
(2006) 07 AP CK 0053

In the Andhra Pradesh High Court

Case No : AS No. 714 and CRP No's. 4210 of 1996 and 1838 of 1997

Mullapudi Veera Venkata Balayogi Satyanarayana and Others	APPELLANT
Vs	
Mullapudi Indravathi	RESPONDENT

Date of Decision : 03-07-2006

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 20 Rule 4(2), Order 22 Rule 3, Order 9 Rule 9, 151, 2(9)

Citation : (2006) 5 ALD 547

Hon'ble Judges : V. Eswaraiah, J

Bench : Single Bench

Advocate : T.S. Anand, for the Appellant; K. Ranga Rao and E.V.V.S. Ravi Kumar, for the Respondent

Final Decision : Dismissed

Judgement

V. Eswaraiah, J.—The appeal suit and the civil revision petitions arise out of the common proceedings in O.S. No. 119 of 1988 on. the file of the Subordinate Judge, Kowur. The appellants in the first appeal and petitioners in the civil revision petitions are the defendants in the suit. The respondent in all these cases is the plaintiff (second plaintiff) in the above suit. The parties herein are referred to as they are arrayed in the original suit.

2. O.S. No. 119 of 1988 was originally filed by one Mullapudi Dorayya, alleging that Mullapudi Narayana and Krishnarao are brothers and sons of Mullapudi Narayana and his wife Atchamma of Kalavalapalli Village. The first plaintiff and the first defendant and one Chakradhararao are the sons of said Krishnarao and his wife Kanthamma. Chakradhararao died unmarried and therefore, there remained only two sons i.e., the first plaintiff, Mullapudi Dorayya @ Doraju and the first defendant namely Mullapudi Veera Venkata Balayogi Sityanarayana. Their father had no daughters. The first defendant had two sons i.e., defendants 3 and 4 and had a wife-the second defendant. The mother of the first plaintiff and first defendant Kantamma died 14 years back and they are the owners of

various plaint schedule properties.

The first plaintiff was to attend the sweeping work and go to the fields and no proper food was given to him. The second plaintiff was offered to give in marriage by her mother Varalaxmi to the first plaintiff, but the defendants 1 and 2 refused for the said alliance. The mother of second plaintiff asked the first plaintiff confidentially whether he is willing to marry her daughter. The first plaintiff agreed, but stated that his sister-in-law-the second defendant will not allow for his marriage. Subsequently, the maternal uncle of the first plaintiff i.e., father of said Varalaxmi came to Kalavalapalli and the first plaintiff voluntarily followed him to Bhadrachalam. Thereafter, first plaintiff married Indravathi-second plaintiff and the marriage was performed in Sreerama temple at 9.30 p.m., on 21-6-1988 at Bhadrachalam. Photos were also taken and that the first plaintiff was living with his wife.

The first defendant made a false complaint to the Police suspecting that his cousins have kidnapped the first plaintiff alleging that the first plaintiff is not a sound man. It was the case of the first plaintiff that he was a sound man and capable of answering any question and can show every piece of family lands and perfectly a sound man. He can plough and cultivate the lands. The first plaintiff was 29 years old and he was deprived of a full life, which the first defendant is enjoying at the expenses of the first plaintiff. He was kept away from the marriage and was treated as a slave and was made as a bonded labour, though his share of land is about 25 acres. The first plaintiff came out of the clutches of defendants 1 and 2. The joint family of the first plaintiff and first defendant owns about 45 acres and owns gold and silver and the annual income is not less than Rs. 40,000/- and the defendants 1 and 2 have been screening the income.

Plaint "A" Schedule items 1 to 3 are the ancestral and paternal properties. Items 4 to 9 are also joint family properties acquired with the money realized by sale of the coparcenary properties and with the income of the family. Items 10 to 13 are also ancestral and paternal properties. Item No. 14 is the ancestral house, which was fallen to the share of their father. Item No. 15 is the house portion and site acquired by the income of the family. Item No. 16 is the family site for tethering the cattle of the family. Hence, plaint "A" schedule properties are coparcenary properties of the first plaintiff and the first defendant.

The first defendant sold away the joint family lands of about Ac.5-20 cents to one Gudapati Venkataratnam and others for purchase of item Nos. 4 to 9 of plaint A schedule property. The first defendant disposed of Ac.5.20 cents of land without any necessity of the family, but with the sole intention of acquiring properties in the names of defendants 2 to 4 and screen them and keep them out of the reach of first plaintiff. The land sold was very fertile and the first defendant sold the said land at the rate of Rs. 39,000/- per acre. The first defendant obtained the sale deeds for item Nos. 4 and 5 in the name of his wife-second defendant, for item Nos. 6 and 7 in the name of his minor son-defendant No. 3 and for item Nos. 8 and 9 in the name another minor son, the 4th

defendant with a view to screen them and keep them out of the share of the first plaintiff and deprive his share in the said property. It is stated that the defendants 2 to 4 have no independent source of income and they have no capacity to acquire the said property and therefore, the first plaintiff is entitled for half share in the entire A schedule lands.

B-Schedule properties are movable properties of the joint family and the motorcycle is also acquired with the money of the joint family. C-Schedule items 1 to 4 are the gold and silver jewellery of the mother of first plaintiff and first defendant, which were given by her brother as Stridhana at the time of her marriage. D-Schedule properties are also joint family properties and therefore, C and D Schedule properties have to be shared by first plaintiff and first defendant. Thus, the first plaintiff filed the suit for half share in A to E Schedule properties.

3. During the pendency of the suit, the first plaintiff died on 2-8-1989 at Kovvur and therefore, the second plaintiff was added as legal representative of the first plaintiff as per the orders in LA. No. 1097 of 1989 dated 30-7-1996. It is stated that the second plaintiff is the legally wedded wife of the first plaintiff and therefore, she is entitled to the share of the first plaintiff. It is stated that the family has no debts and the defendants 1 and 2 are in possession of huge amount and cash, and the first plaintiff cannot be deprived of his share in the properties. Therefore, the second plaintiff prayed for passing a decree in her favour and against the defendants for division of plaint schedule properties in equal shares and put the second plaintiff in one such share and for further direction to the defendants to account the cash assets of the family on the date of the suit and allot half share to her and also to render accounts and pay half share from the date of the suit, till the delivery of the same to her and for costs.

4. After the death of the first plaintiff, the second plaintiff filed I.A. No. 1097 of 1989 under Order 22 Rule 3 read with Section 151 of CPC to add her as second plaintiff in the suit in place of the deceased first plaintiff as his sole legal heir. The said I.A., was contested by filing a detailed counter and after conducting enquiry and after examining the second plaintiff as P.W.1 and after recording the evidence of other witnesses who performed the marriage, the Purohit, relatives and others as PWs.2 to 6 and after marking the documents Exs.A1 to A22 i.e., marriage photographs and negatives etc, on behalf of the second plaintiff/petitioner and after perusing the oral evidence of R.Ws.1 to 4 and the documents Exs.B1 to B4, the said application was allowed on 30-7-1996, holding that the second plaintiff is the legally wedded wife of the first plaintiff and the Will relied on by the defendants is not a genuine one and the same has been brought into existence to deprive the rights of the second plaintiff in the joint family and that the second plaintiff being the sole surviving legal heir of the first plaintiff, she is entitled to be brought on record as second plaintiff in the suit and prosecute the same. Aggrieved by the said order dated 30-7-1996, C.R.P. No. 4210 of 1996 has been filed.

5. As no written statement has been filed by the defendants in O.S. No. 119 of

1988 even after the lapse of 8 years the suit was coming up for the plaintiffs evidence and when the Court posted the suit for additional written statement, an application in LA. No. 1773 of 1996 was filed by the second plaintiff to strike off the posting dated 27-8-1996 "for filing additional written statement" and the said application was allowed by order dated 18-9-1996. Aggrieved by the said order, C.R.P. No. 1838 of 1997 has been filed. Thus, all the cases have been heard together.

6. Heard Sri T.S. Anand appearing for defendants 1 and 2, Sri E.V.V.S. Ravi Kumar appearing for defendants 3 and 4 and Sri K. Kanga Rao appearing for the second plaintiff.

It is the case of the defendants that the trial Court ought to have dismissed the application in LA. No. 1773 of 1996 filed by the second plaintiff to strike off the posting dated 27-8-1996 for filing additional written statement and ought to have allowed the defendants to file written statement. It is further submitted that the trial Court ought to have allowed I.A. No. 2164 of 1996 filed by the defendants to set aside the ex parte order and receive the written statement. It is also further stated that IA. No. 1097 of 1989 filed by the second plaintiff under Order 22 Rule 3 to add her as second plaintiff in place of the deceased first plaintiff ought to have been dismissed, stating that the second plaintiff is not the legally wedded wife of the first plaintiff and the marriage was not proved and the Court below ought to have believed the Will dated 25-9-1988 and therefore, they contend that C.R.P. No. 4210 of 1996 filed against the order in IA. No. 1097 of 1989 is liable to be allowed. An alternative submission was made stating that even if C.R.P. No. 4210 of 1996 is not allowed, but the C.R.P. No. 1838 of 1997 filed against the order in IA. No. 1773 of 1996 is liable to be allowed as the Court below erroneously refused to receive the additional written statement by allowing the application of the second plaintiff by striking off the posting dated 27-8-1996, which was a step for filing additional written statement. Therefore, it is stated that the defendants may be permitted to file the written statement to contest the suit by remanding the matter.

The questions that arise for consideration are:

- (1) Whether the second plaintiff is the legally wedded wife of the first plaintiff ?
- (2) Whether the defendants failed to avail the opportunity of filing the written statement ?
- (3) Whether the step taken by the Court below after a lapse of 8 years of filing of the suit, posting the case on 27-8-1996 for filing additional written statement is justified ?
- (4) Whether the Court below has rightly rectified its mistake in striking off the posting dated 27-8-1996 for filing additional written statement by allowing IA. No. 1773 of 1996 filed by the second plaintiff ?
- (5) Whether the trial Court is justified in decreeing the suit based on the

evidence adduced by the plaintiff without discussing the pleadings and evidence ?

(6) Whether the defendants are entitled for any further opportunity of contesting the suit ?

7. The facts that bom from the record are as follows:

The marriage of the second plaintiff was performed with the first plaintiff at Bhadrachalam on 21-6-1988. On the next day itself, it appears that the first defendant filed a complaint before the police, stating that his brother-first plaintiff was kidnapped by his maternal uncles. Thereafter, the first plaintiff filed O.S. No. 119 of 1988 for partition of the plaint schedule properties on 11-7-1988. After filing of the suit, the first plaintiff disappeared. The second plaintiff filed Crl.M.P. No. 2115 of 1988 on the file of the II-Additional Munsif Magistrate Court, Kovvur on 2-9-1988, alleging that the constables of Chagallu Police Station took away the first plaintiff from Jeelugumilli Village at 5.30 p.m., on 29-8-1988 and handed over the custody to the first defendant and the first defendant wrongfully confined the first plaintiff in his house. It is also stated that the first plaintiff was suffering with fever and no medical treatment was provided to him. It was apprehended that the life of the first plaintiff is in danger. Though a search was conducted, the Advocate-Commissioner was prevented from searching and therefore, a request was made to order the Station House Officer, Kowur to extend the Police help to the Advocate-Commissioner for the production of the first plaintiff. After undergoing several adjournments, from 2-9-1988, on 16-9-1988 the II-Additional Munsif Magistrate Kovvur passed an order stating that when the first plaintiff was produced he was asked to state whether he was in unlawful custody and as his reply was negative and he expressed his willingness to continue his life with his brother-first defendant, he was set at liberty and the said application was closed. The order in Crl.M.P. was marked as Ex.B1 in I.A. No. 1097 of 1989.

8. Thereafter, one Ch. R. Krishna Mohan Advocate filed LA. No. 1338 of 1988 on behalf of the first plaintiff, requesting the Court to dismiss the suit without costs as the first plaintiff is living with the defendants and the plaint filed by the first plaintiff may be cancelled as he desires to withdraw the suit.

It is pertinent to note that as the suit was filed through Sri K.V. Ramana Rao Advocate on 11-7-1988, a notice was given to the earlier Advocate Sri K.V. Ramana Rao who was on record by the said Ch, R. Krishna Mohan Advocate, for which a reply was given by Sri K.V. Ramana Rao, Advocate, stating that the notice issued is only engineered by the first defendant and in fact, the first plaintiff came to his office and as per his personal instructions, the suit was filed and the first plaintiff married the second plaintiff and many particulars have been furnished in the plaint and the plaint was actually signed by the first plaintiff and that the first plaintiff was living with his wife from 21-6-1988 to 29-8-1988 and they have attended a cinema on 29-8-1988 and had gone to his father-in-laws place, but he was illegally brought back and was kept in custody of the first

defendant. Therefore, a search warrant was taken and the first defendant only produced the first plaintiff into Court on 16-9-1988. No doubt, the first plaintiff stated before the Court that he will live with his brother, but the first defendant did not let him free and he was taken from the Court. It is further stated that he filed the case as per the instructions of the first plaintiff only and that the entire action has been taken as per the instructions of the first plaintiff.

The petition filed in I.A. No. 1338 of 1988 by said Ch. R. Krishna Mohan to cancel the vakalatnama filed by Sri K.V. Ramana Rao and to dismiss the suit as not pressed without costs was objected by the second plaintiff by way of filing an affidavit before the Court and the said petition was considered and the Court below made the following order:

When the matter is coming for enquiry, this Court directed Sri Ch. R. Krishnamohan, Advocate who filed this petition to produce the petitioner/plaintiff before this Court. He took time for producing the petitioner/plaintiff before this Court, but ultimately reported that he is unable to produce the petitioner/plaintiff before this Court as the petitioner/plaintiff is apprehending that he may be taken away forcibly by others. The plaintiff filed the suit O.S. No. 119/1988 for partition and possession. In view of the affidavit of the wife of the plaintiff, I feel it is not desirable to grant the relief sought for in this petition particularly when the petitioner/plaintiff is not chosen to appear before this Court. If really the petitioner/plaintiff is interested in getting the suit dismissed as not pressed, he can as well come to the Court and state the same. Hence for the above said reasons, I hold the point framed for consideration against the petitioner/plaintiff.

In the result, the petition is dismissed. No costs.

The said order in LA. No. 1338 of 1988 dated 8-3-1989 has become final and has not been questioned. After dismissing the said application on 8-3-1989, the suit was posted to 7-4-1989 for written statement of the defendants. The defendants did not file the written statement and the suit was adjourned from 7-4-1989 to 7-7-1989 for written statement of the defendants. On 7-7-1989 a memo was filed on behalf of the defendants signed by the first defendant and also the Advocate for all the defendants, which read as follows:

Memo filed by the defendants

In view of the petition filed by the plaintiff withdrawing the suit, the defendants submit there is no need for them to file any written statement and request the Honourable Court to so record.

9. Then the Court posted the suit for evidence of the plaintiff to 25-7-1989, Thereafter, the first plaintiff died on 2-8-1989 and the evidence on record shows that the first defendant without informing anybody even the second plaintiff, cremated the body of first plaintiff. On 13-8-1989, the second plaintiff filed I.A. No. 1097 of 1989 to implead her as the second plaintiff, claiming that she is the wife of first plaintiff. In the said application, the first defendant filed a counter on

17-1-1990 stating that the second plaintiff (Indravathi) is not the wife of first plaintiff and the first plaintiff executed a Will dated 25-9-1988 bequeathing his half share in the joint family property in favour of defendants 3 and 4. The said petition was enquired in detail and as stated supra, after examining six witnesses on behalf of the second plaintiff and 4 witnesses on behalf of the defendants and after marking necessary documents, the said petition was allowed, holding that the second plaintiff is the wife of Dorayya and the Will dated 25-9-1988 is not genuine and cannot be believed, against which the C.R.P. No. 4210 of 1996 has been filed on the file of this Court on 30-10-1996.

10. The second plaintiff filed amended copy of plaint on 1-8-1996 showing herself as second plaintiff and the suit was posted to 19-8-1996. It is contended that both the Counsel appearing for the respective parties did not attend the Court on 19-8-1996 and when the case was posted to 27-8-1996 for filing additional written statement of the defendants, than the second plaintiff filed LA. No. 1773 of 1996 to strike off the posting dated 27-8-1996 "for filing additional written statement" and post the suit for evidence of the plaintiff. The said I.A., was opposed by filing a counter and after considering the rival contentions, the Court allowed the said application on 18-9-1996 and posted the suit for the evidence of plaintiff. Against the said order, C.R.P. No. 1838 of 1997 has been filed.

11. The defendants again filed LA. No. 2146 of 1996 under Order 9 Rule 9 of CPC to set aside the order dated 18-9-1996 passed in I.A. No. 1773 of 1996 alleging that it was an ex parte order and to receive the written statement. The said LA., was opposed by filing a counter stating that the petition filed by Sri Ch. R. Krishna Mohan to dismiss the suit by filing I.A. No. 1338 of 1988 was dismissed on 8-3-1989. The first plaintiff was in the custody of the first defendant from 16-9-1988 onwards and he was kept in hide outs of Rajahmundry as admitted by the first defendant in his evidence as R.W.1 in LA. No. 1097 of 1989 and the first plaintiff was starved to death and brought to Kovvur and admitted in a private Nursing Home, who died there at Kowur and the body was carried in a rickshaw and burnt away unceremoniously, the way in which a murdered person is cremated. It is further stated that LA. No. 1097 of 1989 was allowed on 30-7-1996 and the suit was posted to 19-8-1996 for filing neat copy of the plaint, but on 19-8-1996 there was a general bundh organized by the farmers and the Advocates were prevented to enter the Court Hall and therefore, the Court by mistake posted the suit for additional written statement to 27-8-1996. Therefore, the second plaintiff filed LA. No. 1773 of 1996 on 19-8-1996 to strike off the step posted for additional written statement and post the suit for the evidence of second plaintiff. After filing the counter and hearing the arguments, the said application was allowed on 18-9-1996 and the Court did strikeoff the step taken "for filing additional statement" and posted the suit for second plaintiff's evidence to 4-10-1996. The first defendant having kept the first plaintiff in hideouts, got managed to file a memo through some other Advocate to dismiss the suit and that memo was enquired and dismissed in I.A. No. 1338

of 1988 on 8-3-1989 and therefore the LA. No. 2164 of 1996 under Order 9 Rule 9 of CPC to set aside the order dated 18-9-1996 is not maintainable as it was not an ex parte order, but it was the order made after thorough enquiry therefore, LA. No. 2164 of 1996 was dismissed by the Court below, holding that the only remedy available to the defendants is to file a revision against the order in LA. No. 1773 of 1996. Against the said order in LA. No. 2164 of 1996 dated 18-9-1996 no revision has been filed.

12. Thereafter, the suit was posted to 28-10-1996 for the plaintiffs' evidence and the second plaintiff was examined as PW.1 and Exs.A1 to A10 were marked. I am of the opinion that it is just and proper to extract the oral evidence of PW.1-the second plaintiff which reads as under:

Chief Examination :-I am the 2nd plaintiff in this suit. After the death of 1st plaintiff who is my husband I came on record as his L.R.1st plaintiff filed this suit for partition of his share in the plaint schedule properties. D-1 is elder brother of 1st plaintiff. D-2 is the wife of D-1. D-3 and 4 are the children of D-1 and D-2. 1st plaintiff and D-1 and 3 and 4 constitute members of Hindu Joint Family. My husband's family is related to our family. The family of my husband used to have 45 acres of landed property, it is one of the richest families of the village. There are mango trees, cashewnut trees and coconut trees in part of the suit land and the remaining land is being used for paddy cultivation and for raising other crops. The properties used to yield very good income for every year. To my knowledge my husband's family has no debts. Defendants 1, 2 and 4 have no separate properties so also D-2. D-2 has no independent properties. It is true 1st plaintiff and D-1 sold away some of the joint family properties to 3rd parties though they have no necessity to sell them. I have obtained copies of some of the registered sale deeds and filed them into Court. They are ExsA1 to A4. For other properties, I could not obtain the copies of sale deeds. Within one and half year thereafter, they purchased the lands in the names of D2 to D4. Two sale deeds in the name of each of them were obtained with a view to avoid the share of my husband in those properties. Exs.A5 to A10 are the copies of registered sale deeds obtained in favour of D-2 to D-4. D-2 to D-4 have no capacity to purchase the properties. My husband claimed partition of his half share in those items also. My husband claimed half share in the plaint-A to E Schedule properties. 1st plaintiff claimed mesne profits also. I pray for the value of movables in case they are not available for partition. I pray for decree with costs.

In view of the said evidence, the learned Subordinate Judge, Kovvur, decreed the suit as follows:

Suit for partition of the joint family-A schedule immovable properties and B to E Schedule movable properties into equal shares and allot one such share to the plaintiff to account on the plaintiff's half share and for costs of the suit.

PW.1 examined. Exs.A1 to A10 marked, plaintiffs claim is proved. A preliminary decree is passed in favour of the second plaintiff as prayed for with costs. A

separate enquiry shall be conducted into the mesne profits to which the plaintiff No. 2 is entitled to on an application to be filed by her in this regard.

13. It is the case of the second plaintiff that she is the legally wedded wife of the first plaintiff and therefore immediately after the death of the first plaintiff, she filed LA. No. 1097 of 1989 to add her as second plaintiff as legal heir of the first plaintiff. In her application, she has clearly stated that she is the legally wedded wife of the first plaintiff and the marriage was performed at 9.30 p.m., on 21-6-1988 at Bhadrachalam in accordance with their caste custom in the presence of the elders. She further stated that after filing the suit, the defendants influenced the police Chagallu and took away her husband and held with them and therefore, she filed Crl.M.P. No. 2115 of 1988 before the II-Additional Munsif Magistrate, Kovvur. The first defendant produced him into the Court on 16-9-1988 and he was made to say before the Court that he will live with his brother and therefore, the Court left him and he was taken by the first defendant. Thereafter, his whereabouts were not known and he was confined in some place by the first defendant. The first defendant tried to get the suit dismissed by filing a petition through some other Advocate in LA. No. 1338 of 1988, stating that the first plaintiff does not want to continue the suit and after hearing both sides, the Court dismissed the said application on 8-3-1989 as the said Advocate who filed the application failed to produce the first plaintiff before the Court. She further stated that she learnt that her husband was killed and cremated unceremoniously. As her husband died on 2-8-1989, she being the legal heir, she is entitled to come on record as second plaintiff in the place of first plaintiff.

A counter has been filed by first defendant, disputing the marriage. He also set up a Will dated 25-9-1988 said to have been executed by the first plaintiff in favour of defendants 3 and 4. The said application filed under Order 22 Rule 3 of CPC has been enquired. Six witnesses were examined on behalf of the second plaintiff and the marriage photographs and negatives were marked. Four witnesses were examined on behalf of the defendants and Criminal Petition No. 2115 of 1988, un-registered Will and the F.I.R., were marked. The trial Court considered the evidence adduced on behalf of the second plaintiff with regard to the marriage that has been performed in Sreerama Temple at Bhadrachalam. To prove the marriage, Purohit was examined and the rituals such as placing Jeelakarra and Jaggery on each others head and thereafter, the bridegroom tied Mangalasuthra around the neck of the bride as shown in Ex.A3 photograph and thereafter PW.4 recited mantras and performed Talambralu ceremony and then got the bride and bridegroom pressed each others leg, which according to him is Saptapadi ceremony.

PW.1-the second plaintiff in her cross-examination deposed that the purohit belongs to Bhadrachalam and he officiated the marriage. After the marriage, they performed Gouri Pooja and Jeelakarra-and-Jaggery was also pasted on their heads by each other. A curtain was placed between herself and her husband and

the legs of her husband were washed. Mangalasuthra was tied around her neck. Exchange of garlands was performed and on the same night, they returned to Palcherla and on the next day, their marriage was consummated. Thus in the cross-examination also, nothing could be elicited from her to rebut the evidence of the examination, with regard to her marriage with the first plaintiff.

One of the witnesses of the marriage was examined as PW2 in the said application and he deposed about the details of the marriage. PW.3 is the grandfather of second plaintiff, who is also closely related to the first defendant as first defendant is son of his younger sister. He deposed about the marriage of first and second plaintiffs that were performed on 21-6-1988 at Bhadrachalam and he performed the said marriage. It is stated that at the request of the first plaintiff only, the marriage was performed. He stated that ExsA1 to A10 are the photographs taken at the time of the marriage and Exs.A11 to A20 are negatives. He spoke all the material particulars with regard to the fixing and performance of marriage. The photographer died in an accident, therefore, he could not be examined.

The purohit who performed the marriage of the second plaintiff with the first plaintiff was examined as Court witness by the Advocate-Commissioner and he stated that he performed the marriage and he also described the meticulous particulars of taking photographs at the time of marriage. He also spoke about the meticulous particulars of the way in which the marriage was performed.

P.W.5 is another witness, who witnessed the marriage and he stated that himself and PWs.1 and 2 and parents of second plaintiff were present at the time of the marriage. PW.6 is also one of the witness who witnessed the marriage and he spoken all the details.

To disprove the said marriage and to prove the Will, the first defendant was examined as RW.1. He stated that he gave a report to Chagallu police and thereafter, Chagallu police handed over the first plaintiff to him. The first plaintiff executed Ex.B3 Will dated 25-9-1988 and as per the said Will, he is entitled for the property under Ex.B3 Will. He denied the marriage of the first plaintiff with the second plaintiff. In the cross-examination, he stated that he does not know whether the plaintiffs 1 and 2 lived together in the house of Mullapudi Venkata Rao for ten days. He does not know whether the elders blessed them after the marriage. He accepted that the first plaintiff was brought to Kalavalapalli after 16-9-1988 and kept him at Kovvur for 15 days and thereafter at Rajahmundry. He was not present at the time of execution of Ex.B3 Will and except himself, others do not know the whereabouts of the first plaintiff when he kept him at Rajahmundry. He stated that he did not see the photographs Exs.A1 to A10 and he refused to see them in the Court. He accepted that in the complaint, he described the first plaintiff as an unsound person. He denied the suggestion that he made attempts to keep his brother unmarried. He also derived the suggestion that the Advocate who filed I.A. No. 1338 of 1988 to dismiss the suit is his Advocate. He accepts that the said Advocate was engaged by him subsequently

in other case. He stated that he does not know whether the memo dated 7-7-1989 was filed before the Court. It is stated that Ex.B3 Will is not fabricated. He accepted that he has taken the dead body of his brother in a rickshaw from the private hospital and cremated without informing anybody except to his co-son-in-law Venkatrao.

The co-brother of first defendant was also examined as R.W.2. He stated about the execution of Will. He accepted that the dead body was brought in a rickshaw and burnt immediately after the death. He has seen many people who died and to his knowledge, no dead body was carried in a rickshaw and burnt immediately after the death and no member of Mullapudi family attended the funeral of the first plaintiff.

With regard to the Will, it is stated that the thumb impression was obtained on the Will and again second thumb impression was obtained overlapping the first thumb impression. It is stated that he knows about the suit filed by the first plaintiff and he also accepted the genuineness and correct figures appearing in the photographs.

The relative of R.Ws.1 and 2 is examined as R.W.3 and he stated that himself and R.W.2 attested Ex.B3 Will. He also accepted that the testator put his thumb impression on the Will and second thumb impression was also put over the first thumb impression. Thus it is stated that each page of Ex.B3 there is one thumb impression and over it another thumb impression. The scribe of the Will was examined as R.W.4.

In view of the aforesaid evidence, the Court below rightly held that the execution of the Will is not proved and according to the evidence of all the witnesses, the testator put his thumb impression over the same thumb impression on the Will. I am also of the opinion that after filing the suit for partition and after the marriage of the first plaintiff with the second plaintiff, the surrounding circumstances that goes to show that there are suspicious circumstances to disbelieve the Will said to have been executed by the first plaintiff. It is the case of the first defendant that his brother is not of sound mind and therefore, he cannot rely on the Will, as obviously it was brought for the purpose of claiming the entire property. The suit has been filed in the year 1988 and immediately thereafter several events have been occurred i.e., the death of the first plaintiff and filing an application to bring the wife of the first plaintiff on record as his sole heir and while disputing the marriage, the said Will has been set up. Therefore, I am of the opinion that the said Will was rightly disbelieved by the learned Judge and also rightly believed the marriage of the second plaintiff with the first plaintiff and accordingly allowed the said application by order dated 30-7-1996.

The said application was enquired as if a regular suit as the result of the suit depends upon the result of the said application. Therefore, I am of the opinion that the findings recorded by the learned Judge are legal and valid and C.R.P, No. 4210 of 1996 filed by the defendants is without any merits and the impugned

order do not suffer from any infirmity legal or otherwise. Accordingly, point No. 1 is answered in favour of the second plaintiff holding that the second plaintiff is the legally wedded wife of the first plaintiff.

14. Insofar as point Nos. 3 and 4 are concerned; after dismissing IA. No. 1338 of 1988 on 8-3-1989, the suit was posted for filing written statement on 7-4-1989. But, instead of filing the written statement, a memo was filed on 7-7-1989 after a lapse of four months of the dismissal of the said application, stating that the plaintiff filed a petition withdrawing the suit, therefore, there is no need for them to file written statement. By the time of filing of the memo, the alleged application said to have been filed on behalf of the first plaintiff withdrawing the suit was already dismissed on 8-3-1989 and as no written statement was filed, the suit was posted for plaintiffs evidence on 25-7-1989. Once the suit was posted for plaintiff's evidence, the question of filing written statement by- the defendants does not arise. Unfortunately, the first plaintiff died on 2-8-1989. Immediately, the wife of first plaintiff filed LA. No. 1097 of 1989, which was allowed after regular enquiry on 30-7-1996. Immediately, after allowing the said application, the second plaintiff filed the amended neat copy of the plaint showing herself as second plaintiff on 19-8-1996. Instead of posting the suit for plaintiff's evidence, it was posted to 27-8-1996 for additional written statement. I am of the opinion that the second plaintiff rightly filed LA. No. 1773 of 1996 to strike off the step for posting the suit to 27-8-1996 for additional written statement as admittedly, no written statement was filed by the defendants and the suit was coming up for plaintiff's evidence only as the second plaintiff was added in the place of first plaintiff, she being the wife and sole legal heir. Therefore, the Court below has rightly allowed the said application filed by the second plaintiff on 18-9-1996. After allowing the said application, the suit was posted for plaintiff's evidence. Aggrieved by the said order, C.R.P. No. 1838 of 1997 has been filed.

In view of the aforesaid facts and circumstances of the case, I am of the opinion that the posting of 27-8-1996 for filing additional written statement is not justified and therefore, the trial Court rightly rectified its mistake by striking off the said posting. There is no any legal infirmity in the order in LA. No. 1773 of 1996 and therefore, C.R.P. No. 1838 of 1997 is liable to be dismissed. Accordingly, point Nos. 3 and 4 are answered in favour of the second plaintiff.

15. Insofar as the second point is concerned; admittedly, the defendants have not availed the opportunity of filing the written statement, even after the dismissal of I.A. No. 1338 of 1988, as they themselves filed a memo stating that there is no need to file any written statement, the suit was posted for plaintiff's evidence to 25-7-1989 and therefore, the case was coming up for plaintiff's evidence only. However, the claim of the second plaintiff with regard to her marriage was disputed and ultimately, she succeeded to come on record as second plaintiff. There is no justification on the part of the defendants in not availing the opportunity of filing the written statement. The second plaintiff only

stepped into the shoe of the first plaintiff and the defendants failed to avail the opportunity of filing written statement during the lifetime of the first plaintiff. Even after the death of the first plaintiff also, no written statement was filed and the defendants have not taken any steps to set aside the order of the Court in posting the case for plaintiff's evidence. The defendants have taken steps to file the written statement only after allowing the two applications filed by the second plaintiff to add her as second plaintiff as she being the legal heir of the first plaintiff and to strike off the posting of the suit for filing additional written statement. Obviously, posting the suit for filing additional written statement is illegal and by mistake and there was no written statement at all. If there is no any written statement and therefore, posting the suit for additional written statement after adding the second plaintiff does not arise. Therefore, I am of the opinion that the defendants have not availed the opportunity of filing the written statement and the second point is accordingly answered in favour of the second plaintiff.

16. Insofar as point Nos. 5 and 6 are concerned; no doubt, the trial Court has not discussed the evidence available on record and no issues have been framed. As per the judgment of the Hon"ble Supreme Court in the case of Balraj Taneja and Another Vs. Sunil Madan and Another, , "Judgment" as defined in Section 2(9) of the CPC means the statement given by the Judge on the grounds for a decree or order. What a judgment should contain is indicated in Order 20 Rule 4(2) which says that a judgment; "shall contain a concise statement of the case, the points for determination, the decision thereon and the reasons for which decision". In the said case, a suit for specific performance was filed in Delhi High Court as the Delhi High Court is having original jurisdiction. Since no written statement was filed, the suit was decreed. The suit was decreed only on the ground that no written statement was filed. As against the said order of the learned Single Judge of the Delhi High Court, an appeal was filed, but the Division Bench also dismissed the appeal, upholding the judgment of the learned Single Judge. In the said case, it was held that the suit claim was not proved even though written statement was not filed. In the absence of the written statement also suit cannot be decreed unless the suit claim is proved.

In the instant case, I am of the opinion that first appeal being a continuation proceedings of the suit, this Court is entitled to consider the points that arise for consideration as to whether the plaintiff has proved the suit claim. In the instant case, the suit was filed by the first plaintiff for partition. It is clearly alleged in the plaint that some of the joint family properties were sold and some of the properties were acquired in the names of defendants 2 to 4 who are the wife and minor sons of first defendant. Defendants 2 to 4 have no independent source of income and some of the joint family property were sold and the properties mentioned in the plaint schedule were purchased in the names of defendants 2 to 4. In support of her contention, the second plaintiff examined herself as P.W.I and she furnished the particulars about the existence of joint family lands about 45 acres and admittedly, the family is one of the richest families of the village

and there are mango trees, cashewnut trees and coconut trees in part of the land and the remaining land is being used for paddy cultivation and for raising other crops. The properties used to yield very good income for every year and the family has no debts. The defendants have no separate properties and the second defendant has no independent properties. It is specifically stated that defendant No. 1 sold away the joint family properties and acquired certain properties with the sale proceeds of the joint family in the names of defendants 2 to 4. The second plaintiff marked Exs.A1 to A4 relating to joint family properties, which have been sold. She also filed Exs.A5 to A10-the properties purchased in the names of defendants 2 to 4. It is stated that defendants 2 to 4 have no capacity to purchase the properties. Her husband claimed partition of half share in those items also and half share in the plaint A to E schedule properties and the plaintiff also claims mesne profits. Thus, there is no dispute with regard to the fact that the suit schedule properties are the joint family properties.

When the suit was posted for the evidence of second plaintiff on 28-10-1998, even though no written statement was filed by the defendants, they are entitled to cross-examine the plaintiff, but the defendants did not choose to cross-examine her to disprove her case. Therefore, I am of the opinion that the plaint averments coupled with the oral and documentary evidence goes to show that the suit schedule properties are the joint family properties and the second plaintiff is entitled for half share in the properties belonging to her husband. Merely because the trial Court has not framed the issues for consideration, the facts on record show that the plaint averments were not rebutted and there was no rebuttal evidence either by way of cross-examination or by way of confronting the plaintiff by any other cogent evidence. Therefore, I am of the opinion that the suit claim is proved and the second plaintiff is entitled for partition of the suit schedule properties as prayed for. The trial Court is justified in decreeing the suit. This being the first appeal this Court is entitled to appreciate the evidence available on record and frame the points for consideration, which has been framed and held in favour of the second plaintiff. Therefore, I am of the opinion that the defendants are not entitled for any further opportunity of contesting the suit, as they have not availed the ample opportunity available to them for contesting the suit. The point Nos. 5 and 6 are accordingly answered.

For the aforesaid reasons the first appeal and the civil revision petitions are accordingly dismissed with costs.