

**HON'BLE SMT. JUSTICE G. ANUPAMA CHAKRAVARTHY**

**C.C.C.A.No.207 of 2001**

**JUDGMENT :**

This appeal is arising out of and against the judgment and decree dated 30.06.2001 in O.S.No.790 of 1992 on the file of I Senior Civil Judge, City Civil Court, Hyderabad. The defendant is the appellant.

2. For the sake of convenience, parties will be referred to as arrayed in the suit.

3. The brief facts of the case are that the plaintiff has filed a suit for partition against the defendant, claiming half share of the plaintiff's schedule properties.

4. As per the recitals of the plaint, the plaintiff is the widow of Late P.Ramchandra Reddy and the defendant is the son of Late P.Ramchandra Reddy through his first wife by name Smt.Ratnamma. After the death of the first wife, the said Ramchandra Reddy married the plaintiff and the defendant was 3 months old when his mother died. Sri P. Ramchandra Reddy died

on 17.05.1989 leaving behind the plaintiff and the defendant as surviving legal heirs. The parties are Hindus by religion and they are governed by Mithakshara school of law. Late P. Ramchandra Reddy acquired the plaint schedule properties with his self-acquired funds and upon his death, the plaintiff and the defendant have succeeded to equal shares to the plaint schedule properties. The plaintiff is dwelling in a portion of the plaint schedule property and also collecting the rents from the tenants of the said building towards her maintenance. When the defendant is not in cordial terms with the plaintiff, she decided for partition of the plaint schedule property and is no more interested in maintaining the joint ownership. On 01.04.1992, the plaintiff orally demanded the defendant for partition of the suit schedule property by metes and bounds which was refused by the defendant, for which, she was constrained to file the suit for partition. Later, by way of amendment, Item No.2 was added to the suit schedule properties in the plaint schedule.

5. The defendant filed a detailed written statement denying all the averments made in the plaint. It is the case of the defendant that

the plaintiff never married his father and as such, she cannot get the share in the properties of her father and she was only a servant maid and her father made her to live along with them due to sympathy, as she had no means of livelihood. After the death of his father in the month of May, 1989, he allowed the plaintiff to stay in one portion of house and asked her to collect the rents on his behalf, as he used to reside in Bangalore on account of his Government service and as such, the plaintiff was only the caretaker of his house. Later, he got transferred to Hyderabad and his tenants paid rents to him from July, 1989 onwards. It is the specific contention of defendant that when he asked about the rents collected by the plaintiff, she gave evasive replies for which, he asked the tenants to pay rents directly to him and also addressed a letter to them in the month of October, 1991, but the tenants, instead of paying rents to him, filed petition before the Rent Controller in R.C.Nos.836, 837 and 838 and sought permission to deposit the rents in the Court, in view of the disputes between the plaintiff and the defendant. The plaintiff, in order to knock away the property of the defendant with collusion of the Municipal authorities, managed to get her name mutated in the

revenue records, for which, the defendant made an application before the Municipal authorities and got her mutation cancelled by proceedings dated 06.05.1992. Thus, the defendant denied that the plaintiff got right over the property and further stated that Form No.I which deals with the application for pension and gratuity, does not show the column relating to Family Pension in the name of the plaintiff and also the certificate issued by Syndicate Bank, dated 30.10.1991 regarding the Savings Bank Account No.11309 BVCC2032 and SSD 1611 of his father (Late P. Ramchandra Reddy) were paid to him as nominee. Further, the insurance policy No.640231821 of LIC held by his father, was also paid to him and therefore, prayed to dismiss the suit.

6. Basing on the pleadings, the trial Court has framed the following issues:

1. Whether the plaintiff is entitled for partition, separate possession as prayed for ?
2. To what relief ?

7. In order to substantiate their respective claims, on behalf of the plaintiff, PWs.1 and 2 were examined and Exs.A-1 to A-61

were marked and on behalf of the defendant, DWs.1 and 2 were examined and Exs.B-1 to B-53, Ex.C-1 and Exs.X-1 to X-6 were marked.

8. After appreciating the entire oral and documentary evidence, the trial Court decreed the suit in favour of the plaintiff for partition of the plaint schedule property by allotting her half share and a preliminary decree was drawn. Being aggrieved by the preliminary decree, this appeal is filed by the defendant.

9. The grounds raised in the appeal are that the trial Court has not properly appreciated the evidence on record and the trial Court ought to have considered that the plaintiff is not the wife of the defendant's father as contemplated by law.

10. It is urged by the learned counsel for the appellant that the trial Court failed to note that as per Ex.B-53, the appellant was born on 07.10.1945 and by which date, the mother of the defendant i.e. S.Ratnamma was alive and it is the specific plea of the plaintiff that she married the father of the defendant in the year 1941 and as per her evidence, she was 17 years old, which is not permitted by law

and in view of the fact, there cannot be a 2<sup>nd</sup> marriage of the plaintiff with the father of the defendant who was a Government servant and admittedly, the mother of the appellant was alive by October, 1945. It is further urged by the learned counsel for the appellant that Exs.A-1 and A-2 are the paper cuttings which do not bear the date and do not disclose in which newspaper they are published and reliance cannot be placed on them and the trial Court cannot give a finding that the defendant never contradicted such publications which is absolutely incorrect and Exs.A-1 and A-2 are inadmissible in law. It is further urged by the learned counsel for the appellant that the lower Court observed “the defendant never contradicted such publications A-1 and A-2” is absolutely incorrect and that the plaintiff did not file any proof before the Court to prove that marriage was consummated between the plaintiff and Late P.Ramchandra Reddy who is the father of the defendant and in the absence of such evidence and strong rebuttal from close relatives, the trial Court cannot declare her as one of the sharer of the property belonging to Late P.Ramchandra Reddy.

11. It is further urged by the learned counsel for the appellant that there was no pleading before the Court with respect to the marriage between the plaintiff and Late P.Ramchandra Reddy and the Court erred in relying on Exs.A-4/letter, dated 10.05.1977 and A-5/No objection certificate, which are not originals and does not contain even the office seal and date respectively, under which, the plaintiff claims to have been nominated for payment of lumpsum amount. It is further urged by the learned counsel to treat all the grounds raised by him in the appeal as part of his arguments.

12. The learned counsel for the appellant contended that the appeal has to be allowed in view of suppression of the fact about the Will which is alleged to have been registered in favour of the 2<sup>nd</sup> respondent by the plaintiff even prior to filing of the suit and also not deposing about the said fact during the course of evidence by the plaintiff and it has seen the light only after the death of the plaintiff. It is further urged by the learned counsel for appellant that no person can get a title without having a right over the property and as the plaintiff do not have any right as on the date of

registration of the Will, the 2<sup>nd</sup> respondent cannot acquire right over the property.

13. On the other hand, the learned counsel for the respondent contended that the trial Court has rightly decreed the suit for partition, treating the plaintiff as the wife of Late P.Ramchandra Reddy and further contended that even in the absence of proof of marriage, the long cohabitation between a man and woman are to be treated as wife and husband and as such, right accrues to the plaintiff as the wife of Late P.Ramchandra Reddy and also for his property and therefore, prayed to dismiss the appeal.

14. It is pertinent to mention that on 22.06.2006, LR petition was filed by the 2<sup>nd</sup> respondent vide CCCA.MP.No.359 of 2006 and this Court allowed the petition on 04.07.2006. The docket further reveals that the appellant has opposed for allowing the LR petition, for which, a detailed order dated 11.07.2006 has been passed by this Court as follows:

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

The petition to bring the legal representative of the sole respondent was ordered on 04.07.2006, but the same is seriously disputed as the petitioner is sought to come on



record through the Will dated 17.07.1992 being the legatee. Hence, this Court Suo Motu recalls the order dated 04.07.2006 in CMP.No.359 of 2006.

The respondent herein filed counter contending inter alia, that the above Will is forged and the petitioner is not the legal heir. In the circumstances, the lower Court is directed to give notice to all the concerned and also parties to this lis, conduct an enquiry into the matter and record a finding as to who is the real legal representative of the deceased/respondent and then submit a report to this Court in Eight weeks from the date of receipt of this order. Till such time, status quo granted in CCCA.MP.No.369 of 2006 vide order dated 04.07.2006 shall continue.”

15. In view of the orders of this Court, dated 11.07.2006, the learned I Senior Civil Judge, City Civil Court, Hyderabad submitted a detailed report dated 08.09.2006 which was received by this Court on 12.09.2006. The synopsis of the report of Senior Civil Judge reads as follows:

“Originally the deceased P.Lakshmi Devi, the plaintiff filed the suit O.S.No.790 of 1992 before the Court for partition against the respondent/appellant and after full-fledged trial, the said suit was decreed on 30.06.2001 in favour of the plaintiff that she is entitled to half share in the properties of Late P. Ramchandra Reddy. Aggrieved by the said judgment and decree, the appellant preferred the appeal which is registered as CCCA.No.207 of 2001. During the pendency of appeal, the sole plaintiff died on..... and Smt.K.Suguna filed petition to bring her on record as the legal representative of P.Lakshmi Devi contending that Lakshmi Devi executed registered Will in her favour on 17.07.1992. Basing on the directions issued by the High Court, notices were issued to both the counsel who are on record and on behalf of K.Suguna, three witnesses are examined and Exs.P-1 and X-1 are marked

and no witnesses or documents are marked on behalf of the respondent/appellants.”

16. Basing on the strength of the statements and documents, the learned I Senior Civil Judge concluded that Smt.K.Suguna is the legal heir of Smt. Lakshmi Devi basing on Ex.P-1 i.e. the Will. The alleged Will was executed on 17.07.1992 at Hyderabad by the plaintiff in favour of Smt. K.Suguna declaring her to be entitled for all her properties. The contents of the Will disclose that plaintiff is entitled to succeed to half undivided share of Late P. Ramchandra Reddy being his wife along with the defendant. Two properties were mentioned in the Will declaring herself as half of the share-holder of the undivided property.

17. It is important to note that Late P.Ramchandra Reddy died on 17.05.1989 and the Will was executed by P.Lakshmi Devi on 17.07.1992 and she filed the suit for partition on 23.07.1992 i.e. 7 days after registration of the Will. But the recitals of the plaint do not disclose about the Will which is alleged to have been executed by the plaintiff. Moreover, plaintiff was examined as PW-1 before the Court on different dates i.e. 05.08.1997, 20.08.1997,

02.09.1997, 09.07.1998, 03.08.1998, 27.08.1998 and on 12.10.1998, but she did not depose about the alleged Will in her evidence. The judgment was pronounced in this case on 30.06.2001 and appeal was also filed in the same year. The plaintiff died on 05.06.2006 and the legal representative application was filed by the 2<sup>nd</sup> respondent/K.Suguna on 22.06.2006 i.e. after 17 days of the death of the plaintiff, claiming that by virtue of the Will dated 17.07.1992, she is the legatee of P. Lakshmi Devi/the plaintiff herein. Hence, it can be construed that the Will has seen the light of the day on 22.06.2006 though it was executed on 17.07.1992.

18. It is the specific plea taken by the appellant that the alleged Will is forged and fabricated for the purpose of knocking away the property of the appellant. Admittedly, there is no evidence on record as to the proof of marriage between the plaintiff and Late P.Ramchandra Reddy, who is the father of the defendant/appellant.

19. The learned Senior Civil Judge has marked Ex.P-1/Will dated 17.07.1992 with receipt and Memo and Ex.X-1 as the extract of Ex.P-1/Will, which are enclosed along with the report.

20. Appeal is the continuation of the suit. If at all the 2<sup>nd</sup> respondent wants to come on record as a legatee of P.Lakshmi Devi, the Will will be the crucial document for the respondent to mark it in the appeal. But, no efforts were made by the 2<sup>nd</sup> respondent for the reasons best known to her to bring the Will on record by adducing additional evidence to that effect. It is pertinent to mention the report of the I Senior Civil Judge, City Civil Court, Hyderabad can be looked into for limited purpose of bringing K.Suguna as 2<sup>nd</sup> respondent in the case.

21. On perusal of the pleadings i.e. the plaint, it is evident that though the plaintiff has pleaded that she got married to Late P. Ramchandra Reddy and lived together, there is no mention as to the date of marriage, place of marriage and the mode or custom of marriage as per Hindu Marriage Act. Even the period for which they (plaintiff and Late P.Ramchandra Reddy) lived together, was

not mentioned in the plaint. It is pertinent to mention that the plaintiff did not choose to lead evidence as to the proof of her marriage with Late P. Ramchandra Reddy.

22. In the judgment of the Apex Court reported in **Sri Shivaji Balaram Haibatti v. Sri Avinash Maruthi Pawar**<sup>1</sup>, their Lordships have formulated a question whether Courts below have committed an error in the manner of considering the pleadings as well as evidence available on record and whether the same is contrary to the recitals in the documents. Their Lordships have also held at para 26 as under:

“First the respondent/defendant has not raised such plea in his written statement. In other words, the respondent did not set up such defence in written statement. Second, the trial Court, therefore, had no occasion to frame any issue on such plea for want of factual foundation in the written statement. Third, the trial Court and the 1<sup>st</sup> appellate Court, in these occasions, had no occasion to record any finding to this plea in either way. Fourth, in the light of these three reasonings, the High Court ought to have seen that such plea really did not arise for consideration, because, in order that any question is involved in the case, the party concerned should lay its factual foundation in the pleading and invite finding on such plea. Fifth, the High Court failed to see the case set up by the respondent in his written statement. As mentioned above, the defence of the respondent was that he had denied the appellants’ title over the suit shop and then set up a plea of adverse

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<sup>1</sup> (2017) 4 HLT 287 (SC)

possession contending that he has become the owner of the suit shop by virtue of adverse possession, which according to him, was from time immemorial.”

The ratio formulated in the aforesaid judgment is that no party shall travel beyond the pleadings and issues and no evidence can be looked into. A new case of any party in the absence of the pleadings, cannot be considered by the appellate Courts.

23. In the present appeal, the Will, which has seen the light of the day on 22.06.2006, was alleged to have been executed by the plaintiff/Lakshmi Devi in favour of the 2<sup>nd</sup> respondent/Suguna on 17.07.1992 i.e. much prior to filing of the suit on 23.07.1992. The plaint was silent about the Will, so also the evidence of PW-1/ plaintiff. Hence, the trial Court has no occasion to determine the right of the 2<sup>nd</sup> respondent in a suit for partition, which was claimed by virtue of the Will. Admittedly, the 2<sup>nd</sup> respondent came on record as legal representative of the plaintiff in the appeal. The above judgment in the case of **Sri Shivaji Balaram Haibatti** (1 supra) squarely applies to the facts and circumstances of the present case and this Court cannot decide the right of the 2<sup>nd</sup> respondent in the absence of pleadings and evidence. It is relevant to mention

that the appellant himself vehemently opposed the bringing of 2<sup>nd</sup> respondent on record as legal representative of the plaintiff contending that the said Will dated 17.07.1992 was forged and it was not executed by the plaintiff as such, the plaintiff did not mention about the Will either in the plaint or in her evidence.

24. It is the contention of the appellant that Late P. Ramchandra Reddy, during his lifetime, never considered the plaintiff as his legally wedded wife. Admittedly, the said fact can be verified if the Service Register of Late P. Ramchandra Reddy is filed. It is the further contention of the learned counsel for the appellant that Late P. Ramchandra Reddy never nominated the plaintiff to receive his retirement or pension benefits.

25. On perusal of Ex.B-10 i.e. the letter dated 18.03.1995 issued by the Commissioner of Civil Supplies, it is evident that the appellant was informed on verifying the office records that Late P. Ramchandra Reddy, Retired Assistant Commissioner, has not nominated any person for sanction of family pension and no family pension has been sanctioned to any person in the case of Late P.

Ramchandra Reddy. Hence, it can be construed that during the lifetime of Late P. Ramchandra Reddy, he has not treated the plaintiff as his wife and as such, he has not nominated her to receive his retirement benefits or family pension benefits and there is no rebuttal evidence to Ex.B-10 before the trial Court.

26. The pleadings as well as the evidence of both the parties disclose that Late P. Ramchandra Reddy died on 17.05.1989 and the suit was filed on 23.07.1992. It is the specific contention of the plaintiff that Late P. Ramchandra Reddy and the plaintiff lived together under a single roof for a considerable period and as such, they shall be presumed to be wife and husband. But such presumption cannot be considered as Late P. Ramchandra Reddy himself has not recognized the plaintiff as his wife in view of Ex.B-10. It is also relevant to mention that not even a single photograph of both plaintiff and Late P. Ramchandra Reddy (including marriage photographs or any photographs where the plaintiff and Late P. Ramchandra Reddy are together) was filed before the trial Court to prove the intimacy between them.



27. On the other hand, the learned counsel for the 2<sup>nd</sup> respondent contended that the defendant has communicated letters to the plaintiff addressing her as “Amma” and the wife of the defendant addressing plaintiff as “Athamma” and basing on that communication, inference has to be taken that the plaintiff is the wife of Late P. Ramchandra Reddy. But Ex.A-18 is the letter addressed by the wife of the appellant to the plaintiff. In normal course of living, even the neighbours address each other with relationships. Basing on the references/addressing each other in the letters of communication, relationships cannot be established and either way, it is not conclusive evidence of a lawful marriage. Admittedly, there is no evidence on record to establish that the plaintiff was married to Late P. Ramchandra Reddy.

28. Section 5 of the Hindu Marriage Act imposes conditions for a valid marriage, as under;

“A marriage may be solemnized between any two Hindus, if the following conditions are fulfilled, namely:—

- (i) neither party has a spouse living at the time of the marriage;
- (ii) at the time of the marriage, neither party—
  - (a) is incapable of giving a valid consent to it in consequence of unsoundness of mind; or

- (b) though capable of giving a valid consent, has been suffering from mental disorder of such a kind or to such an extent as to be unfit for marriage and the procreation of children; or
- (c) has been subject to recurrent attacks of insanity; or
- (iii) the bridegroom has completed the age of twenty-one years and the bride, the age of eighteen years at the time of the marriage;
- (iv) the parties are not within the degrees of prohibited relationship unless the custom or usage governing each of them permits of a marriage between the two;
- (v) the parties are not sapindas of each other, unless the custom or usage governing each of them permits of a marriage between the two;

29. As per the first condition of Section 5 of the said Act, neither of the parties should have a spouse living at the time of the marriage, which means, the plaintiff ought to have married Late P.Ramchandra Reddy only after the death of the mother of the appellant. The evidence of plaintiff disclose that she got married to Late P.Ramchandra Reddy when the defendant was aged 4 months and she was aged 17 years. Section 5 (iii) of the Hindu Marriage Act contemplates that the parties to the marriage have to attain majority i.e. the bride must be aged 18 years and bridegroom must be aged 21 years. Specific date of marriage was not stated by the

plaintiff in her evidence except the year, but, as she stated that the age of the appellant was 4 months at the time of her marriage, it can be construed that the marriage took place either in the month of January 1945 or February 1946, by which time, the Hindu Marriage Act has not come into existence. Admittedly, the Hindu Marriage Act has come into force in the year 1955. Further, the evidence of the appellant disclose that he was born on 07.10.1945 and there is no contrary evidence on record to prove that the wife of Late P.Ramchandra Reddy died by that time. Admittedly, Late P.Ramchandra Reddy was a Government servant and he died in the year 1989 and Late P.Ramchandra Reddy cannot marry the plaintiff while the mother of the appellant was living. Further more, there is no evidence on record as to the date of death of the 1<sup>st</sup> wife of Late P.Ramchandra Reddy. The specific plea of the plaintiff is that she married Late P.Ramchandra Reddy in the year 1941, therefore, the trial Court erred in coming to the conclusion that the plaintiff is the wife of Late P.Ramchandra Reddy and she is entitled for partition on par with the appellant.

30. Exs.A-1 and A-2 are the paper cuttings which do not have any details as to on which date it was being published and as to who made such publications. Basing on the publications in the newspapers as to the relationships of a dead person, Courts cannot determine the rights of the parties and publications of the newspapers can be only treated as secondary evidence which is not admissible in the eye of law.

31. It is relevant to mention that in view of the death of the plaintiff and of the subsequent developments i.e. the 2<sup>nd</sup> respondent came on record by virtue of the Will dated 17.07.1992, this Court is of the opinion that at this juncture there is no necessity to deal in detail, with the oral or documentary evidence as to whether the plaintiff is the wife of Late P.Ramchandra Reddy or not ? The issue before this Court is, whether the 2<sup>nd</sup> respondent gets any right over the properties of Late P. Ramchandra Reddy, by virtue of the Will, alleged to have been executed by the plaintiff ?

32. It is important to note that as on the date of execution of the Will, the plaintiff has no right over the properties of Late

P.Ramchandra Reddy but she has executed Will for half of the undivided share of the property, claiming herself to be the wife of Late P.Ramchandra Reddy. Therefore, the Will deed can be treated as precursor for filing of the suit for partition. The record also reveals that prior to filing of the suit, the plaintiff got the suit schedule properties mutated in her name in Municipal records behind the back of the appellant without giving him any notice. Further, basing on the representations of the appellant who is the son of Late P.Ramchandra Reddy, the Municipal authorities have reversed the mutation made by the authorities, which is part of the pleadings and it is also admitted by PW-1 in her cross-examination. The unfolding of the events prove that it is a clandestine effort made by the plaintiff to knock-away the properties of Late P.Ramchandra Reddy, using the Will deed as a tool, without there being any relationship with Late P.Ramchandra Reddy. It is an admitted fact that the 2<sup>nd</sup> respondent is in no way connected with the properties of Late P.Ramchandra Reddy and she is not the blood-relative of the plaintiff, so as to acquire right in the properties of Late P.Ramchandra Reddy.

33. The Hindu Succession Act, 1956 gives a list of persons who can inherit the right of Hindu male intestate in the absence of any testamentary document i.e. the Will. There is no dispute as to the fact that Late P.Ramchandra Reddy died intestate and his properties are to be inherited as per Hindu Succession Act, in the absence of any testamentary document. Section 8 of the Hindu Succession Act envisages about the general rules of succession in case of males, as under;

“General rules of succession in the case of males.—

The property of a male Hindu dying intestate shall devolve according to the provisions of this Chapter—

- (a) firstly, upon the heirs, being the relatives specified in class I of the Schedule;
- (b) secondly, if there is no heir of class I, then upon the heirs, being the relatives specified in class II of the Schedule;
- (c) thirdly, if there is no heir of any of the two classes, then upon the agnates of the deceased; and
- (d) lastly, if there is no agnate, then upon the cognates of the deceased.”

34. In the present case, Class-I legal heirs are entitled for the properties of Late P. Ramchandra Reddy. As per the Schedule, Class-I heirs are, mother, widow, daughter and son. The wife of Late P. Ramchandra Reddy i.e. the mother of the appellant, pre-deceased him. The only legal heir available is the son as Late P. Ramchandra Reddy as he has no daughters and by the time of filing of this partition suit, mother also is no more. Plaintiff alleges herself to be the widow of Late P. Ramchandra Reddy, but there is no evidence on record to prove that she is the wife of Late P. Ramchandra Reddy. In the absence of any oral or documentary evidence, the property has to go to the son of Late P. Ramchandra Reddy alone i.e. the appellant.

35. Apart from the oral evidence of PW-1, the trial Court has relied on the documentary evidence i.e. Exs.A-1 and A-2 i.e. the paper cuttings and Ex.A-3/legal heir certificate, in which, the name of plaintiff is shown as the wife of Late P. Ramchandra Reddy. As stated supra, Exs.A-1 and A-2/paper cuttings have no evidentiary value as they are only publications made in memory of Late P. Ramchandra Reddy for the death ceremonies. Ex.A-3 which is

said to be the legal heir certificate issued by MRO, cannot have any relevance in view of the law laid down by this Court in **Syed Abdul Majeed & others v. Joint Collector-II, Ranga Reddy District & others**<sup>2</sup> to the effect that it is only for the trial Courts to declare the legal heirs of the deceased while deciding the succession OPs and MROs cannot issue legal heir certificates in order to determine the rights of the parties. The trial Court also believed Exs.A-4 and A-5, which is the letter dated 10.05.1997 alleged to have been written by Late P. Ramchandra Reddy and also the 'no objection certificate' which is said to have been issued by the appellant, which is denied by the appellant as to its execution, but there is no rebuttal evidence to that effect.

36. As per Section 101 of the Indian Evidence Act, whoever asserts a particular fact, has to prove it. So, the burden initially lies on the plaintiff to prove that she is the legally wedded wife of Late P. Ramchandra Reddy in order to inherit his properties and the plaintiff cannot rely on the laches or the weaknesses of the defendant. It is the onus which shifts, but not the burden of proof.

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<sup>2</sup> (2006) 5 ALD 348



The evidence of PW-1 further disclose that at the age of 21, she gave birth to a female child through Late P. Ramchandra Reddy, who later died. But, there is no evidence on record to prove the same. The finding of the trial Court is that the oral evidence of PW-1 and the documentary evidence show that during the life time of Late P. Ramchandra Reddy, he recognised the plaintiff as his wife and purchased a house in her name. On perusal of Ex.A-9, it is evident that the Municipal Corporation has addressed a letter to the plaintiff, referring as to the wife of Late P. Ramchandra Reddy, but it cannot be a conclusive proof in the absence of any oral or documentary evidence to establish that she was the wife of Late P. Ramchandra Reddy. The self-declaration of a person cannot be treated as a conclusive proof. On one hand, the trial Court disbelieved the documents i.e. Exs.B-12 to B-14 and B-20 to B-25, treating the documents as property tax receipts and telephone shifting in the name of the plaintiff and later for its cancellation by the defendant, which are made after the death of Late P. Ramchandra Reddy and concluded that they are not useful to decide the relationship between the parties. But on the other hand,

believes the documents filed by the plaintiff to prove the same relationship between the parties. Admittedly, most of the documents relied upon by the plaintiff relate to third parties. The trial Court believed the group photographs which are alleged to have been taken on the occasions of 'Satyanarayana Swamy Vratam' and 'Shashtipurthy' of Late P. Ramchandra Reddy, but, the negatives of the photographs are not filed for the reasons best known to the plaintiff. The trial Court erred in giving a finding that the defendant has not proved that his marriage was performed by any others, itself goes to show that PW-1 and Late P. Ramchandra Reddy performed his marriage. The issue before the Court is that whether the plaintiff is entitled for partition and separate possession of properties of Late P. Ramchandra Reddy, but the trial Court have unnecessarily gone into the facts as to the performance of the marriage of the defendant and came to a conclusion that the marriage of the defendant was performed by the plaintiff and Late P. Ramchandra Reddy, and as such, they are wife and husband even without any oral or documentary evidence before the Court. The findings of the trial Court are to be based on the pleadings as well

as on the evidence before it, that too, should be restricted to the pleadings and the issues before the Court and shall not be based on the assumptions and presumptions. As per Indian Evidence Act, oral evidence must be direct and as far as documentary evidence is concerned, it should be of primary evidence and secondary evidence can be permitted in the absence of primary evidence under certain conditions. The trial Court, believing the photographs of Late P. Ramchandra Reddy and the plaintiff on the eve of 'Satyanarayana Swamy Vratam' and 'Shashtipurthy', have come to a conclusion that pooja can be performed only in case of wife and husband and so also letters were addressed in view of the relationship between the plaintiff and Late P. Ramchandra Reddy. It is relevant to mention that even for secondary evidence, the photographs are to be accompanied with negatives and further, staying under one roof by the plaintiff and Late P. Ramchandra Reddy for a long period cannot be presumed as wife and husband and rights cannot be inherited.

37. It is pertinent to note that no evidence was lead before the trial Court as to the scribe of the Will deed. The burden is on the

2<sup>nd</sup> respondent, who claims herself to be closely associated with the family of Late P. Ramchandra Reddy, to prove about the execution of the Will. It is relevant to mention that one of the attestors of the alleged Will dated 17.07.1992 i.e. Yadagiri was examined as PW-3, but he also did not depose about the alleged Will executed by the plaintiff in favour of Smt.Suguna. Hence, it can be construed that in the absence of evidence of PW-1 and PW-3 (executor and attestors of the Will deed) about the Will, the Will deed cannot be said as genuine, as such, no disclosure was made by PWs.1 and 3 about the execution of Will on 17.07.1992 in their evidence. It is for the profounder of the Will, to prove such Will deed strictly in terms of mandatory provisions under Section 63(3) of the Succession Act, 1925 as well as under Section 68 of the Indian Evidence Act. As per Section 68 of the Indian Evidence Act, atleast one of the attesting witnesses has to be examined, to speak about his attestation on the alleged Will deed as well as the other attessor who attested the Will, and also of its execution. The report of the 1<sup>st</sup> Senior Civil Judge, City Civil Court, Hyderabad does not disclose that the attessor was confronted with the alleged Will dated

17.07.1992 to prove the signature of the executor, and also of the attestors. It is mandatory on the part of the proponent of the Will, to confront the said Will to the witnesses alleged to have attested the document when such witness was examined before the Court. Admittedly, in the cross-examination, the attester/PW-3 deposed before the Senior Civil Judge that he has not filed affidavit in lieu of chief examination in the Court and the contents are known by the Advocate who filed it and further stated that he does not remember as to in which year Smt. Lakshmi Devi/plaintiff executed Will and does not know about the execution of Will by the time of deposing his evidence before the Court in O.S.No.790 of 1992 as PW-3. From the record, it is evident that PW-3 was examined on 26.10.1998 and by that time, the Will dated 17.07.1992 was not executed, and as such, PW-3 did not depose about the Will. It is also relevant to mention that it is specifically deposed by PW-3 that he cannot say as to when he came to know about the execution of the Will or about the contents of the Will. Therefore, it can be safely presumed that the Will deed dated 17.07.1992, which was alleged to have been executed by the plaintiff, cannot be proved to

be genuine as the plaintiff herself did not disclose about the Will deed, either in the plaint or in her evidence, further, PW-3, who is one of the attestors of the alleged Will, also did not depose about the execution of the Will, which was much prior to the filing of the suit. This Court is unable to understand as to why the plaintiff, who is no more, did not disclose about the execution of Will either in her plaint or in her evidence, if at all it is genuine. One has to come before the Court with clean hands and if the plaintiff has really suppressed the fact of execution of the Will, she is not at all entitled for the half undivided share in the properties of Late P. Ramchandra Reddy. Even assuming for a moment that due to long cohabitation of plaintiff and Late P. Ramchandra Reddy, they are to be treated as wife and husband, the plaintiff alone can be entitled for partition but not the 2<sup>nd</sup> respondent who have come on record by virtue of the alleged Will as it is found not to be genuine. The 2<sup>nd</sup> respondent utterly failed to prove the genuineness of the Will as the attestor i.e. PW-3's evidence does not disclose as to the date of execution of the Will, which was much prior to filing of the suit.

38. In the judgments of the Apex Court relied on by the learned counsel for the 2<sup>nd</sup> respondent in **Janki Narayan Bhoir v. Narayan Namdeo Kadam**<sup>3</sup>, in **Yumnam Ongbi Tampha Ibemba Devi v. Yumnam Joykumar Singh & others**<sup>4</sup>, in **Raj Kumari & others v. Surinder Pal Sharma**<sup>5</sup>, in **Sridevi v. Jayaraja Shetty**<sup>6</sup> and in **Pentakota Satyanarayana & others v. Pentakota Seetharatnam & others**<sup>7</sup>, the gist of the law laid down in the aforesaid judgments can be summarised as under :

The onus is on the proponent of the Will to prove the Will. The Will must be executed and proved with reference to section 63 and 68 of the Evidence Act. Merely because one of the attester was examined, the Will is not deemed to be proved. The Attester must also confirm as per Sec.63 (3) the second attester, his signature and his presence during execution of the Will, without which, a Will cannot be held to be proved. Where one attesting witness examined to prove the will under Section 68 of the Evidence Act fails to prove the due execution of the Will, then the other available attesting witness has to be called to

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<sup>3</sup> (2003) 2 SCC 91

<sup>4</sup> (2009) 4 SCC 780

<sup>5</sup> AIR Online 2019 SC 2143

<sup>6</sup> (2005) 2 SCC 784

<sup>7</sup> 2012(3) ALL MR 470 (S.C.)

supplement his evidence to make it complete in all respects. Section 71 would not be attached to registered Will unless conditions stipulated in section 63 and 68 are complied with. When a Will is executed under suspicious circumstances, it is the duty of the proponent to prove that the testator had executed the Will with a clear mind under no coercion and under his free will.

39. The learned counsel for the 2<sup>nd</sup> respondent has also relied on the judgments of Apex Court and this Court in **Tulsa v. Durghatiya**<sup>8</sup>, in **Challamma v. Tilaga & others**<sup>9</sup>, in **Shobha Hymavathi Devi v. Setti Gangadhara Swamy & others**<sup>10</sup>, in **Jannu Rama Goud v. Commissioner of Prohibition and Excise, A.P., Hyderabad**<sup>11</sup>, in **Ranganath Parameshwar Panditrao Mali & others v. Ekanth Gajanan Kulkarni & others**<sup>12</sup>, in **Chowdegowda @ Dorji & others v. C.Nagaraju & others**<sup>13</sup>, in **SPS Bakasubramanyam v. Suruttayan @ Andhali Padayachiand & others**<sup>14</sup>, in **Kondamma v. Joint Collector,**

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<sup>8</sup> (2008) 4 SCC 520

<sup>9</sup> (2009) 9 SCC 299

<sup>10</sup> (2005) 2 SCC 244

<sup>11</sup> 2004 ALD (NOC) 39

<sup>12</sup> AIR 1996 SC 1290

<sup>13</sup> AIR 1996 SC 3485

<sup>14</sup> AIR 1994 SC 133



**Anantapur<sup>15</sup>**, in **Bardi Prasad v. Dy. Director of Consolidation & others<sup>16</sup>** and in **Gokal Chand v. Parvin Kumar<sup>17</sup>**, wherein, it is held that long cohabitation gives rise to presumption of marriage, only when there is no rebuttal and protest from the close relatives. Admittedly, the defendant is disputing the relationship between the plaintiff and his father Late P.Ramchandra Reddy. Sections 50 and 114 of the Evidence Act need to be given importance, as the conduct of the parties with each other is important and that onus falls on the party to prove that relationship of husband and wife existed.

40. The learned counsel for the 2<sup>nd</sup> respondent has further relied on the judgments of Apex Court in **Karedla Parthasaradhi v. Gangula Ramanamma<sup>18</sup>** and in **Andhra Bank Ltd. V. R.Srinivasan & others<sup>19</sup>**, wherein, it is held that a suit cannot proceed without impleading all the legal heirs. It is further held that in regards to the intermeddlers, they are said to represent the estate even though they are in possession of parcel of the estate of the

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<sup>15</sup> 1989 (3) ALT 175

<sup>16</sup> AIR 1978 SC 1557

<sup>17</sup> AIR 1952 SC 231

<sup>18</sup> (2015) 2 ALD 67 (SC)

<sup>19</sup> AIR 1962 SC 232

deceased and so there should be no difficulty in holding that the clause “a person who in law represents the estate of a deceased person” must include different legatees under the will. There is no requirement that estate should mean whole of the estate. Logic and commonsense need to be applied.

41. The aforesaid judgments are not applicable for the facts of the present case, as in the case on hand, the 2<sup>nd</sup> respondent is already on record and point for determination is only whether the plaintiff is entitled to share in the properties of Late P.Ramchandra Reddy or not. These judgments rather help to strengthen the case of the appellant.

42. Admittedly, PW-3 did not depose about the other attester of the Will. PW-3 was said to be the Registrar, deposed that he was not the Registrar at the relevant point of registration of the alleged Will deed, and as such, the evidence of PW-3 is in no way helpful to the 2<sup>nd</sup> respondent.

43. The 2<sup>nd</sup> respondent miserably failed to prove the execution of the Will in terms of the provisions of Section 63 of Succession Act

and Section 68 of Evidence Act and therefore, the alleged Will cannot be looked into, to determine the rights of the 2<sup>nd</sup> respondent. It is an admitted fact that the plaintiff died intestate without having any issues or legal heirs even as per her evidence. It is relevant to mention that the evidence of PW-1 disclose that a female child was born to her during the wedlock with Late P. Ramchandra Reddy and later died. Hence, it can be construed that though the plaintiff is entitled for partition of the properties of Late P. Ramchandra Reddy, as she is issueless, the properties again devolve upon the appellant and the 2<sup>nd</sup> respondent cannot acquire right over the properties of Late P. Ramchandra Reddy who is the father of the appellant.

44. In the result, the appeal is allowed setting aside the judgment and decree dated 30.06.2001 in O.S.No.790 of 1992 on the file of I Senior Civil Judge, City Civil Court, Hyderabad. No costs.

Pending miscellaneous applications, if any, shall stand closed.

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**G.ANUPAMA CHAKRAVARTHY, J**

Date: 02.08.2022

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