00,000/- to be paid within two months from today.

Pending applications, if any, shall stand disposed of.

(NEELAM GULATI)	**(TAPAN KR. CHAKRABORTY)**
COURT MASTER	**COURT MASTER**

(Signed reportable judgment is placed on the file)

REVISED

ITEM NO.1A COURT NO.11 SECTION XIIA
(For judgment)

S U P R E M E C O U R T O F I N D I A
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VERSUS

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Mr. Dushyant A. Dave, Sr. Adv.
Mr. Salman Khurshid, Sr. Adv.
Mr. Jayant Bhushan, Sr. Adv.
Mr. S. Udaya Kumar Sagar, Adv.
Ms. Bina Madhavan, Adv.
Mr. Krishna Kumar Singh, Adv.
Mr. Mrityunjai Singh, Adv.
Ms. Elizebeth Antony, Adv.
M/s. Lawyer S Knit & Co,Adv.

Mr. A. Ramesh, Adv.
Mr. Syed Ahmad Naqvi, Adv.
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Mr. Abhinav Agrawal, Adv.
Mr. Munjal Bhatt, Adv.
Mr. K. Priyadarshini, Adv.
Mr. Ashish Yadav, Adv.
Mr. R. Raj, Adv.

Mr. Amit K. Nain,Adv.

Ms. Rekha Pandey, Adv.

Ms. T. Anamika, Adv.

Mr. Ajay Choudhary, Adv.

Mr. Manoj C. Mishra, Adv.

Mr. Nikhil Swami, Adv.
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(NEELAM GULATI)
COURT MASTER

(TAPAN KR. CHAKRABORTY)
COURT MASTER

(Signed reportable judgment is placed on the file)