
(2005) 09 AP CK 0055
In the Andhra Pradesh High Court
Case No : CCCA No. 95 of 1997

B.K. Babu Rao (died) by LRs. and Others	APPELLANT
Vs	
A. Jayalaxmi and Others	RESPONDENT

Date of Decision : 06-09-2005

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 23 Rule 1, Order 9 Rule 8, Order 9 Rule 9
Evidence Act, 1872 — Section 68
Succession Act, 1925 — Section 63

Citation : (2006) 1 ALD 65

Hon'ble Judges : P.S. Narayana, J

Bench : Single Bench

Advocate : V. Hari Haran, for the Appellant; Shyam Sunder, for P.G. Raja Rao, for Respondent Nos. 1 and 2 and Kumari Usha Kiran, for W.B. Srinivas, for the Respondent

Final Decision : Dismissed

Judgement

P.S. Narayana, J.—Heard Sri Hari Haran the learned Counsel representing the appellants. Sri Shyam Sunder, the learned Counsel representing the Respondents No. 1 and 2 and Kumari Usha Kiran the learned Counsel representing Respondent No. 6.

2. The unsuccessful plaintiffs in O.S. No. 1770 of 1989 on the file of the III Additional Judge, City Civil Court, Secunderabad had preferred the present C.C.C.A. The 1st appellant died and appellants 7 to 13 were brought on record as legal representatives of the 1st appellant by order dated 9.8.2002 in C.M.P. No. 10997 of 2002. Likewise, the 2nd appellant died and appellant Nos. 14 to 16 were brought on record by virtue of order dated 26-7-2005 in CCCAMP No. 68 of 2005.

3. The appellants herein the plaintiffs in the suit filed the suit for partition of the plaint "A" and "B" schedule properties and for rendition of accounts of the rents collected and also prayed for alternative relief of recovery of some amount with

interest in lieu of "B" schedule movable properties. The learned Judge on the strength of respective pleadings of the parties had settled the issues. The 6th defendant-6th respondent in the present appeal purchaser pendente lite was impleaded as Defendant No. 6 by virtue of an order made in I.A. No. 2083 of 1994, dated 4-8-1995. The said party who was impleaded filed written statement on the strength of which additional issues were settled. The learned Judge recorded the evidence of PW-1, DWs.1 to 4 marked Exs.A-1 to A-6 and Exs.B1 to B-16 and ultimately came to the conclusion that the plaintiffs are not entitled to any relief as prayed for by them and dismissed the suit without costs. Hence, the appeal.

4. Sri Hari Haran, the learned Counsel representing the appellants had taken this Court through the evidence of PW-1 and also commented on the capacity of the mother to purchase the property at the relevant point of time. The learned Counsel also pointed out that in relation to this portion of evidence of PW-1 there is no serious challenge by way of cross-examination. The circumstances as existed in 1940 may have to be taken into consideration in appreciating the evidence of PW-1. The learned Counsel also would maintain that Ex.B11, the withdrawal of the prior partition suit, would not come in the way, in view of the subsequent changed circumstances. The said litigation was during the life time of the mother, whereas the present litigation is after the death of the mother and when the 1st defendant is claiming the property under a Will to the exclusion of the other natural heirs of the mother the burden is heavy on her to prove Ex.B-1 Will. The learned Counsel would point out that Ex.B-1 Will is an unregistered document and also would point out that except a stray sentence, DW-1 also had not deposed in detail relating to Ex.B-1. The learned Counsel also would comment that the evidence of DW-2 the alleged attester is also highly suspicious. He is interested witness being a close relative of DW-1 and his evidence is also is artificial. Unless the surrounding suspicious circumstances are clearly explained by the 1st defendant-DW-1, the other natural heirs, the plaintiffs cannot be excluded from the right to inherit the property of the mother. In this view of the matter, the findings recorded by the learned Judge cannot be sustained and are liable to be set aside. The learned Counsel also placed reliance on the decision of the learned Judge of Madras High Court in Keesari Santamma Vs. Kanumathareddi Venkatramireddi and Others,

5. Sri Shyam Sunder the learned Counsel representing Respondent Nos. 1 and 2 in the appeal and Defendant Nos. 1 and 2 in the suit, would contend that this is Sridhana property of the mother and she was a cancer patient and she was looked after by the 1st defendant only. The learned Counsel would also submit that by virtue of passage of time, it would be difficult to produce any acceptable evidence relating to a very old transaction. But, however, the fact remains even during the life time of Janakamma, an attempt was made by PW-1 to agitate the rights over the self same property and certain other items as well. Whatever the reasons may be, the same had been withdrawn as is evident by Ex.B-11, without reserving any liberty whatsoever and hence in the background of this fact, the

evidence may have to be appreciated. The learned Counsel would also submit that in view of the young age of PW-1 and also the other plaintiffs at the relevant point of time, it would be futile on the part of these parties to contend that this could not have been purchased by the mother as Sridhana in 1940's. The learned Counsel would also submit that in the light of the clear evidence of DWs.1 and 2 and also the evidence of DW-3 the tenant and DW-4 the purchaser who purchased the property pending litigation, the 6th defendant, there cannot be any doubt whatsoever that the will in fact had been executed by Janakamma. The learned Counsel would also explained that but it is natural that inasmuch as mother was not well she was looked after by the 1st defendant, she executed Ex.B-1 Will in favour of the 1st defendant.

6. Kum. Usha Kiran the learned Counsel representing the 6th respondent-6th defendant the subsequent purchaser pendente lite would contend that it is a clear case where the daughter became absolute owner of the property by virtue of the Will executed by the mother and absolutely there are no suspicious circumstances. Mere fact that it is an unregistered Will does not alter the situation in any way, if the Will has been proved in accordance with law. The learned Counsel also submits that there is nothing unnatural in DW-2, attesting the Will and there are no suspicious circumstances surrounding the Will. The conduct of the mother in executing the Will in favour of the daughter who was looking after her is but natural. The mere fact that the advocate concerned who is said to have been present, had not been examined, would not alter the situation, especially in the light of the evidence of PW-2. Apart from this aspect of the matter, the learned Counsel would also contend that the way in which PW-1 deposed in cross-examination would clearly go to show that the Will in question is a genuine one and to the knowledge of PW-1 also. But, for the reasons best known, he had approached the Court. The learned Counsel also placed reliance on certain decisions in this regard in Ramabai Padmakar Patil (D) through LRs. and Others Vs. Rukminibai Vishnu Vekhande and Others, , in Meenakshiammal (Dead) through LRs. and Others Vs. Chandrasekaran and Another, , in Daulat Ram and Others Vs. Sodha and Others,

7. Heard the learned Counsel on record. Perused the respective pleadings of the parties, the issues and additional issues settled and evidence available on record.

8. On the strength of the submission made by the respective Counsel representing the parties the following points arise for consideration in this appeal.

(1) Whether the Will-Ex.B-1 said to have been executed by the mother in favour of the 1st defendant can be said to be true, valid and binding in the facts and circumstances of the case?

(2) Whether the plaintiffs can maintain the present suit for partition in the light of Ex.B-11 the certified copy of memo filed in O.S. No. 96 of 1975?

(3) Whether the 6th defendant became the absolute owner by virtue of the sale in his favour in pursuance of the Will-Ex.B-1?

(4) If so, to what relief the parties would be entitled to?

9. Point Nos. 1 to 3:

Points 1 to 3 being interlinked, for the purpose of the convenience, the said points can be discussed together. Relating to the maintainability of the suit, in the light of Ex.B-11 it is clear that the suit as against the mother Janakamma had been withdrawn without reserving any liberty, submissions at length were made by the learned Counsel representing respective parties and strong reliance was placed on the decision in Keesari Santamma's case (supra). It is no doubt true that the prior suit was filed questioning the absolute proprietary rights of mother when the mother was alive. At present the mother is no more and in the natural course of events in the absence of any testamentary disposition, the natural heirs would be entitled to the relief of partition relating to the respective shares. In the light of the same Ex.B-11 as such, may not come in the way of the maintainability of the suit. However, Ex.B-11 definitely can be looked into for the limited purpose, whether the property is the exclusive, Sridhana property of the mother or not. When once the question was agitated and had been given up, the same cannot be re-agitated again. This Court is of the considered opinion that at least for this limited purpose the same can be looked into. Be that as it may, the factual matrix as reflected from the pleadings are as here under.

10. The plaintiffs as per the original plaint and as amended subsequent thereto pleaded as here under:

The plaintiffs 1 to 3 herein are own brothers and defendants 1 and 2 are their own sisters. Plaintiff Nos. 4 to 6 are the legal heirs and successors to late Sri B.K. Bhaskar Rao, one of the brothers who died on 16-12-1985. Therefore, the plaintiffs 4 to 6 are joining this suit as legal representatives of Late Sri B.K. Bhaskar Rao. The plaintiffs 1 to 3 herein along with Late B.K. Bhaskar Rao and the defendants are the children of Late B.S. Konda Naidu alias B.S. Kondal Rao and Late Smt. B. Janakamma. Defendants 3 to 5 are the tenants in the suit schedule property and therefore are joined in the suit as the possession of the suit schedule property is with them and that the plaintiffs and the defendants 1 and 2 are in constructive possession of the suit schedule property.

Late Sri B.S. Konda Raidu, expired in 1953 intestate. The wife of late B.S. Konda Raidu and the mother of the parties also expired on 3-6-1983 intestate. A copy of the death certificate issued by the Registrar of Births and Deaths is filed herewith marked document No. 1. The parties herein are Hindus and are governed by the Hindu Laws.

The plaintiffs submit that by a registered document No. 175, dated 27-5-1952 Fasli house bearing No. 1414, 1415 now bearing Municipal No. 11-1-401, Mylargadda, Sitafalmandi, Secunderabad was purchased by Smt. B. Janakamma the mother of the parties herein for and on behalf of the joint family from out of joint family funds. Further since the date of purchase the said house, more clearly described in the schedule "A" annexed to the plaint has been let out on

rent and the rental proceeds were being collected by late Smt. B. Janakamma and utilized by her. Even today, the said house stands in the name of Smt. B. Janakamma in the municipal records vide certificate of extract from assessment book for the year 88/89 dated 1-2-1989 issued by the Additional Commissioner Municipal Corporation of Hyderabad, Secunderabad Division which is filed herewith marked document No. II. After the death of late B. Janakamma the plaintiffs herein are joint legal owners and in constructive possession having succeeding to the Estate have been persuading the defendants to come forward and amicably settle the issue for partition of the suit schedule property as legal heirs and successors of late B. Janakamma. However, the defendants have been blowing it hot and cold in this issue but did not settle the matter and have been protracting the same.

At this juncture, it is pertinent to bring a few additional facts to the notice of this Hon'ble Court in regard to the conduct of the defendants and the motives of the allegations that were hoisted by the first defendant herein. It is submitted that during the life time of the mother of the plaintiff i.e., Smt. B. Janakamma, the defendant No. 1 herein taking undue advantage of her old age, illiteracy and motherly affection for the daughter, foisted O.S.No. 1012 of 1973 on the file of the 10th Assistant Judge, City Civil Court, Hyderabad. In the said suit, the first defendant prompted late B. Janakamma to set up a claim for another house situated at 6-2-150, New Boiguda, Secunderabad belonging to the plaintiffs herein on the alleged ground that the father of the plaintiff i.e., late B.S. Kondal Raidu had executed a will in September, 1949 bequeathing the said house for his wife, B. Janakamma. Further, it was alleged that the said house was transferred by a gift deed dated 14-9-1971 in favour of the defendant No. 1 herein by late B. Janakamma and that the plaintiffs herein were only licencees in the property, and therefore sought for an injunction restraining them from interfering with their peaceful possession of that property. The plaintiffs resisted the said claim as dubious and perpetuated with fraud, as the documents have also been brought up for the purpose of the said suit by the first defendant herein. The trial Court considered all these aspects and dismissed the suit by a decree and judgment dated 3-2-1979, categorically disbelieving the version of the defendant No. 1 herein and rejecting her claim based on the will and the gift deed. It was categorically held that late B.S. Konda Raidu could not and did not have the capacity to purchase the house and that the houses were purchased out of the contributions made by the plaintiffs 1 to 3 along with the deceased B.K. Bhaskar Rao, as by the time of houses were purchased, they were already in employment and were effectively contributing to the upkeep and maintenance of the house etc.

Unsatiated, the first defendant herein along with B. Janakamma carried the matter in AS.332 of 1979 which also stood dismissed by a Judgment dated 27-7-1981 by the Hon'ble Addl. Chief Judge, City Civil Court cum-Special Judge, for ACB cases, Hyderabad. In order to further harass the plaintiffs herein, the defendant No. 1 forcibly carried the matter in Second Appeal No. 88 of 1982,

which also stood dismissed by a Judgment dated 23-2-1987. A copy of the said judgment is filed marked as document No. 3.

Even after this, the first defendant failed to remove herself from the plaintiff of the plaintiffs at New Bhoiguda and doggedly persisted in continuing her illegal occupation of a portion of the premises. Even in response to a legal notice issued, the first defendant herein exhibited her guilty mind by rushing to the Court of the 11th Assistant Judge, City Civil Court, Secunderabad by filing a fresh suit for injunction in O.S. 4433/ 87 on the ground that she should not be vacated unless by due process of Law. Thus the plaintiffs in pursuance of their legal notice filed O.S. No. 3523 of 1988 on the file of Ith Assistant Judge, City Civil Court, Secunderabad seeking for recovery of possession and past and future mesne profits against the D1 herein.

The plaintiffs further submit that during the pendency of O.S. No. 1012 of 1973 since the first defendant herein was acting prejudicially to the interests of the family, were constrained to file O.S. No. 96 of 1975 on the file of the I Addl. Judge, City Civil Court, Hyderabad seeking for declaration that the plaintiffs are the absolute and exclusive owners of properties situate at New Bhoiguda and the present suit schedule property. The said suit was subsequently withdrawn on 18-4-1980 as the mother of the parties herein late B. Janakamma along with defendant No. 1 herein, took a stand that the present suit schedule property belongs to her (Smt. Janakamma) exclusively and had been purchased by her and that no division or declaration of partition can be effected during her life time. Thus the suit schedule property continued to be the property of late B. Janakamma and the plaintiffs out of natural love and affection and in order to give semblance of financial security to their mother, permitted the said arrangements.

However, the defendant No. 1 herein, taking advantage of late B. Janakamma's old age etc., as stated above and having been assisting her in collection of rents etc., has been misusing the property for her own personal benefits. It is pertinent to mention at this juncture that at the time of the death of late B. Janakamma, she had nearly 40 tolas of gold and about 60 tolas of silver belonging to the family and that the defendant No. 1 herein had removed the same and appropriated it for herself without any authority in law. It is humbly submitted that the plaintiffs 1 to 3 herein along with late B.K. Bhaskara Rao and defendant No. 2 are also entitled to their share in the movables stated above and detailed in Schedule "B" and in the Schedule "A" property.

Thereafter, the plaintiffs have been making all efforts to settle the issue amicably and called upon both the first and second defendants herein to settle the issue either by themselves or in the presence of elders, so that the dignity and honour of the family is saved, and to avoid unnecessary litigation in Courts of Law. However, defendant No. 1 has been doggedly evading the issue and also has persuaded defendant No. 2 to join her in nefarious intentions.

Constrained by such adamant attitude of the defendants the plaintiffs got issued a legal notice dated 30-8-1987 to the defendants calling upon them to come forward and settle the issue of division of movables belongs to late B. Janakamma and also partition the suit schedule property by metes and bounds as in law all are entitled to equal share in the estate of their mother late B. Janakamma. The plaintiffs also called upon the defendants 1 and 2 to render true and proper accounts for the rents collected by them from the date of death of late B. Janakamma and share the proceeds as per law. The office copy of the said legal notice is filed herewith marked document No. IV. Though both the defendants received the said legal notice, vide their acknowledgments filed herewith marked document Nos. V and VI, however, failed to comply with the demand. In the meantime, still in order not to drag the matter to the court, the plaintiffs kept the option open to the defendants to negotiate and settle the issue amicably. However, the defendant won't need to such appeals. In the meantime, the husband of the first defendant herein died in September, 1987. Again in order not to cause further agony in her personal loss, the plaintiffs once again waited and appealed to her good sense as also to the second defendant to settle the issue, but without any success. The defendants not only did not care to the well meaning advances made by the plaintiffs to settle the issue, but the plaintiffs learnt, were trying to dispose off the property behind the back of the plaintiffs claiming themselves to be the actual owners of the suit schedule property. Constrained by such dubious means, the plaintiffs caused a public notice to be issued through their Counsel and the same published in the English Daily "DECCAN CHRONICLE" dated 15-10-1988 cautioning any intended purchaser of the risk involved in buying the property from the defendants herein behind the back of the plaintiffs. A copy of the said newspaper publication is filed herewith marked document No. VII.

It is submitted that the suit schedule property consists of 2 mulgies facing the road and one tenant at the back. The plaintiffs submit that the two mulgies are rented out on a monthly rent of Rs. 210/- for each shop and Rs. 210/- for residential. However, the first defendant by virtue of her earlier acquaintance and having been collecting the rents even during the life time of late B. Janakamma continued to collect the rents and appropriated it for herself illegally. It is submitted that the approximate rents collected by her from the date of death of late B. Janakamma on 3-6-1983 till date i.e., upto August 1989 (for 75 months) amount to Rs. 210/- each X 3 portions (tenants) X 75 months = Rs. 47,250/-. The defendants are liable to render true and correct accounts for the amounts collected by them.

It is further submitted that as stated in para 8 above the plaintiffs 1 to 3 and plaintiffs 4 to 6 are entitled one share each of the gold and silver left behind by late B. Janakamma. The value of the 40 tolas of gold is valued at Rs. 1,10,000/- and 60 tolas of silver is valued Rs. 2,300/-.

It is submitted that the first defendant is liable to render true and proper account

for such collections and share the same along with movable and immovables of late B. Janakamma with the parties to the suit. Since all the pleadings of the plaintiffs have been in vain, the plaintiffs have no other alternative but to file the present suit.

The cause of action for the suit originally arose in 1352 Fasli when the suit schedule property was purchased by Smt. Janakamma for the purpose of the joint family. The cause of action further arose in June 1975 when late B. Janakamma along with first defendant herein filed a written statement in O.S.No. 90 of 1975 claiming that the suit schedule property belongs exclusively to late B. Janakamma. The cause of action further arose on 3-6-1983 when late B. Janakamma died intestate leaving the plaintiffs 1 to 3 and defendants 1 and 2 along with late B.K. Bhaskar Rao as legal heirs and successors. The cause of action further arose on all the dates when the plaintiffs demanded the defendants to settle the issue of partition as also share the movables left behind by Smt. B. Janakamma. The cause of action finally arose on 30-8-1987 when the plaintiffs caused a legal notice to be issued demanding partition of the suit schedule house and for rendition of accounts and the defendants having failed to comply with the demand in spite of several reproaches. Thus the suit filed is within time and not barred by limitation.

11. The 1st and 2nd defendant filed written statement denying other allegations while admitting the relationship. It was pleaded as hereunder:

With reference to para 3 of the plaint, these defendants while admitting the relationship therein set out, deny that the plaintiffs are in constructive possession of the suit schedule of property. They were never in possession either actually or constructively at any time. Defendants 3, 4 and 5 were the tenants of these defendants mother late B. Janakamma, the absolute owner in her life time and after her death, the first defendant is in possession as owner under her mothers will as testamentary heir. Defendants 3, 4 and 5 are not necessary parties. There is no privity of contract between them and the plaintiffs who have no interest in the suit schedule property.

With reference to paragraph 4, these defendants deny that their parents late B.S. Kondal Raidu and late B. Janakamma died intestate. Both parents died leaving duly executed wills in a sound state of mind. Late B.S. Kondal Raidu executed a will dated 2-9-1949 bequeathing the property bearing House No. 2-150, New Bhoiguda, Secunderabad to his third wife Smt. B. Janakamma who in turn gifted the said property in favour of the 1st defendant by registered Gift Deed dated 14-9-1971. The plaintiffs have no interest in the suit house, the suit schedule property bearing the suit house, the suit schedule property bearing No. 11-1-401 situated at Mylaragadda, Seethapalmandi, Secunderabad, as late B. Janakamma in her will dated 17-8-1979 bequeathed the suit house to the 1st defendant absolutely. A Xerox copy of the said will of the defendants mother is herewith filed marked "No. I", and the original will be submitted at the time of trial.

With reference to para 5, the defendants deny that their mother purchased the suit house bearing No. 11-1-401 situated at Mylargadda, Seethapalmandi, Secunderabad for the joint family out of joint family funds. In this connection, it is stated that late B. Janakamma purchased the suit house with her monies and it was her absolute "Streedhana" property. She was in possession and enjoyment of the suit house till her death. She was never in good terms with the plaintiffs who illtreated her, ridiculed her, troubled her and subjected her to false and frivolous litigation for 10 long years in her old age. She lived with the 1st defendant who looked after her in old age with utmost care and devotion and attended to her medical needs during the fag end of her life. The suit property belongs to 1st defendant by virtue of will executed by late B. Janakamma on 17-8-1979 and the plaintiffs have no share or claim of any kind whatsoever in the suit house.

With reference to para 6(a) of the plaint, these defendants submit that the allegations therein refer to another house bearing No. 6-2-150, situated at New Bhoiguda, Secunderabad and this suit is not concerned with the same and references to the said house are not relevant. All these false allegations set out in this para cannot go unchallenged and the defendants deny the same. These defendants deny the same. These defendants submit that their late father B.S. Kondal Raidu was the full and absolute sole owner of the said house No. 6-2-150, New Bhoiguda, Secunderabad and constructed by him with his hard earned and own earnings and it was his self acquired property. He later bequeathed the said house in his will dated 2.9.1949 in favour of the defendants mother late B. Janakamma who in turn gifted the said property in favour of the 1st defendant. In the suit of O.S. No. 1012 of 1973, the plaintiffs and their advocates urged a fantastic proposition that since the family had no property and no nucleus, the property acquired, constructed and owned by their father was joint family property. A more absurd proposition cannot be urged. The Court concerned erroneously held it was joint family property and not the separate property of their father and thus the plaintiffs subjected the 1st defendant to false and erroneous litigation. The said house No. 6-2-150 situated at New Bhoiguda, Secunderabad was the absolute property of late B.S. Kondal Raidu and the Municipal taxes are still coming in his name.

The plaintiffs filed a suit O.S. No. 96 of 1975 in the Court of Honourable C. Ramakrishna, the I Additional Judge, City Civil Court, Hyderabad seeking for declaration the plaintiffs are absolute and exclusive owners of the properties situated at New Bhoiguda and the present suit schedule property. At the time of final trial, when the question of proof of the defendants father will was raised, the plaintiffs withdrew the suit without permission to file a fresh suit from the said Court. They abandoned the suit and did not press for the suit and the same was dismissed on 10-4-1980. Hence, the plaintiffs are precluded from filing this suit and are not competent to raise any dispute or claim for this suit schedule property, the subject-matter of the said suit.

Finally, it is submitted, that House No. 11-1-401 situated at Mylargadda, Seethapalmandi, Secunderabad is the absolute property of the 1st defendant. The other parties including the 2nd defendant have no right, title or interest of any kind in the suit schedule property. The same does not belong to any joint family including the plaintiffs family. The 1st defendant is enjoying the property as the absolute owner since her inheritance of the property and spent considerable amount on the suit schedule of property for repairs and maintenance all these years, which was in dilapidated condition. She is enjoying the rents and paying all taxes. The first defendants mother and after her death this defendant were in exclusive possession and enjoyment of the suit house No. 11-1-401 situated at Mylaragadda, Seethapalmandi, Secunderabad and as owners exercising all rights of ownership free from any claims of others adversely to all others in her own right as owner exercising all rights of ownership.

Therefore, this suit for parties is false, untenable and not maintainable and also not liable for partition. It is misconceived, the defendants deny that the plaintiffs have any claim nor do they have any right whatsoever and it is a separate property of 1st defendant and she was exercising her absolute right sunder mothers aforesaid will dated 17-8-1979.

With reference to paragraph 6(b) of the plaint, these defendants deny all adverse allegations contained therein and submit the suit house had always been with 1st defendant. All allegations of the plaintiffs are irrelevant as they refer to house No. 6-2-150 situated at New Bhoiguda, Secunderabad and not a subject-matter of this suit and has absolutely no relevance on this suit. As the plaintiffs resorted to unlawful means of evicting her by cutting off the electricity, the 1st defendant had no other alternative except to file an injunction suit No. O.S. 4433 of 1987 in the Court of 11th Assistant Judge, City Civil Court, Secunderabad praying that she should be vacated by due process of law. The 1st defendant also filed a Writ Petition No. 13951 of 1987 in the High Court of A.P. at Hyderabad for restoration of electricity supply. Orders for restoration of electricity supply was issued by Hon"ble Mr. Justice M.N. Rao on 23-9-1987. The judgments in AS No. 332 of 1979 and 88 of 1982 referred to therein are irrelevant as far as this suit is concerned and will only closed the issues in this suit which is concerned with house No. 11-1-401, situated Mylaragadda, Seethapalmandi, Secunderabad.

The statement made by the plaintiffs in para 7 of the plaint, that they were constrained to file O.S. No. 96 of 1975 on the file of the I Additional Judge, City Civil Court, Hyderabad seeking for declaration that they are the absolute owners of properties situated at New Bhoiguda and the present suit schedule property, since the 1st defendant herein was acting prejudicially to the interests of the family is totally baseless and that the suit was subsequently withdrawn at the instance of their mother in 1980 is totally false, baseless and concocted. At the time of final trial, when the question of proof of their fathers will was raised, the plaintiffs filed a memo and did not press for the suit fearing that their father's

will may be proved The Suit No. O.S. No. 96 of 1975 was dismissed on 18-4-1980 under Order No. 23 Rule 1 of CPC which has become final and irrevocable. The same cannot be raised in this suit. It is respectfully submitted that this suit dealing with the same issues directly and substantially, the plaintiffs are precluded from filing this suit under Order 23 Rule 1 (Proviso) CPC having withdrawn without the leave of the Court and also under Order 9 and Rules 8 and 9 of the Civil Procedure Code. The suit is not maintainable under law.

With reference to para 8, it is denied that 1st defendant took undue advantage of old age of her mother and collected rents and misappropriated for her personal benefits. The defendants vehemently deny that gold and silver ornaments worth of 40 and 60 tolas respectively of their late mother was confiscated by them.

A legal notice issued by their advocate late Ram Mohan Rao to the defendants and their mother on 12-9-1974 show that as much as 100 tolas of gold and 400 tolas silver was in possession of late B. Janakamma. A Xerox copy of the notice is filed herewith marked "No. II". And the original copy will be submitted at the time of trial. Therefore, the plaintiffs are put to strict proof of the properties their values and their existence and all other particulars given therein without any basis or proof. There is no cause for action in this suit. The question of shares in the movables therefore does not arise in this case.

With reference to para 9, the defendants deny that the plaintiffs have come forward with the proposal for amicable settlement in presence of elders to avoid unnecessary litigation in the Court of law. On the contrary, after the High Courts verdict, the Plaintiff subjected the 1st defendant and her husband to lot of harassment for vacating the house at Bhoiguda. Not satisfied with this, they have resorted to unlawful means by getting the 1st defendant electric supply disconnected for about one month and also tried in vain to cut off water supply. Due to this harassment, the 1st defendant husband died due to hypertension on 24-9-1987. The 2nd defendant deny the allegation made by plaintiffs that she has been persuaded by 1st defendant to join in her nefarious intentions.

With reference to paragraph 10 of the plaint, these defendants deny that they have any properties with them movable or immovable in which plaintiffs are entitled for any share or right. One legal notice was issued on 31-8-1987 and another within three months of the death of 1st defendants husband in January, 1988. It is not true that the plaintiffs have appealed to the defendants after 1st defendants husbands death to settle the issue amicably outside the Court of law. The 1st defendant is the absolute owner of the schedule suit property after her mother's death in 1983 and exercising all rights of ownership free from any claims from others. The first defendant has every right to sell or gift or bequeath the property in any manner. The plaintiffs having lost the suit in 1980 have no right or claim over the property.

With reference to paragraphs 11(a), 11(b) and 12 of the plaint, the 1st defendant is not responsible for true correct accounts of the rents collected by

her to the plaintiffs for the period 3.6.1983 to 31.8.1989 as she is the absolute owner of the house enjoying the rents and spending considerable amount on repair and maintenance of the schedule suit property and paying all taxes. The plaintiffs are put to strict proof of gold and silver and their values and their existence. All particulars given in para 11(b) are without any basis or proof. A legal notice issued to their mother and defendants by their Advocate late Rammohan Rao on 12.9.1974 reveal that 100 tolas of gold and 400 tolas of silver with plaintiffs mother. The plaintiffs were now saying 40 tolas of gold and 60 tolas of silver was with their mother. It clearly shows that values given are very high, jewellery mentioned imaginary and not in existence. The plaintiffs are required to prove their existence.

The defendants deny that there is any movables left by their mother for showing with the plaintiffs. The plaintiffs are put to strict proof of the properties their values and their existences and all other particulars given in paragraph 13 are without any basis. There is no cause of action for this suit as earlier suit O.S. No. 96 of 1975 was dismissed on 18-4-1980 under Order No. 23 Rule 1 of CPC which has become final and irrevocable. The same cannot be raised in this suit. It is respectfully submitted that this suit is dealing with the same issues directly and substantially, the plaintiffs are precluded from filing this suit under Order 23 Rule 1 (Proviso), CPC having withdrawn without the leave of the Court and also under Order 9 and Rules 8 and 9 of the Civil Procedure Code. The suit is not maintainable under law.

The jurisdiction of this Hon'ble Court to try this suit is admitted.

12. The 6th defendant purchaser pendente lite who was brought on record filed written statement as here under:

This defendant submits that he is the sole and absolute owner in possession of house bearing No. 11-1-140 admeasuring 150 square yards situated at Mylargadda, Secunderabad, and other parties to the suit have got no right, title or interest in any manner whatsoever this defendant has purchased the above mentioned property by virtue of registered sale deed dated 8-10-1990, having purchased the same from the first defendant (Smt. A. Jayalakshmi, w/o late A. Sathyanarayana) who in turn had become the owner by virtue of a will dated 17-8-1979 extended by the mother of the first defendant in favour of 1st defendant. After the death of the 1st defendant's mother the defendant No. 1 is in absolute and exclusive possession of the said property. The defendants 3, 4 and 5 were the tenants of defendant No. 1. The defendant No. 1 has been collecting the rents from defendants 3, 4 and 5 till she sold of the property to the 6th defendant. It is submitted that the above said property is neither joint family property nor the plaintiffs have got any right to claim a share therein.

This defendant submits that the defendant No. 3 had filed R.C.203/91 on the file of the Additional Rent Controller, Secunderabad, against one Saibaba, defendant No. 1 herein and this defendant for deposit of rents in the Court and this

defendant filed an eviction petition against defendant No. 3 herein in R.c.No. 215/91. Both the petitions were tried together and a common judgment was pronounced on dated 18-10-1994. In the said judgment the R.c.No. 203/91 for deposit of rents was dismissed and the Court held that this defendant was at liberty to withdraw the amounts deposited by the tenant (Defendant No. 3), while dismissing the eviction petition filed by this defendant on the ground that the tenant was not a wilful defaulter. During the pendency of the above said R.c.S. the plaintiffs No. 2, 3 and 4 filed the petition in R.C.No. 203/91 for getting themselves impleaded in the case which was dismissed on 6-6-1994. Against which they preferred a rent appeal bearing R.A. No. 345/ 94 which was also dismissed and it became final.

After the dismissal of the said rent appeal they have got this defendant impleaded as 6th defendant and also obtained stay from this Hon"ble Court against this defendant from withdrawing the rents from the Rent Control Act.

This defendant submits that he is entitle to withdraw the rents from the R.C. Court which has been deposited by defendant No. 3 and this defendant is in full and absolute enjoyment of the said property, as such the property bearing No. 11-1-401 situated at Mylargadda, Secunderabad, has to be excluded from the array of the properties in this suit and this suit is liable to be dismissed as against this defendant.

13. On the strength of the original pleadings the following issues were settled.

(1) Whether the suit property belongs to the family of late B.S. Kondalraidu though standing in the name of late B. Janakamma?

(2) Whether late B. Janakamma had absolute right to dispose off the suit property?

(3) Whether the suit schedule property is liable for partition, if so what are the shares of the parties entitled to ?

(4) Whether late B. Janakamma bequeathed the suit schedule property entirely to D1 by Will?

(5) Whether the defendants are liable to render accounts in respect of the rents collected from the suit house?

(6) Whether the defendants are in exclusive possession and enjoyment of the suit schedule property?

(7) To what relief ?

14. Subsequent thereto in the light of the written statement filed by the 6th defendant the following additional issues were settled:

(1) Whether the 6th defendant is the owner of the suit schedule property as contended by him?

(2) Whether the property claimed by D-6 is liable for partition?

(3) To what relief ?

15. The learned Judge recorded findings in detail and arrived at a conclusion that the plaintiffs are not entitled to any of the reliefs prayed for. It is no doubt true that the 6th defendant was brought on record as a purchaser pendente lite and his rights would depend upon his vendor ultimately being successful in establishing Ex.B-1. Hence, the crucial question which may have to be decided, is the validity of Ex.B-1 which had been attacked by the appellants-plaintiffs in the suit on certain grounds. The evidence of PW-1, DW-1 and DW-2 is available on record in relation to the validity of Ex.B-1. PW-1 no doubt deposed in detail about the prior litigation O.S. No. 96 of 1975 and had taken a stand that inasmuch as his mother assured to settle the dispute in the family and on her assurance the same had been withdrawn. The question need not detain this Court any further since the mother is no more now, the children are fighting the litigation. The fact remains that at a particular point of time relating to the nature of the property, assertion was made that this was not separate or Sridhana property of the mother. But, whatever the reasons may be the suit had been withdrawn unconditionally without reserving any liberty as is evident from Ex.B-11. Hence, this Court is of the considered opinion that this faint attempt made by PW-1 in this direction to raise the question again and re-agitate this question that this is not the separate or Sridhana property of the mother, but, the property of the family as such and hence all are entitled to shares, cannot be accepted, in the light of Ex.B-11. As far as validity of Ex.B-11 is concerned, PW-1 deposed in detail in relation to the affairs of the family. Ex.A-1 is the death certificate. Ex.A-2 is the certified extract from assessment book for the year 1988-89. Ex.A-3, A-4 and A-5 notice issued through an advocate and postal acknowledgement. Ex.A-6 is paper publication in Deccan Chronicle. The main grievance ventilated by the Counsel representing appellants is that despite the knowledge about the pending litigation and despite controversy, the purchaser pendente lite, defendant No. 6 purchased the property, purchasing the risk and hence the said purchase is not bona fide. As already referred to supra the rights of the purchaser would flow from Ex.B-1 and the findings which may be recorded by this Court in relation thereto. Ex.B-1 is the Will dated 17-8-1979. Apart from Ex.B1, Ex.B2 the plaint in O.S. No. 96 of 1975. Ex.B-3 deposition of PW-1 in the said suit. Ex.B-4 the portion marked in Ex.B-3. Ex.B-5 the judgment in O.S. No. 96 of 1975 also were marked. Apart from these documents Exs.B-8, 11, 12 and 13 also relate to O.S. No. 96 of 1975. Exs.B-14, 15 and 16 relate to some interlocutory application and Rent Controller proceedings. Exs.B-6 is the sale deed and Ex.B-7 is the translation. In the chief-examination no doubt PW-1 asserted that all the parties are entitled to the shares. But, however, in cross-examination this witness deposed that he filed the suit O.S. No. 96 of 1975 and explained that it is in relation to some other property, but admitted that the suit was withdrawn by him unconditionally. This witness also deposed that Ex.B-1 Will dated 17-8-1979 was executed by his mother in favour of the 1st defendant and

this witness also deposed about the prior judicial proceedings in O.S. No. 96 of 1975 in detail. Certain of the admissions made by PW-1 in relation to Ex.B-1 would support the version of DW-1. The evidence of DW-1 is to the effect that this property was the property of her mother and she was letting out the property and collecting the rents from the tenants and her mother alone was utilizing the rents collected and she was paying tax and she was attending to the maintenance of the house repairs etc. She also deposed that her mother was living with her for about 30 years and she died in 1985 and her mother bequeathed the property in her name under Ex.B-1 and it bears the signature of her mother and she sold the suit property to Ch. Venkateswarlu-defendant No. 6. No doubt, she was cross-examined at length. In relation to the evidence of DW-1, much comment was made that except a couple of sentences she had not deposed in detail in relation to Ex.B-1. As can be seen from the admissions made by PW-1 there is no serious controversy in relation to Ex.B-1 though it is an unregistered document. Much comment was made on the evidence of DW-2, attester, who had deposed that when he had gone on some personal work he was told that the mother of DW-1 intended to execute a Will in favour of the daughter in relation to the plaint schedule property and this witness also deposed that the document was ready and the same was read over to Janakamma who executed the document in his presence and he also deposed about the other attester attesting and this witness attesting the document and identifying the signature of Janakamma and the other particulars. This witness no doubt was cross-examined. But, nothing serious had been elicited. This witness denied the other suggestions and the evidence of this witness was commented on the ground that it is an interested testimony since in a way he is related to the 1st defendant.

16. The learned Counsel representing 6th respondent-defendant No. 6 purchaser pendente lite placed reliance on certain decisions in relation to the validity of Ex.B-1. In Ramabaipadmakar Patil's case (supra) the Apex Court observed:

A Will is executed to alter the mode of succession and by the very nature of things it is bound to result in either reducing or depriving the share of a natural heir. If a person intends his property to pass to his natural heirs, there is no necessity at all executing a Will. It is true that a propounder of the Will has to remove all suspicious circumstances. Suspicion means doubt, conjecture or mistrust. But, the fact that natural heirs have either been excluded or a lesser share has been given to them, by itself without anything more, cannot be held to be a suspicious circumstance, especially in a case where the bequest has been made in favour of an offspring. In P.P.K. Gopalan Nambiar Vs. P.P.K. Balakrishnan Nambiar and others, , it has been held that it is the duty of the propounder of the Will to remove all the suspected features, but there must be real, germane and valid suspicious features and not fantasy of the doubting mind. In this case, the fact that the whole estate was given to the son under the Will depriving two daughters was held to be not a suspicious circumstance and the finding to the contrary recorded by the District Court and the High Court was reversed. In

Pushpavathi and Others Vs. Chandraraja Kadamba and Others, , it has been held that if the propounder succeeds in removing the suspicious circumstances, the Court would have to give effect to the Will, even if the Will might be unnatural in the sense that it has cut off wholly or in part the near relations. In Rabindra Nath Mukherjee and another Vs. Panchanan Banerjee (dead) by L.Rs. and others, , it was observed that the circumstance of deprivation of natural heirs should not arise any suspicion because the whole idea behind execution of the Will is to interfere with the normal line of succession and so, natural heirs would be debarred in every case of Will. Of course, it may be that in some cases they are fully debarred and in some cases partly. The concurrent finding recorded by the District Court and the High Court for doubting the genuineness of the Will on the aforesaid ground was reversed.

The learned District Judge has observed that Smt. Yamunabai was very old when she executed the Will and she was hard of hearing and was unable to walk. He further observed that Chhaya Dighe who typed the Will and one Shri Tiwari, Advocate, who was present at the time of preparation and execution of the Will, were not examined and these facts together created a doubt regarding the authenticity of the Will. As discussed earlier, in view of Section 63 of the Indian Succession Act and the proviso to Section 68 of the Evidence Act, the requirement of law would be fully satisfied if only one of the attesting witnesses is examined to prove the Will. That this had been done in the present case by examining PW-2 Raghunath Govind Sogale cannot be disputed. No infirmity of any kind had been found in the testimony of this witness. Chhaya Dighe merely typed the Will and she is not an attesting witness nor is it anybody's case that Smt. Yamunabai had put her thumb impression on the Will in her presence, therefore, her examination as a witness was wholly redundant. There mere non-examination of the advocate who was present at the time of preparation or registration of the Will cannot be itself, be a ground to discard the same. The fact that Smt. Yamunabai was hard of hearing or that she was unable to walk does not lead to an inference that her mental faculties had been impaired or that she did not understand the contents of the document which she was executing. It is important to note that Smt. Yamunabai personally came to the Office of the Sub-Registrar and her death took place after a considerable period i.e., 3 years and 9 months after the execution of the Will. No evidence has been adduced by the defendants to show that at the time of the execution of the Will she had been suffering from any such ailment which had impaired her mental faculties to such an extent that she was unable to understand the real nature of the document which she was executing. We are, therefore, clearly of the opinion that the finding recorded by the learned District Judge, which has been affirmed by the High Court in the second appeal, is not based upon a correct application of the legal principles governing the proof and acceptance of Will and the same is completely perverse. The aforesaid finding is accordingly set aside. The finding recorded by the trial Court that the Will is genuine is hereby restored.

17. In Daulat Ram's case (supra) above at para 10 it was observed:

Will being a document has to be proved by primary evidence except where the Court permits a document to be proved by leading secondary evidence. Since it is required to be attested as provided in Section 68 of the Indian Evidence Act, 1872, it cannot be used as evidence until one of the attesting witnesses at least has been called for the purpose of proving its execution, if there be an attesting witness alive, and subject to the process of the Court and capable of giving evidence. In addition, it has to satisfy the requirements of Section 63 of the Indian Succession Act, 1925. In order to assess as to whether the Will has been validly executed and is a genuine document, the propounder has to show that the Will was signed by the testator and that he had put his signatures to the testament of his own free will; that he was at the relevant time in a sound disposing state of mind and understood the nature and effect of the dispositions and that the testator had signed it in the presence of two witnesses who attested it in his presence and in the presence of each other. Once these elements are established, the onus which rests on the propounder is discharged. But, where there are suspicious circumstances, the onus is on the propounder to remove the suspicion by leading appropriate evidence. The burden to prove that the Will was forged or that it was obtained under undue influence or coercion or by playing a fraud is on the person who alleges it to be so.

18. In Meenakshiammal's case (supra), it was observed by the Apex Court at paras 20 and 21:

In the case of Ryali Kameswara Rao Vs. Bendapudi Suryaprakasarao and Others, , the Court while discussing the provisions of Section 63 of the Succession Act, 1925, has held that the suspicion alleged must be one inherent in the transaction itself and to the doubt that may arise from conflict of testimony which becomes apparent on an investigation of the transaction. That suspicious circumstances cannot be defined precisely. They cannot be enumerated exhaustively. They must depend upon the facts of each case. When a question arises as to whether a will is genuine or forged, normally the fact that nothing can be said against the reasonable nature of its provisions will be a strong and material element in favour of the probabilities of the will. Whether a will has been executed by the testator in a sound and disposing state of mind is purely a question of fact, which will have to be decided in each case on the circumstances disclosed and the nature and quality of the evidence adduced. When the will is alleged to have been executed under undue influence, the onus of proving undue influence is upon the person making such allegation and mere presence of motive and opportunity are not enough.

In the case of Madhukar D. Shende Vs. Tarabai Aba Shedage, , it has been held as follows : (SCC pp.91-92, paras 8-9)

"8. The requirement of proof of a Will is the same as any other document excepting that the evidence tendered in proof of a will should additionally satisfy the requirement of Section 63 of the Succession Act, 1925 and Section 68 of the Evidence Act, 1872. If after considering the matters before it, that is, the facts

and circumstances as emanating from the material available on record of a given case, the Court either believes that the will was duly executed by the testator or considers the existence of such fact so probable that any prudent person ought, under the circumstances of that particular case, to act upon the supposition that the will was duly executed by the testator, then the factum of execution of will shall be said to have been proved. The delicate structure of proof framed by a judicially trained mind cannot stand on weak foundation nor survive any inherent defects therein but at the same time ought not to be permitted to be demolished by wayward pelting of stones of suspicion and supposition by wayfarers and waylayers.

What was told by Baron Alderson to the jury in *R.V. Hodge* may be apposite to some extent:

"The mind is apt to take a pleasure in adapting circumstances to one another and even in straining them a little, if need be, to force them to form parts of one connected whole, and the more ingenious the mind of the individual, the more likely was it, considering such matters, to overreach and mislead itself, to supply some little link that is wanting, to take for granted some fact consistent with its previous theories and necessary to render them complete".

The conscience of the Court has to be satisfied by the propounder of will adducing evidence so as to dispel any suspicious or unnatural circumstances attaching to a will provided that there is something unnatural or suspicious about the Will. The law of evidence does not permit conjecture or suspicion having the place of legal proof nor permit them to demolish a fact otherwise proved by legal and convincing evidence. Well-founded suspicion may be a ground for closer scrutiny of evidence but suspicion alone cannot form the foundation of a judicial verdict positive or negative.

9. It is well settled that one who propounds a will must establish the competence of the testator to make the will at the time when it was executed. The onus is discharged by the propounder adducing prima facie evidence proving the competence of the testator and execution of the will in the manner contemplated by law. The contestant opposing the will may bring material on record meeting such prima facie case in which event the onus would shift back on the propounder to satisfy the Court affirmatively that the testator did know well the contents of the will and in sound disposing capacity executed the same. The factors, such as the will being a natural one or being registered or executed in such circumstances and ambience, as would leave no room for suspicion, assume significance. If there is nothing unnatural about the transaction and the evidence adduced satisfies the requirement of proving a will, the Court would not return a finding of "not proved" merely on account of certain assumed suspicion or supposition. Who are the persons propounding and supporting a will as against the person disputing the will and the pleadings of the parties would be relevant and of significance.

19. There cannot be any serious doubt in relation to the settled principles regarding the proof of the Will and the burden is on the proponent to explain and remove the suspicious circumstances surrounding the Will if any. On a careful scrutiny of the respective pleadings of the parties and also the conduct of PW-1 and the stand of PW-1 taken in the prior litigation and the withdrawal of the suit, Ex.B-11 and the fact that the mother had been residing with the 1st defendant for long time, for the last more than 30 years as deposed by DW-1 inasmuch as she was looking after, the mother, it would be but natural that the mother would have thought of making this testamentary disposition in favour of the daughter. This Court is of the considered opinion that mere fact that the document is an unregistered one and the mere fact that D W-2 attester is a distant relative of the 1st defendant, these factors by themselves are not circumstance of such a suspicious nature, so as to disbelieve Ex.B-1. Hence, this Court is of the considered opinion that though the suit for partition on subsequent cause of action as such is maintainable in view of the fact that the mother made the testamentary disposition in favour of the daughter-1st defendant, the 1st defendant became the absolute owner in turn who sold the property in favour of the 6th defendant. Except this conclusion, no other conclusion would be possible. Apart from this aspect of the matter, the evidence of DWs.3 and 4 available on record also would support the stand taken by both DWs.1 and 2. DW-3 is the tenant, DW-4 is the purchaser pendente lite 6th defendant. The evidence of these witnesses need not be dealt with in elaboration in view of the fact that already finding had been recorded relating to the validity of Ex.B-1 as referred to supra. Accordingly, viewed from any angle the findings recorded by the learned Judge do not suffer from any infirmity whatsoever and the said findings are hereby confirmed.

20. Point No. 4: In the light of the foregoing discussion inasmuch as this Court recorded the findings upholding the validity of Ex.B-1. It is needless to say the appeal is devoid of any merit whatsoever and accordingly, the same shall stand dismissed. In view of the close relationship between the parties and taking into consideration the fact that the 6th defendant is purchaser pendente lite who was brought on record subsequently, the parties to the litigation to bear their own costs.