

HON'BLE SRI JUSTICE M. SATYANARAYANA MURTHY

CITY CIVIL COURT APPEAL No.85 OF 1996

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JUDGMENT:

Aggrieved by the decree and judgment dated 01.09.1995, passed in Original Suit No.1219 of 1984, by the IV Additional Judge, City Civil Court, Hyderabad (for short, the 'trial Court'), the unsuccessful plaintiffs therein preferred this appeal.

2. The appellants herein were the plaintiffs and the respondents herein were the defendants, before the trial Court, in O.S. No.1219 of 1984. For convenience of reference the ranks given to the parties in O.S. No.1219 of 1984 will be adopted throughout this judgment.

3. The plaintiffs are sons of defendants 1 and 2; 2nd defendant is the mother of plaintiffs, 4th defendant is the wife of 1st defendant, 3rd defendant is the mother and defendants 5 to 7 are the sons of 1st defendant born through 4th defendant. Due to misunderstandings between defendants 1 and 2, they approached the Court, prosecuted Civil and Criminal litigation by filing O.S. No.102 of 1962 on the file of the Court of II Assistant Judge, City Civil Court, Hyderabad, Maintenance Case No.51 of 1962 on the file of the Court of VII Metropolitan Magistrate, Hyderabad and Original Suit No.272 of 1968 on the file of I Assistant Judge, City Civil Court, Secunderabad. The 1st defendant, to avoid litigation with a *mala fide* intention, to keep his 2nd illegal marriage as secret, made alternative arrangements for their maintenance and accommodation, shifted them to house bearing No.4-2-406 to 409, Ramkote, Hyderabad. The 1st defendant taking advantage of minority of the plaintiffs and helplessness of their mother *i.e.*, 2nd defendant, obtained her signatures on some blank papers, utilized them for illegal purposes, created some documents during the

minority of plaintiffs which are not enforceable against them. The 2nd defendant, who is an illiterate lady, under duress and coercion, was forcibly made to sign on those papers contrary to the interest of the plaintiffs, who were minors by then. Therefore, the plaintiffs are entitled to claim rights in the joint family property, despite creation of any document by the 1st defendant taking advantage of illiteracy of the 2nd defendant.

4. The plaintiffs and 1st defendant are the members of joint family, which possessed the plaint schedule property; the 1st defendant is acting as *Kartha*, being the elder male member, managing the property and liable to render account for the income received by him on the property since he denied the legitimate share to the plaintiffs by making paper publication in the month of January, 1994 when the marriage of the 1st plaintiff was performed. Therefore, the plaintiffs are constrained to file a suit for partition of the schedule property and for allotment of 2/3rd share in the joint family property.

5. The 1st defendant filed written statement denying material allegations of the plaint *inter alia* contending that the plaintiffs are not his legitimate children and the 2nd defendant is not his legally wedded wife; thereby, the children born to the 2nd defendant through him would not acquire the status of legitimate children. The 2nd defendant, with an intention to harass the 1st defendant, on the ill-advice of her supporters, who are inimically disposed of towards the 1st defendant, filed Suits and Maintenance Case with a *mala fide* intention. The 1st defendant denied obtaining signatures of 2nd defendant on blank papers and creating any documents taking advantage of her signatures to deprive the plaintiffs from claiming their due share.

6. The 2nd defendant is not the legally wedded wife of 1st

defendant but there was illicit relationship between them and, during their illicit contact, 2nd defendant gave birth to the plaintiffs. Thus, the 2nd defendant is not the legally wedded wife of 1st defendant. The 1st defendant married one Aruna Bai (*sic*) in the year 1964, living with her since then, blessed with three sons and three daughters, during their wedlock.

7. The 1st defendant made adequate arrangements executing necessary documents conveying title in immovable property to the 2nd defendant and plaintiffs thereby they became absolute owners of the houses bearing door Nos.4-2-406 to 409 situated at Ramkote, Hyderabad, worth Rs.2,00,000/- by then. The plaintiffs and 2nd defendant used to maintain themselves with the income derived from the said house property. The said house property was transferred by the 1st defendant by way of sale, on a nominal price, in their favour, by registered document and they are in possession of it; which arrangement was made after considering all the facts and circumstances and as per the advice of the elders of the community; the 2nd defendant also executed an agreement dated 17.07.1970, in favour of the 1st defendant, narrating all the facts in the agreement categorically admitting the relation that she had with the 1st defendant, accepted that the houses given to her at Ramkote, Hyderabad by the 1st defendant as an arrangement for their maintenance and up-keeping.

8. The 1st defendant never acted as *Kartha* of Hindu undivided joint family, or there is any joint family property available for partition. He further submits that description of plaintiffs and 2nd defendant in the plaint is incorrect and as such valuation of the suit schedule property is false. With regard to Item 1 of plaint schedule property, the 1st defendant contended that it belonged to his mother, 3rd defendant,

devolved on her in the family arrangement in 1972 but, later, she sold the same. However, in the year 1978, 3rd defendant purchased the said property afresh, wherein the 1st defendant paid half of the consideration amount and as such he became absolute owner to the relevant extent. Item 3 of plaint schedule property bearing house No.3-5-676 situated at Vittalwadi, Narayanaguda, Hyderabad, exclusively belongs to 3rd defendant. Item 2 of plaint schedule property bearing house No.5-9-893 at Gunfoundry, Hyderabad, does not belong to 1st defendant and it is the exclusive property of his wife, 4th defendant, actually purchased in 1972. Item 4 of the plaint schedule property *i.e.*, house bearing Nos.4-3-403 to 405 situated at Troop Bazar, Hyderabad, is the self acquired property of the 1st defendant, not available for partition, as it was sold in the year 1978. Finally, it is contended that the court fees paid is insufficient and the plaintiffs are not in possession of the suit schedule property, they are not entitled to claim any right and prayed to dismiss the Suit.

9. The 2nd defendant filed separate written statement, in support of the plaintiff's claim, alleging that she is the wife of 1st defendant and admitted that she got the house bearing Nos.4-2-406 to 409, Ramkote, Hyderabad from the 1st defendant in a compromise in O.S. No.102 of 1962, on the file of I Additional Judge, City Civil Court, Hyderabad and since then she was in possession of the same as absolute owner. She denied the relationship of 1st defendant with 4th defendant as husband and wife and admitted that she is the wife of 1st defendant, and plaintiffs are the sons of 1st defendant through her, entitled to claim equal share in the said property. She further submitted that the house bearing Nos.5-4-456 to 461 situated at Nampally Station Road, Hyderabad is the joint family property but the 1st defendant created sham documents to show that it is his self acquisition. Late Sheetal

Prasad, great grand father of the plaintiffs, who was an Excise Contractor, in order to avoid attachment of the property for his Excise dues, settled the property in favour of his son late Ramnath, who is the father of 1st defendant. The house bearing Nos.5-9-893 to 898 situated at Gun Foundry and the house bearing Nos.3-5-676 to 679 situated at Vittalwadi, Nampally, Hyderabad was purchased by late Ramnath. Thus, Items 1 to 3 of schedule property is the joint family property and in so far as Item 4 of schedule property is concerned, the 1st defendant is estopped from claiming it as his self acquired property, as he has filed a suit in the Court of II Additional Judge, City Civil Court, Hyderabad claiming Item 4 as his ancestral property and, finally, prayed to decree the Suit in favour of the plaintiffs.

10. 3rd defendant filed separate written statement contending that she is the exclusive owner of house bearing Nos.5-4-456 to 461 situated at Nampally Station Road, Hyderabad and house bearing Nos.3-5-673 to 677 situated at Vittalwadi, Narayanaguda, Hyderabad since the date of purchase, which is not the joint family property but the plaintiffs with oblique motive and ill-intention included them in the schedule property. Hence, they are not entitled to claim any share, much less 1/3rd share, in the schedule property and, finally, prayed to dismiss the Suit.

11. 4th defendant filed separate written statement contending that she is the exclusive owner of house bearing Nos.5-9-893 to 898 situated at Gun Foundry, Hyderabad, since the date of her purchase and denied the material allegations of the plaint *inter alia* contending that there is no joint family property but the plaintiffs with oblique motive and ill-intention included them in the schedule property. Defendants 3 to 7, in one voice, stated that the 1st defendant is the proper person to explain his relationship with the 2nd defendant and plaintiffs and they were unaware of anything regarding execution of

Ex.B-3, agreement dated 17.07.1970, transferring the immovable property *i.e.*, house bearing Nos.4-2-406 to 409, situated at Ramkote, Hyderabad in favour of plaintiffs and 2nd defendant for their maintenance and upkeep. Hence, they are not entitled to claim any share, much less 1/3rd share, in the schedule property and, finally, prayed to dismiss the Suit.

12. Defendants 5 to 7 filed separate written statements, in similar lines, admitting that 3rd defendant is the owner of house bearing Nos.5-4-456 to 461 situated at Nampally Station Road, Hyderabad and also house Nos.3-5-673 to 677 situated at Vittalwadi, Narayanaguda, Hyderabad which are in her exclusive possession and enjoyment but the plaintiffs with oblique motive and ill-intention included the same in the schedule property. Hence, the plaintiffs are not entitled to claim any share, much less 1/3rd share, in the schedule property. It is further admitted by them that the house bearing Nos.5-9-893 to 898 situated at Gunfoundry, Hyderabad is jointly owned by 4th defendant along with defendants 5 to 7. Hence, the property is not liable for partition and, finally, prayed to dismiss the Suit.

13. Basing on the above pleadings, the trial Court framed the following issues on 22.11.1985, including 2 additional issues:

- 1) Whether the plaintiffs were entitled for partition and separate possession of the 2/3rd share of the suit schedules 1 to 4 properties as prayed for?
- 2) Whether the plaintiffs are not the legitimate sons of D1 as alleged in the written statement?
- 3) Whether D2 is not the wife of D1?
- 4) Whether the plaintiffs are not the members of Hindu Joint Family of D1 as alleged in the Written Statement?
- 5) Whether the plaintiffs have any cause of action to file

the suit?

6) Whether the plaintiffs are not in joint possession of the suit schedule property along with the defendants as alleged in the written statements?

7) Whether the suit valuation is correct and the court fee paid is sufficient?

8) Whether item No.1 of the suit schedule property is the self acquired property of D1?

9) Whether Item No.2 of the suit schedule property belongs to Aruna Bai (*sic*) as alleged in the written Statements?

10) Whether Item No.3 of the suit schedule property belongs to Rupa Bai, mother of D1?

11) Whether Item No.4 of the suit property is the self acquired property of D1 and whether it was sold away in the year 1978?

12) Whether the suit is barred by limitation?

13) To what relief?

Additional issues:

14) Whether D4 is the absolute owner of H.Nos.5-4-456 to 461 as notified 3-5-673 to 677 at Vittalwadi, Hyderabad and not liable for partition?

15) Whether D4, is the absolute owner of H.Nos.5-9-898, Gunfoundry, Hyderabad and is not liable for partition?

14. During course of trial, on behalf of the plaintiffs, PWs.1 and 2 were examined and Exs.A-1 to A-13 were marked. On behalf of the defendants, DWs.1 to 4 were examined and Exs.B-1 to B-15 were marked.

15. Upon hearing argument of both the counsel, considering oral and documentary evidence, the trial Court held all the issues against the plaintiffs and in favour of defendants, consequently, dismissed the

suit negating the relief of partition and other reliefs.

16. Aggrieved by the impugned decree and judgment of the trial Court, the unsuccessful plaintiffs preferred this appeal on various grounds questioning each finding of the trial Court referring to various parts of the evidence of the witnesses and documents.

17. Learned counsel for the plaintiffs-appellants filed written briefs mainly contending that the evidence on record, more particularly the evidence of PW.2 that himself and 1st defendant are classmates and the marriage of 1st defendant with 2nd defendant was performed. PW.2 is the competent witness to speak about the marriage between defendants 1 and 2. DW.2 is no other than closely related to 2nd defendant; according to him, 2nd defendant is his sister-in-law's daughter and that 1st defendant's father and his father are brothers. Due to their close relationship, as they happened to be the classmates, lived together. However, the trial Court concluded that she was only a concubine which is improbable to the natural circumstances for the reason that no family members will allow a girl of 16 years to be a concubine of the 1st defendant, more particularly, when they are closely related. The evidence of PW.2 established the marriage between defendants 1 and 2. It is specifically contended that when the plaintiffs were admitted in school, 1st defendant signed as father of the plaintiffs and did not deny his signature in the admission register, in his entire evidence. This piece of evidence was ignored by the trial Court to decide the relationship between the plaintiffs and 1st defendant and committed an error; when the 2nd defendant filed civil suit and a Maintenance Case under Section 125 of Cr.P.C., the matter ended in compromise and executed a sale deed for a nominal price conveying title of the property to 2nd defendant, in view of pendency of O.S. No.272 of 1968 on the file of I Assistant Judge, City Civil Court,

Secunderabad and for settlement of maintenance claim in a Petition filed under Section 125 of Cr.P.C. so also O.S. No.102 of 1962 on the file of II Assistant Judge, City Civil Court, Hyderabad. If really, 2nd defendant was not the legally wedded wife of 1st defendant, the question of executing those documents by admitting their relationship before competent civil Court does not arise but this fact was ignored by the trial Court.

18. One of the major contentions of plaintiffs-appellants is that even if the plaintiffs failed to prove the marriage between defendants 1 and 2, their living together for a long time is admitted and on the strength of their long live in relationship a presumption can be drawn that they are husband and wife and the children born to them are legitimate children, placed reliance on Division Bench judgments of Apex Court in **S.P.S. Balasubramanyam Vs. Suruttayan alias Andali Padayachi**^[1], **Gokal Chand Vs. Parvin Kumari**^[2] and Full Bench judgment of the Apex Court in **Sobha Hymavathi Devi Vs. Setti Gangadhara Swamy**^[3] but the trial Court without considering the relationship between plaintiffs and defendants 1 and 2, erroneously concluded that the plaintiffs are only illegitimate children born due to illicit contact between defendants 1 and 2 but this finding is not supported by any evidence. Finally, it is contended that various items of property originally belongs to father of the 1st defendant and he succeeded, being the legal heir as per the provisions of the Hindu Succession Act, 1956 but the trial Court did not consider voluminous evidence produced by the plaintiffs and defendants and committed an error, finally, prayed to allow appeal *setting-aside* the decree and judgment of the trial Court and pass a preliminary decree in favour of the plaintiffs for partition of the schedule property and for other reliefs.

19. Learned counsel for the defendants-respondents while supporting every finding recorded by the trial Court contended that the

specific plea of the plaintiffs in the plaint is that the marriage between the defendants 1 and 2 was performed as per Hindu rites and customs but during argument a different theory of living together for a long time is invented by their counsel and in the absence of any such plea, which is contrary to the earlier plea in the plaint, cannot be accepted and in the absence of plea, the evidence whatever adduced to establish living together as wife and husband is of no use, however, the law laid down by the Apex Court in the decisions relied on by learned counsel for the plaintiffs-appellants is not in dispute but when it was not pleaded before the trial Court, the legal position relied on by the counsel for the plaintiffs is of no assistance. As the plaintiffs failed to establish the marital relationship between defendants 1 and 2, at best, their relationship is only paramour and concubine and the children born to them are only illegitimate children and not entitled to claim any share in the ancestral property; at best, they are entitled to claim share in the separate property of the 1st defendant but only after his death to claim partition along with the legitimate children but not during his life time. Therefore, the plaintiffs are not entitled to claim any share in the property claiming to be the legitimate children of defendants 1 and 2.

20. It is further contended that except few items, the entire property is the ancestral property of 1st defendant and Items 2 and 3 of the property belong to 4th defendant who is the legally wedded wife of the 1st defendant. Therefore, the plaintiffs are not entitled to claim any share in the property of 4th defendant so also in the property of 3rd defendant, mother of the 1st defendant. On this ground also the plaintiffs are not entitled to claim any share in the schedule property and prayed to dismiss the appeal confirming the decree and judgment passed by the trial Court.

21. Considering rival contentions, perusing oral and documentary

evidence including the decree and judgment of the trial Court, the points that arise for consideration are:

- 1) Whether 2nd defendant is the legally wedded wife of 1st defendant? If not, whether the plaintiffs are illegitimate children of 1st defendant?
- 2) Whether Item 1 of schedule property belongs to Rupa Bai, mother of the 1st defendant, which was sold in the year 1972 and again repurchased in the year 1978? If so, are the plaintiffs entitled to a share in the half share of the 1st defendant?
- 3) Whether 4th defendant, Aruna Bai (*sic*), is the exclusive owner of Item 2 of the schedule property?
- 4) Whether Rupa Bai, 3rd defendant, is the absolute owner of Item 3 of schedule property?
- 5) Whether Item 4 of schedule property is available for partition, as on the date of filing suit?
- 6) Whether the plaintiffs are entitled to claim partition and for allotment of 2/3rd share in various items of the schedule property?

22. **POINT No.1:** The basis for claim for partition of the schedule property into 3 shares and allotment of 2/3rd shares to the plaintiffs is marital relationship between defendants 1 and 2. Admittedly, plaintiffs are the children born to 2nd defendant through 1st defendant. The relationship between defendants 1 and 2 is the marital relationship, according to the plaintiffs; whereas, the defendants' contention is that the 2nd defendant was only a kept mistress or concubine of 1st defendant and during their illicit contact, 2nd defendant gave birth to the plaintiffs; consequently, the plaintiffs are only illegitimate children of the 1st defendant. During course of argument before this Court,

learned counsel for the plaintiffs-appellants took a different stand that defendants 1 and 2 lived together for a long period as husband and wife, gave birth to the plaintiffs, thereby a presumption is to be drawn that they lived as husband and wife and the children born to them are legitimate children of defendants 1 and 2.

23. In view of specific contentions raised in the plaint, written briefs and during argument before this Court, I must necessarily advert to the pleadings in the plaint to decide the relationship between defendants 1 and 2. In Para 3 of the plaint, it is specifically averred by the plaintiffs that 2nd defendant is the wife of 1st defendant and the plaintiffs are their children but nowhere there is a recital in the plaint about manner of performance of their marriage, year of marriage or any other details of marriage; whereas, the 1st defendant, in his written statement at Para 3, specifically contended that there was no relationship of husband and wife between defendants 1 and 2 and for some time the 2nd defendant had illicit relationship with 1st defendant and, during their illicit relationship, 2nd defendant gave birth to the plaintiffs. Thus, the 2nd defendant is not the legally wedded wife of 1st defendant and she cannot claim status of a legally wedded wife. It is further contended that in the year 1964 the marriage of the 1st defendant was performed with one Smt. Aruna Bai (*sic*), 4th defendant herein, and they were blessed with three sons and three daughters; the marriage of the 1st defendant with Aruna Bai (*sic*) was performed as per Hindu rites and customs and she is the only legally wedded wife of 1st defendant but the 2nd defendant's status is only a concubine or kept mistress. The 2nd defendant, mother of the plaintiffs and alleged legally wedded wife of 1st defendant, filed separate written statement admitting the relationship between defendants 1 and 2 as pleaded in the plaint while denying the contention of 1st defendant as to their

relationship. Thus, she claimed that she is the legally wedded wife of 1st defendant; whereas the marriage between the 1st defendant and Aruna Bai (*sic*), 4th defendant, is not the legal marriage and she cannot claim the status of legally wedded wife as the marriage of Aruna Bai (*sic*) was performed during subsistence of the 1st marriage between defendants 1 and 2.

24. The 3rd defendant, mother of the 1st defendant, pleaded ignorance about the marital relationship between defendants 1 and 2; whereas, the 4th defendant in her written statement pleaded that she is the legally wedded wife of 1st defendant. In view of these specific contentions of both the parties affirmed by the plaintiffs that defendants 1 and 2 are the legally wedded husband and wife and denied by defendants 1, 3 and 4, it is necessary to go into their evidence to find out the relationship between defendants 1 and 2. PW.1 is the 1st plaintiff; in his examination-in-chief, he reiterated the same contention about the marital relationship between defendants 1 and 2 while denying the marital relationship between defendants 1 and 4 and claimed that the plaintiffs are the legitimate children of defendants 1 and 2. In the cross-examination by 1st defendant's counsel, he admitted that prior to compromise in 1970, he was residing at Jinsi Chowrah in the house of his maternal grand father since the date of his birth. Prior to the litigation, there were criminal and civil cases between defendants 1 and 2 for maintenance and other reliefs, all the matters were compromised. 2nd defendant is an illiterate woman, she does not know how to read and write Hindi except to speak but she affixed her thumb impressions on the compromise petitions in all the matters, which are in English without knowing the contents by her. Therefore, PW.1 denied the knowledge about the contents of the compromise memos and petitions filed in the earlier litigation but this is not relevant for deciding the present controversy between the parties. A suggestion

was put to PW.1, at page 9 of his cross-examination, that 1st defendant never married 2nd defendant and denied by him. He admitted that he does not know whether 1st defendant contended in criminal proceedings and in civil suits against 2nd defendant that he never married her. PW.1 does not know whether there were any findings by the Court to show that 1st defendant did not marry 2nd defendant and had no documentary evidence to show that his mother, 2nd defendant, married 1st defendant and exact date of their marriage. PW.1 is the son of 2nd defendant born during the illicit contact between defendants 1 and 2, allegedly, but the plaintiffs' contention is that there was a marriage between defendants 1 and 2 but PW.1 is not competent to speak about the performance of marriage between defendants 1 and 2 as he allegedly born subsequent to marriage; therefore, whatever he testified regarding marriage of defendants 1 and 2 is of no use and the same cannot be believed, even if he testified anything about performance of their marriage.

25. The plaintiffs also examined PW.2, B. Lakshmi Prasad, who allegedly attended the marriage of defendants 1 and 2; according to his evidence, the marriage between defendants 1 and 2 was performed about 40 years back and he attended the said marriage but he does not remember the date of marriage. After marriage of defendants 1 and 2, plaintiffs were born to them during their wedlock. In the cross-examination at Page 3, PW.2 admitted that he does not remember the date, time, at least year of the marriage between defendants 1 and 2 and, strangely, he admitted that he does not remember whether his elder brother attended the marriage or not and it is followed by a suggestion that 1st defendant never married 2nd defendant was denied. Ex. A-13 is the counter filed in R.C. No.86/DR of 1979 on the file of Principal Rent Controller, Hyderabad and on the strength of the same, PW.2 testified that the sale deed and the

compromise agreement executed on stamp papers worth Rs.1.50 Naye Paise, dated 30.07.1963 and in the said document 1st defendant agreed to pay maintenance at the rate of Rs.50/- p.m. to Kamalesh Kumari, 2nd defendant and Suresh Kumar, 1st plaintiff, and in view of the agreement, Kamalesh Kumari and Suresh Kumar had withdrawn the petitions preferred before the VII City Magistrate, City Criminal Court, Hyderabad. Similarly, Ex.B-3 is agreement deed dated 17.07.1970 executed by 2nd defendant, Kamalesh Kumari in favour of 1st defendant, Surya Pratap Jaiswal. In the 1st and 2nd paragraphs of Ex.B-13, the marital relationship between defendants 1 and 2 was denied categorically. PW.2 admitted about execution of Ex.B-3, marriage was presided over by Tulja Prasad and Jaggilal who are no more. In the said agreement, there is a clear admission in 3rd Para that there were some illegal connections between defendants 1 and 2 resulting in two male issues and in 2nd Para at 2nd page, both parties agreed not to claim any interest or right against each others property and she also agreed that the minor sons, after attaining majority, shall not claim any right in the property. The 2nd defendant affixed her thumb impression on Ex.B-3 and duly witnessed by 3 attestors. Taking advantage of these documents, the 1st defendant contended that the relationship between defendants 1 and 2 is only illicit contact but the contention of the plaintiffs is that 2nd defendant does not know how to read and write English or Hindi but can speak and affixing of thumb impression on Ex.B-3 itself indicates that 2nd defendant is an illiterate woman.

26. DW.4 is 2nd defendant, mother of the plaintiffs, whose evidence is an important piece of evidence to decide the marital relationship between defendants 1 and 2. In her examination-in-chief, she testified that her marriage was solemnized as per the rites and caste custom of Jaiswal community; the marriage was officiated by two purohits

namely, Tulja Prasad and Prabhakar, who are her community purohits, no more by the date of examination. Most of the people, who attended the marriage, expired long back except Lakshmi Prasad, PW.2. In her examination-in-chief itself, she further testified that her husband got issued a paper publication and issued a legal notice to her contending that the plaintiffs are not his children, immediately she got issued a reply claiming the status of legally wedded wife. As the cross-examination is totally centred on the contents of Exs.B-3 and B-13, as seen from the evidence of PWs.1, 2 and DW.4, the contention of the plaintiffs is that 2nd defendant affixed her thumb impression on Ex.B-3 without knowing the contents therein, being illiterate lady. Admittedly, DW.4 is an illiterate as she affixed her thumb impression on all the documents including written statement. Therefore, the illiteracy of 2nd defendant is not in dispute but she engaged an Advocate in all the matters and the said fact is admitted by her in the cross-examination at 2nd page. However, when it is suggested that she engaged an Advocate, Manohar Saxena, in the maintenance suit filed in Secunderabad Court and denied by her. Whosoever may be the advocate, she engaged an advocate to defend her in the litigation with the 1st defendant. Therefore, she was guided by an advocate, though she is an illiterate. It is not her case that her advocate misled her or forced her to affix her thumb impression on the document for any other reason. When she was guided by an advocate, she is not supposed to affix her thumb impression on Ex.B-3. Yet, the contention of 1st defendant is that in O.S. No.51 of 1973 filed by 2nd defendant against him on the file of V Assistant Court, Hyderabad, she described her as daughter of Sarada Prasad and not as his wife, when it is suggested to her, she bluntly denied the description in the long cause title of the plaint in O.S. No.51 of 1973, as daughter of Sarada Prasad. The plaint copy was not brought on record to prove the description of the plaintiff (2nd defendant) in O.S. No.51 of 1973 as daughter of Sarada Prasad,

more particularly, when she denied the suggestion. Therefore, on the strength of the suggestion, it is difficult to hold that 2nd defendant was described as daughter of Sarada Prasad. In the further cross-examination, a suggestion was put to her that in Ex.B-3 she mentioned that there is only illicit relationship between defendants 1 and 2, denied by her. The major contention of the plaintiffs and 2nd defendant from the beginning is that her thumb impression was obtained on the original of Ex.B-3 without explaining the contents in her mother tongue. In normal course of events, when a document is to be obtained from an illiterate, the contents must be read over and after admitting those contents as true and correct, the signature or thumb impression of such person can be obtained but as seen from Ex.B-3, there is nothing which indicates that the contents were read over to 2nd defendant before obtaining her thumb impression on Ex.B-3, however, only on the sole ground that the contents were not read over, Ex.B-3 cannot be thrown out, for the reason that subsequent to affixing thumb impression on Ex.B-3 she had withdrawn the pending legal proceedings with the aid of her advocate, thereby acted upon Ex.B-3. Therefore, she is estopped to contend that she had no knowledge about contents of Ex.B-3.

27. As the plaintiffs approached the Court contending that they are the children of defendants 1 and 2, born during their wedlock, it is for them to establish their specific case, irrespective of the defence set-up by the defendants 1, 3 and 4. The main evidence available on record is the evidence of PW.2, Lakshmi Prasad, who was aged 60 years by the date of his examination. Though, his evidence to some extent supports the case of the plaintiffs regarding performance of marriage between defendants 1 and 2, but failed to disclose the date of marriage or at least the year and place of marriage. If really, he attended the marriage of defendants 1 and 2, he would have disclosed such details. In the absence of disclosing such details, it is difficult to believe the

contention of the plaintiffs that PW.2 attended the marriage of defendants 1 and 2. As discussed in the earlier paragraphs, PW.1 is not competent witness to speak about the marriage of defendants 1 and 2. The other evidence available on record is of DW.4, who is 2nd defendant and mother of PW.1. Her evidence is also silent as to the details of marriage except testifying about solemnization of her marriage with 1st defendant as per Jaiswal community rites and customs officiated by Tulja Prasad and Prabhakar, purohits of her caste. Thus, the evidence of DW.4 is also not sufficient to establish the marriage between defendants 1 and 2, since it is self-serving statement.

28. The documentary evidence relied upon by the plaintiffs is Ex.A-1, the affidavit filed by B. Kunwar Pershad, one of the witnesses on Ex.B-3. The other documents marked as Exs.A-2 to A-12 are of no assistance to prove the marriage between defendants 1 and 2. Ex.A-13 is the certified copy of the counter filed by Surya Pratap in R.C. No.86/DR of 1979 and this document is also not useful to establish the marriage; at best, it would be helpful to prove the nature of properties possessed by the 1st defendant. On the other hand, the defendants produced Ex.B-3, an agreement which I have discussed in the earlier paragraphs but based on Ex.B-3 it is difficult to accept the case of the defendants. Even in the sale deed executed by 1st defendant in favour of 2nd defendant, allegedly to avoid payment of maintenance and future litigation, the name of the husband of 2nd defendant was not mentioned. If really, the 1st defendant accepted 2nd defendant as his wife, he would not have conveyed the property for consideration or at least nominal consideration describing her as daughter of Sarada Prasad.

29. Learned counsel for the plaintiffs-appellants mainly contended that the evidence of DW.2 disclosed the relationship between

defendants 1 and 2 before marriage and it is sufficient to draw an inference that due to close relationship between defendants 1 and 2 their marriage was performed but the same cannot be accepted for the reason that the marriage was not proved by adducing any evidence. Even in Ex.B-13 also nothing is available to prove performance of marriage between defendants 1 and 2. In the written briefs, the learned counsel for the plaintiffs-appellants drawn the attention of this Court to Ex.B-12 progress card, Exs.B-10 and B-11, positive family photographs but failed to produce the relevant negatives; there is every possibility for creating Exs.B-10 and B-11 by using advanced technology. Therefore, appearance of man and woman in photographs, particularly in Exs.B-10 and B-11, would be of no assistance to the plaintiffs. Ex.B-12 is the progress card produced by the defendants disclosing the name of 1st plaintiff as Suresh Kumar. Similarly, Ex.B-14 is another progress report of Suresh Kumar, 1st plaintiff, where his father's name was mentioned as Surya Pratap but no where there is signature of 1st defendant in Exs.B-12 and B-14. Therefore, on the strength of Exs.B-12 and B-14, it is difficult to hold that 1st defendant is the husband of 2nd defendant and father of plaintiffs and there was legal marriage between defendants 1 and 2.

30. On over all consideration of entire material available on record, what all the plaintiffs able to establish is that they are the children born to defendants 1 and 2 but failed to establish their legitimacy by producing any evidence. Strangely, during course of argument, learned counsel for the plaintiffs-appellants totally changed the basis for their claim and contended that when a man and woman lived together for sufficiently long time, a presumption can be drawn that their relationship is wife and husband and placed reliance on several judgments. As seen from the pleadings, the plaintiffs never pleaded that due to long live-in relationship between defendants 1 and 2, they were treated as husband and wife by their neighbours but contended

that there was a marriage between defendants 1 and 2. Therefore, in the absence of any pleading on record about living of defendants 1 and 2 continuously for a long period and treating them as wife and husband by their neighbours, the said contention for the first time cannot be accepted. Learned counsel for the plaintiffs-appellants has drawn the attention of this Court to the judgment of the Apex Court in ***S.P.S. Balasubramanyam*¹**, where the Apex Court had an occasion to decide about drawing presumption due to prolonged living of man and woman as husband and wife but no law was laid down by the Apex Court. On the other hand, the plea of living together for a prolonged period as wife and husband is without any factual foundation and in the same judgment, the Apex Court, held as follows:

“What has been settled by this Court is that if a man and woman live together for long years as husband and wife, then a presumption arises in law of legality of marriage existing between the two but the presumption is rebuttable.”

31. He also placed reliance on another judgment of the Apex Court in ***Sobha Hymavathi Devi*³** in support of the same contention. Learned counsel further drawn the attention of this Court to another judgment of the Apex Court in ***Gokal Chand*²**

32. Undoubtedly, presumption of marriage may be drawn between defendants 1 and 2, if they lived together as husband and wife for a prolonged period. In the instant case, the plaintiffs were aged 26 and 20 years respectively as on the date of filing suit and even according to the plaintiffs, the marriage between defendants 1 and 2, allegedly, took place in the year 1961 and the marriage of 1st defendant with 4th defendant, Aruna Bai (*sic*), was performed in the year 1964. Thus, the gap between marriage of defendants 1 and 4 and alleged living together by defendants 1 and 2 is only three years and it is not such a prolonged period to draw a presumption that they are living as husband and wife. Mere living together is not sufficient to draw such

presumption unless the neighbours recognized them as wife and husband due to their prolonged living together. The 1st defendant admitted that the plaintiffs are the illegitimate children of the 2nd defendant born through 1st defendant; in the absence of proof of legally valid marriage between defendants 1 and 2 as pleaded by the plaintiffs in the plaint, they cannot be termed as legitimate children and would not become members of Hindu coparcenary. If the 1st defendant's plea is accepted, plaintiffs are entitled to a share in the separate property of his father, only after his death but not during his life time. A vain attempt is made by learned counsel for the plaintiffs-appellants that by drawing a presumption of marriage between defendants 1 and 2 to treat the plaintiffs as legitimate children and the marriage with Aruna Bai (*sic*) is only a second marriage during subsistence of his 1st marriage with the 2nd defendant. Thereby, the children born to Aruna Bai (*sic*) through 1st defendant would not acquire the status of legitimate children but this contention cannot be accepted for the reason that defendants 1 and 2 did not live together for a prolonged period but, according to the admission of 1st defendant, there was illicit contact between defendants 1 and 2 and during the illicit contact, plaintiffs were born. In such a case, the marriage of defendants 1 and 4 cannot be said to be an illegal marriage for the simple reason that the marriage between defendants 1 and 2 was not proved by adducing satisfactory evidence. Hence, I find that the plaintiffs are not the legitimate children born during the wedlock of defendants 1 and 2.

33. As discussed above, the marriage between defendants 1 and 2 was not proved; however, 2nd defendant gave birth to plaintiffs 1 and 2 due to her illicit contact with 1st defendant. When the marriage, if any, between defendants 1 and 2 is not proved, the children born to them are only illegitimate children, they are not entitled to claim any share

as they are not coparceners in Hindu Coparcenary property. When similar question came up before a Division Bench of this Court in ***Rasala Suryaprakasarao and others Vs. Rasala Venkateswararao and others***^[4], it was held as follows:

“By virtue of Section 16(1) of the Hindu Marriage Act, as amended in 1976, the illegitimate son can be equated with his natural sons and treated as coparceners for the properties held by the father whether the property be originally joint family property or not. The only limitation is that during the life time of the father, the illegitimate son of a void marriage is not entitled to seek a partition. He can seek a partition only after the death of the father.”

34. If the principle laid down by the Division Bench of this Court in ***Rasala Suryaprakasarao***⁴ is applied to the present facts of the case, the plaintiffs 1 and 2 being the illegitimate children can claim share in coparcenary property on par with the coparceners. At this stage, I would like to advert to Section 16 of the Hindu Marriage Act, which deals with legitimacy of children of *void* and *voidable* marriages and the same is extracted hereunder for better appreciation:

“16. Legitimacy of children of void and voidable marriages :

(1) Notwithstanding that a marriage is null and void under Section 11, any child of such marriage who would have been legitimate, if the marriage had been valid, shall be legitimate, whether such child is born before or after the commencement of the Marriage Laws (Amendment) Act, 1976, and whether or not a decree of nullity is granted in respect of that marriage under this Act and whether or not the marriage is held to be void otherwise than on a petition under this Act.

(2) Where a decree of nullity is granted in respect of a voidable marriage under Section 12 any child begotten or conceived before the decree is made, who would have been the legitimate child of the parties to the marriage if at the date of the decree it had been dissolved instead of being annulled, shall be deemed to be their legitimate child notwithstanding the decree of nullity.

(3) Nothing contained in sub-section (1) or sub-section (2) shall be construed as conferring upon any child of a marriage

which is null and void or which is annulled by a decree of nullity under Section 12, any rights in or to the property of any person, other than the parents, in any case where, but for the passing of this Act, such child would have been incapable of possessing or acquiring any such rights by reason of his not being the legitimate child of his parents.”

35. The original Section was amended by the Marriage Laws (Amendment) Act, 1976. The original section before amendment dealt with the children born out of *void* marriage is replaced by Sub-section (1) and the proviso to old Section is now incorporated as Sub-Section (3). The Section before amendment dealt with the children born during *void* marriages, provided that if a decree of nullity was passed, the children begotten or conceived before the decree, who would have been the legitimate children of the party to marriage, if it had been dissolved, instead of having declared as *null and void* or which is annulled by decree of nullity shall be deemed to be their legitimate children. However, the said provision is totally changed by amendment and according to it, irrespective of nullity and voidability of the marriage under Section 11 of the Hindu Marriage Act, the children born to couple of *void* marriage would have been legitimate, if the marriage has been completely annulled, and by virtue of this provision, the Children born after amendment of Section 16 to the Marriage Laws (Amendment) Act, 1976, irrespective of validity of marriage, they are legitimate children.

36. In view of Sub-section 3 of Section 16, as amended by the Marriage Laws (Amendment) Act, 1976, the children born to the couple of *void* marriage are entitled to acquire rights in or to any property of their parents and not to those of others. In fact, it means such children would not have status of legitimate children so far as the persons other than the parents are concerned. The son born out of *void* marriage (second marriage) is not entitled to claim any share in the property, obtained by his father, in the partition suit filed by 1st wife. The amendment to Section 16 is applicable to *void* or *voidable* marriages as contemplated under Sections 11 and 12 of the Hindu Marriage Act

but not the children born due to illicit or illegal contacts. If the marriage is *void* or *voidable*, then only Section 16 applies but not to the children born due to illicit contact. In ***Margabandhu and another Vs. Kothandarama Mandhiri and others***^[5], learned Single Judge of Madras High Court held that the illegitimate children are not entitled to claim any share in the ancestral property. In view of the principles laid down by this Court in ***Rasala Suryaprakasarao***⁴, plaintiffs are not entitled to claim a share in the coparcenary property though they were born to the defendants 1 and 2, whose marriage was not proved

37. The trial Court rightly declined to grant decree for partition only on the ground that the marriage between defendants 1 and 2 was not proved and the relationship between them is only a live-in relationship or illicit contact and thereby the question of application of Section 16 does not arise and that too they were born even prior to commencement of amendment to Section 16 of the Hindu Marriage Act. Learned counsel for the defendants-respondents contended that the plaintiffs are not entitled to claim any share in the coparcenary property but such children are entitled to share in the self acquired property of parents, placed reliance on a decision of the Apex Court in ***Neelamma and others Vs. Sarojamma and others***^[6] wherein the Apex Court relying on its earlier judgment in ***Jinia Keotin Vs. Kumar Sitaram Manjhi***^[7] and also referring to Section 16(3) of the Hindu Marriage Act, after amendment, held that the illegitimate children are not entitled to claim any share in the coparcenary property, but are entitled to a share in the self acquired property of their parents and, further, held that the illegitimate children cannot acquire or claim, as of right, any share in the Hindu Coparcenary Property, but such children are entitled to share in the self acquired property of parents. Even in the earlier judgment of the Apex Court, the Apex Court expressed the same view referring to Section 16(3) of the Hindu Marriage Act (after its

amendment). Therefore, by applying the principles laid down by the Apex Court in ***Neelamma***⁶, the plaintiffs are not entitled to claim share in the Hindu Coparcenary Property. Therefore, this Court had no other alternative except to apply the law existing on this day and conclude that the plaintiffs had not acquired the status of legitimate children so as to claim share in the property of 1st defendant.

38. According to the contentions of the 1st defendant, Item 1 of plaint schedule property belongs to Rupa Bai, 3rd defendant, mother of 1st defendant, and it was given to her in the family arrangement in the year 1972 irrespective of acquisition of the property of Item 1 of the schedule, it was sold to third party and again purchased by 1st defendant and his mother with equal contribution in the year 1978. Therefore, according to his own admission, the 1st defendant is having half share in the property *i.e.*, item 1 of schedule property in the half share of item 1, the plaintiffs are entitled to claim partition only after the death of 1st defendant but not during his life time. Item 2 of the plaint schedule property exclusively belongs to his wife, 4th defendant, as she purchased the same in the year 1972. Similarly, Item 3 is in the name of 3rd defendant and Item 4 is the self acquired property of 1st defendant but it was sold away in the year 1978. Therefore, it is not available for partition at this stage. Thus, the only property available for partition as on today is Item 1, which was admittedly purchased by 1st defendant along with his mother, in which the plaintiffs can claim partition after the death of 1st defendant being the illegitimate children. Therefore, it is clear from the law consistently laid down by the Apex Court that the children born due to illicit contact are not legitimate children and they are not entitled to claim share in the coparcenary property claiming to be the coparceners but they are entitled to claim share in the self acquired property of their father after his death on par with the legitimate children. As such, the plaintiffs are not entitled to

claim any share in the property. Accordingly, the point is answered.

39. **POINT Nos.2 to 6:** Since the plaintiffs failed to establish their legitimacy *i.e.*, they were born to 2nd defendant through 1st defendant by virtue of a valid marriage, they cannot acquire the status of legitimate children and in view of my finding, the plaintiffs are disentitled to claim any share in the ancestral property of defendants.

40. According to Order XX Rule 5 of C.P.C. it is the duty of the Court to record finding on each and every issue but if a finding on one issue is sufficient for decision in the suit or appeal, the Court need not record separate finding on the other issues. Hence, in view of my above finding, it is sufficient for deciding the *lis* between the plaintiffs and defendants; no separate finding need be recorded on the remaining points.

41. In view of my foregoing discussion, I find no illegality or legal infirmity in the finding recorded by the trial Court warranting interference of this Court and as such the appeal is devoid of merits and liable to be dismissed.

In the result, the Appeal Suit is dismissed confirming the decree and judgment dated 01.09.1995, passed in Original Suit No.1219 of 1984, by the learned IV Additional Judge, City Civil Court, Hyderabad.

In consequence, miscellaneous petitions, if any, pending in this appeal, shall stand dismissed. No order as to costs.

**M. SATYANARAYANA MURTHY,
J**

Date: 13-02-2015.
Dsh

HON'BLE SRI JUSTICE M. SATYANARAYANA MURTHY

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DSH

[\[1\]](#) AIR 1994 SC 133

[\[2\]](#) AIR (SC) 1952 (231)

[\[3\]](#) AIR (SC) 2005 (800)

[\[4\]](#) AIR 1992 234 (AP)

[\[5\]](#) 1983 2 MLJ 445

[\[6\]](#) (2006) 9 SCC 612

[\[7\]](#) (2003) 1 SCC 730