

**IN THE HIGH COURT OF JUDICATURE AT HYDERABAD FOR
THE STATE OF TELANGANA AND THE STATE OF ANDHRA
PRADESH**

APPEAL SUIT No.1381 OF 1997

AND

APPEAL SUIT No.25 OF 2007

Between:

APPEAL SUIT No.1381 OF 1997

Macherla Raghu and another.

—

Appellants

And

Macherla Venkateswarlu
and others.

Respondents

Date of Judgment Pronounced

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07.08.2015

SUBMITTED FOR APPROVAL:

THE HON'BLE SRI JUSTICE M. SATYANARAYANA MURTHY

1. Whether Reporters of Local newspapers

May be allowed to see the common judgment? No

2. Whether the copy of common judgment may

be marked to Law Reporters/Journals? No

3. Whether Their Lordship wish to see the

Fair copy of the common judgment? No

HON'BLE SRI JUSTICE M. SATYANARAYANA MURTHY

APPEAL SUIT No.1381 OF 1997

AND

APPEAL SUIT No.25 OF 2007

—

COMMON JUDGMENT:

Both these Appeals are preferred against the judgment dated 08.09.1997, passed in Original Suit No.129 of 1988 by the II Additional

Subordinate Judge, Warangal (for short, the 'trial Court') wherein the suit filed by the plaintiff for partition of plaint A and B schedule property into 4 equal shares and to allot 1 such share, by appointing an Advocate Commissioner, and put him in separate possession of the same was allowed in part granting a preliminary decree for partition of Items 1 and 3 of A schedule and Items 1 and 4 of B schedule property, by dividing the same into 2 equal shares and allot 1 such share to the plaintiff, while declining to grant decree for other items in A and B schedule property.

2. As these two Appeals arose out of common judgment and decrees, I find it expedient to decide both these Appeals by common judgment, as the parties to the suit and subject matter of the schedule property is one and the same.

3. Defendants 3 and 4 and 1st defendant in O.S. No.129 of 1988 preferred A.S. No.1381 of 1997 and A.S. No.25 of 2007, separately.

4. For convenience of reference, the ranks given to the parties in O.S. No.129 of 1988, by the trial Court, will be adopted throughout this common judgment.

5. The plaintiff filed the suit for the aforesaid reliefs alleging that one Lingaiah, who is the grand father of plaintiff and father of the 1st defendant, was the owner of the schedule property to an extent of Ac.4.12 guntas of wet land, died intestate leaving behind the 1st defendant who is the son being the sole legal heir to succeed his estate. 1/4th share of the plaintiff in the total extent of Ac.4.12 guntas comes to Ac.1.03 guntas; the said Lingaiah also left behind him residential houses besides the schedule property. Therefore, all the items shown in plaint A and B schedule property are the joint family property. The plaintiff is the elder son of 1st defendant born through 5th defendant, who is the 1st wife of 1st defendant. Defendants 2 and 3

are the sons and defendants 6 to 8 are the daughters of 1st defendant born through 4th defendant, who is the 2nd wife of 1st defendant. The plaintiff and defendants 1 to 3 constituted as members of Hindu coparcenary. The plaintiff being the son of defendants 1 and 5 became coparcener, entitled to claim share, made several demands for partition of the schedule property but the 1st defendant did not heed to the request of the plaintiff for partition of the schedule property. Having no other alternative, the 1st defendant got issued a legal notice dated 18.04.1988, marked as Ex.A-1, calling upon the 1st defendant to co-operate for partition of the schedule property but he got issued an evasive reply, therefore, the plaintiff was constrained to file the present suit.

6. Defendants 1 to 4 filed common written statement while admitting the marriage between defendants 1 and 5, mother of the plaintiff, however attributed unchastity to her making serious allegations touching her character and went to the extent of describing her as a woman of loose character and unchaste woman, used to flirt and have extra marital affairs with several men; on account of such behaviour, disputes arose between the defendants 1 and 5 but the 5th defendant did not mend her behaviour. About 3 years after marriage, the 5th defendant left the house of the 1st defendant without any information to him; the 1st defendant made sincere efforts to trace her but came to know that she is living with one of her paramours. Having no other alternative, the matter was placed before the caste elders and on 10.10.1957, on their advice, a customary divorce was obtained. Since then, the 5th defendant is living with her parents and the 1st defendant never saw or heard anything about her. Thus, the marital relationship between defendants 1 and 5 severed about 29 years ago and the 1st defendant had no access to 5th defendant for the last 33 years. The plaintiff may be her son but certainly he was not born

through the 1st defendant; therefore, the plaintiff is not a member of the joint family and not entitled to claim any share in the property of 1st defendant.

It is further contended that the family did not possess any ancestral property and the property described in the schedule is only self acquired property of the 1st defendant with the aid of income derived from cloth business. Consequently, the plaintiff is not entitled to claim any share in the property.

After obtaining customary divorce, the 1st defendant married the 4th defendant on 22.03.1955 at Warangal, blessed with 2 sons who are defendants 2 and 3 and also blessed with 3 daughters who are defendants 6 to 8 named as Rama Devi, Raja Kumari and Sashirekha, out of them 2 daughters were married and the other daughter was not yet married.

The 1st defendant purchased Item 4 of A schedule under registered sale deed dated 22.02.1952 and Item 4 of B schedule in his own name; Item 1 of B schedule in the name of his son Macherla Raghu, 3rd defendant; Item 2 of B schedule in the name of his son Macherla Viswanatham, 2nd defendant, in the year 1965 and Item 3 of B schedule in the name of his wife Smt. Yashoda, 4th defendant.

The lands in Items 1, 2, 3 and 5 described in A schedule do not belong to the 1st defendant and the 1st defendant possessed only Ac.1.00 guntas of land at Venaktapuram, Mulug Taluq which is an assigned land. Thus, all the properties are self acquired properties of the 1st defendant and the plaintiff has nothing to do with the property.

The 1st defendant never tried to sell or screen the property and thereby the contention of the plaintiff that the 1st defendant is trying to

alienate the property is false and invented for the purpose of this suit, finally prayed to dismiss the suit.

7. Defendants 6 to 8, daughters of the 1st defendant born through 4th defendant, filed written statement adopting the written statement filed by defendants 1 to 4, mainly contending that they were born during the wedlock between defendants 1 and 4 and they are legitimate children and as such the statement made in the plaint is defamatory and prayed to dismiss the suit.

8. On the basis of above pleadings, the trial Court framed the following issues:

- 1) Whether the plaintiff is not the son of 1st defendant?
- 2) Whether suit schedule properties except Item Nos.1, 2, 3 and 5 of A schedule are the self acquired properties of 1st defendant?
- 3) Whether the 1st defendant divorced the 5th defendant on 10.10.1957 and that she is not entitled to maintenance?
- 4) Whether the plaintiff is entitled to a share in the suit schedule properties?
- 5) Whether Item Nos.1, 2, 3 and 5 of A schedule properties also not belong to 1st defendant?
- 6) Whether the suit is bad for non-joinder of necessary parties?
- 7) To what relief?

9. During course of trial, on behalf of the plaintiff, PWs.1 to 4 were examined and Exs.A-1 to A-14 were marked. On behalf of the defendants DW.1 was examined and no documents were marked.

10. Upon hearing argument of both the counsel, considering oral

and documentary evidence available on record, the trial Court decreed the suit in part, granting the relief as stated hereinabove.

11. Aggrieved by the decree and judgment under challenge, defendants 3 and 4 preferred Appeal Suit No.1381 of 1997 and 1st defendant preferred Appeal Suit No.25 of 2007, separately, raising several identical contentions and the main contentions in the grounds of both the Appeals are:

- a) The trial Court did not appreciate the evidence with regard to source of income for acquiring Items 2, 4 and 5 of A schedule and Items 2 and 3 of B schedule by the 1st defendant, however, in the absence of proof that Items 1 and 3 of A schedule and Items 1 and 4 of B schedule are the joint family properties, the trial Court would not have granted a decree in favour of the plaintiff even for Items 1 and 3 of A schedule and Items 1 and 4 of B schedule, dividing the same into 2 equal shares and allotting 1 such share to the plaintiff; and
- b) The trial Court also failed to appreciate the evidence with regard to divorce between defendants 1 and 5; so also, the legitimacy of the plaintiff, who was born on 26.10.1969 subsequent to obtaining customary from 5th defendant on 10.10.1957. Therefore, the plaintiff can never be a coparcener, not entitled to claim any share in the property. Thus, the trial Court committed grave error in granting decree for partition of schedule property into 2 equal shares and allot 1 such share to the plaintiff and 1st defendant in Items 1 and 3 of A schedule and Items 1 and 4 of B schedule property, committed grave error and finally prayed to allow these Appeals setting-aside the decree and judgment under challenge.

12. Learned counsel for the plaintiff-1st respondent in both the Appeals argued totally in support of the finding recorded by the trial Court while disputing the finding of the trial Court with regard to dismissal of suit in respect of Items 2, 4 and 5 of A schedule and Items 2 and 3 of B schedule property on the ground that when the plaintiff claimed that the property is ancestral property or acquired with the aid of joint family nucleus, proof of sufficient nucleus possessed by the joint family is sufficient to shift the onus of proof on to the defendants 1 to 4 and 6 to 8 to establish that Items 2, 4 and 5 of A schedule and Items 2 and 3 of B schedule are the separate properties of the 1st defendant but the trial Court without considering initial onus of proof, declined to grant a decree for partition of Items 2, 4 and 5 of A schedule and Items 2 and 3 of B schedule property, erroneously.

13. He further contended that in the absence of proof of prevailing caste custom of the plaintiff and defendants for obtaining divorce, the divorce pleaded by the 1st defendant cannot be accepted and that too except examining himself before the trial Court, no other person was examined to prove prevalence of custom in the Padmasali caste. Therefore, the trial Court rightly disbelieved the customary divorce.

14. It is further contended that when divorce is not proved, the marital relationship between the defendants 1 and 5 is deemed to subsisting, the children born to defendants 1 and 4 are presumed to be the illegitimate children, and thereby the plaintiff being the son born to 5th defendant through 1st defendant became a coparcener by birth, entitled to claim share in the property.

15. Learned counsel for the defendants-appellants mainly contended that granting half share in the property though the plaintiff claimed 1/4th share is an error apparent on the face of the record; apart from that, though the marriage between defendants 1 and 4 is 2nd marriage, in the absence of proof of customary divorce, the marriage of

1st defendant with 4th defendant may be *void* or *voidable*; even then the children born to defendants 1 and 4, during their wedlock, are entitled to claim share in view of Section 16(3) of the Hindu Marriage Act, 1955. Consequently, grant of decree for half share in Items 1 and 3 of A schedule and Items 1 and 4 of B schedule is *ex-facie* erroneous. However, in view of the conflicting decisions of the Apex Court on this aspect, the matter was referred to Larger Bench for authoritative pronouncement and drawn the attention of this Court to the decisions of the Apex Court reported in ***Jinia Keotin and others Vs. Kumar Sitaram Manjhi and others***^[1], ***Parayankandiyal Eravath Kanapraavan Kalliani Amma and others Vs. K. Devi and others***^[2] and ***Revanasiddappa and another Vs. Mallikarjun and others***^[3]. In view of reference of the matter to the Larger Bench, the illegitimate children are also entitled to claim share along with legitimate children and finally prayed to allow the Appeals setting-aside the decree and judgment of the trial Court.

16. Considering rival contentions, perusing the material available on record including the oral and documentary evidence, the points that arise for consideration are as follows:

1) Whether any custom is prevailing in the caste of Padmasali in the Warangal District of erstwhile Andhra Pradesh? If not, whether the alleged customary divorce between defendants 1 and 5 is valid?

2) Whether the plaintiff is the son born through defendants 1 and 5 during their wedlock?

3) Whether defendants 2 and 3 are the legitimate children of defendants 1 and 4? If so, are they entitled to claim any share in the property along with 1st defendant and plaintiff?

4) Whether the preliminary decree passed by the trial

Court is in accordance with the claim of the plaintiff? If not, liable to be modified?

17. **POINT No.1:** The contention of the plaintiff from the beginning is that the 1st defendant married 5th defendant and during subsistence of their marriage, the plaintiff was born and as such he became coparcener in the Hindu Undivided Coparcenary; whereas the 1st defendant denied the paternity of plaintiff while attributing unchastity to 5th defendant, and that the plaintiff was not the son born to 5th defendant through 1st defendant. Therefore, he is not a legitimate son and, apart from that, there is a customary divorce between defendants 1 and 5 in view of the custom prevailing in Padmasali caste. If such custom is prevailing in the Padmasali caste and customary divorce was obtained by 1st defendant, without approaching the Court on 10.10.1957, as contended by defendants 1 to 4 in Para 3 of the written statement; birth of the plaintiff took place subsequent to customary divorce, the plaintiff can be said to be an illegitimate son. Thus, the legitimacy of the plaintiff will depend upon proof of customary divorce.

18. To prove the custom prevailing in the caste of Padmasali, the 1st defendant himself was examined as DW.1 and in his examination-in-chief, he asserted that a custom is prevailing in their caste to obtain divorce without approaching the Court and further disclosed that the matter was placed before the elders of Orugonda village during the years 1956-57 in the presence of elders by name Gaddam Komuraiah @ Peratla Komuraiah, Gaddam Venkatrajam, Gaddam Ramaiah, Gaddam Kanakaiah, Gaddam Ramaswamy and Thumma Sammaiah, who belong to Padmasali caste and that a custom of obtaining divorce without approaching the Court is prevalent in their community. As per their custom, at the time of taking divorce the articles like plates, tumblers and pot presented at the time of marriage are to be returned and accordingly the said articles were returned; as per the custom the

elders were entertained to drink and dine. In the cross-examination, a suggestion was put to him that there was no divorce since no custom was prevailing in the caste of Padmasali to obtain divorce without approaching the Court. In the cross-examination dated 01.03.1995, DW.1 admitted that he did not disclose the details on which date divorce took place between himself and 5th defendant and that divorce deed was written on 10.10.1957, which is with Rama Raghavulu, who expired later but in the examination-in-chief he specifically testified that the divorce is not reduced into writing. In the cross-examination dated 28.03.1995, he deposed that the counter contents filed by him in M.C. No.10 of 1988 before the Magistrate Court are true and correct. He admitted that no list of articles returned was prepared but those articles were returned through Gaddam Komuraiah, who is alive by the date of his examination.

19. In view of these admissions, there is nothing on record to establish the alleged customary divorce obtained by 1st defendant before the caste elders. If really, it is reduced into writing, nothing prevented the defendants to produce the divorce deed before the trial Court or examine Gaddam Komuraiah, though he is alive, in whose presence the divorce had taken place and returned the articles. Non-examination of Gaddam Komuraiah is fatal to the 1st defendant's plea of customary divorce.

20. Mere assertion in the pleadings without evidence is not sufficient to establish the custom prevailing in the community to obtain divorce without approaching the Court. One of the contentions of the 1st defendant is that there is a custom prevailing in 'Padmasali' community to obtain divorce without approaching the Court. Admittedly, the plaintiff and defendants are governed by the Hindu Marriage Act, 1955 as they are Hindus. Section 29(2) of the Act permits such customary divorce, but it is subject to pleading and proof.

21. The customs may be legal custom, family custom or a caste custom. But here, the contention of the 1st defendant is that there is caste custom recognised by the caste members to obtain divorce without approaching the Court under the provisions of the Hindu Marriage Act. Section 13(b) of the Indian Evidence Act, 1872 deals with the question as to the existence of any right or custom, particular instance in which the right or custom was claimed, recognised or exercised, or in its exercise was disputed. The 1st defendant based his claim on the basis of the custom prevailing in the community of 'Padmasali' without approaching the Court. But it is for him to plead and prove about the prevailing custom of obtaining divorce without approaching any Court of law.

22. To claim such custom, the 1st defendant must plead and prove the essential conditions of custom, which are as follows:

- i) it must have been used so long that the memory of man runneth not in the contrary;
- ii) it must have been continued;
- iii) peaceable;
- iv) it must be reasonable;
- v) it must have been certain. It will be void if it be unreasonable and uncertain or savour too much of arbitrary power;
- vi) it must be compulsory and not left to the option of every person whether he will use it or not;
- vii) it must be consistent with other customs, for one custom cannot be set up in opposition to another.

23. Unless, the 1st defendant establishes all the above requirements by adducing cogent and satisfactory evidence, it is difficult to accept the contention of the defendants that there is custom prevailing in the 'Padmasali' community to obtain divorce. Generally, the custom is a rule which in particular family or particular district or caste has from long usage obtaining force of law. It must be certain, cogent and reasonable and not being in derogation of general rules of

law, it must be construed and proved strictly.

24. In ***Krishnamma and another Vs. P. Subramanyam Reddy***

and another^[4], this Court held as follows:

“The specific family custom pleaded in a particular case should be proved. The initial onus lies on the plaintiffs to prove the special custom. It must be proved that the custom has been acted upon in practice for such a long period and with such invariability, as to how that it has, by common consent been submitted to as the established governing rule of the particular family.”

25. In view of the principle laid by this Court in ***Krishnamma***⁴, it is obligatory on the part of the 1st defendant to plead and prove about the prevailing caste custom in ‘Padmasali’ community to obtain divorce without approaching the Court. In the present case, 1st defendant miserably failed to establish the prevailing caste custom to obtain divorce without approaching the Court by examining at least Gaddam Komuraiah, who was alive, according to his own admission and by producing the divorce deed reduced into writing. In the absence of proof of prevailing custom of obtaining divorce without approaching the Court, it is difficult to accept the contention that 1st defendant obtained customary divorce from 5th defendant without approaching the Court.

26. The trial Court appreciated the evidence on record and discussed about the customary divorce while answering Issues 1 and 3 and the finding of the trial Court is free from any legal infirmities warranting interference of this Court. Therefore, I am unable to accept the contention of the 1st defendant that he obtained customary divorce from 5th defendant, as per the custom prevailing in ‘Padmasali’ community. Accordingly, the point is answered in favour of the plaintiff and against the defendants.

27. **POINT No.2:** The plaintiff claimed that he is the son born to

defendants 1 and 5, during their wedlock, but whereas the contention of the 1st defendant is that the plaintiff was born to 5th defendant due to her illicit contact with somebody. When the defendants admitted about the marriage between defendants 1 and 5 and failed to prove the customary divorce, the marital relationship between defendants 1 and 5 is deemed to be subsisting. Though the defendants raised a specific contention regarding character of 5th defendant, they did not examine any independent witness to establish her immoral life and living with her paramours etc., hence, *ipse dixit* of 1st defendant cannot be accepted as he is an interested witness. When the matter was referred to caste elders, non-examination of any one of the caste elders including Gaddam Komuraiah, who was alive by then, to establish the immoral life of 5th defendant and living with her paramours, giving birth to plaintiff is not acceptable; that apart, when 1st defendant failed to establish the customary divorce, there is every possibility of access between defendants 1 and 5, the plaintiff is presumed to be a legitimate son born during the wedlock between defendants 1 and 5, in view of the presumption under Section 112 of Indian Evidence Act, which reads as follows:

"The fact that any person was born during the continuance of a valid marriage between his mother and any man, or within two hundred and eighty days after its dissolution, the mother remaining unmarried shall be conclusive proof that he is the legitimate son of that man, unless it can be shown that the parties to the marriage had no access to each other at any time when it could have been begotten."

28. In the instant case, as per the written statements of defendants 1 to 4, the marriage between defendants 1 and 5 was performed about 36 years prior to filing of the suit and thereafter on 10.10.1957 the alleged customary divorce was obtained by 1st defendant from 5th defendant. It is the further contention of 1st defendant that for the last 33 years, prior to filing of the suit, he never saw or heard about the 5th

defendant and hence 1st defendant is not legitimate son born to the 5th defendant through him. But, the plaintiff when examined as PW.1 before the trial Court, asserted that he is the son of 1st defendant and even in the school records, his father's name was mentioned as Macherla Uppalaiah but a stray admission is made by him in his cross-examination that his mother, 5th defendant admitted him in the school and signed in the Admission form, which piece of evidence is not of much relevance in view of failure of the defendants to prove the customary divorce and non-accessibility between defendants 1 and 5 led me to conclude that the plaintiff was born during the subsistence of wedlock between defendants 1 and 5, in view of the unrebutted legal presumption under Section 112 of Indian Evidence Act, and as such he is a legitimate son.

29. In similar circumstances the Apex Court in ***Chilukuri Venkateswarlu Vs. Chilukuri Venkatanarayana***^[5], held as follows:

"It may be stated that at the outset that the presumption which Section 112 of the Indian Evidence Act contemplates is a conclusive presumption of law which can be displaced only by proof of the particular fact mentioned in the section, namely, non-access between the parties to the marriage at a time when according to the ordinary course of nature the husband could have been the father of the child. Access and non-access again connote, as has been held by the Privy Council [vide *Karapaya Vs. Mayandy* (AIR 1934 PC 49(A))], existence and non-existence of opportunities for material intercourse. It is conceded by Mr. Somayya, who appeared on behalf of the plaintiff appellant, that non-access could be established not merely by positive or direct evidence; it can be proved undoubtedly like any other physical fact by evidence, either direct or circumstantial, which is relevant to the issue under the provisions of the Indian Evidence Act, though as the presumption of legitimacy is high favored by law it is necessary that proof of non-access must be clear and satisfactory."

30. In ***Perumal Nadar (dead) by Legal representative Vs.***

Ponnuswami Nadar (minor)^[6], the Apex Court held that the parties *i.e.*, husband and wife are living separately long before the birth of the child, unless the husband is able to establish absence of access, presumption raised under Section 112 of the Indian Evidence Act will not be displaced. The proof of non-access must be clear and satisfactory. Similar view was expressed by the Apex Court in **Smt.**

Kanta Devi and another Vs. Poshu Ram^[7] and held as follows:

"Section 112 which raises a conclusive presumption about the paternity of the child born during the subsistence of a valid marriage, itself provides an outlet to the party who wants to escape from the rigour of that conclusive that the said outlet is, if it can be shown that the parties had no access to each other at the time when the child could have been begotten the presumption could be rebutted."

31. The principle laid down by the Apex Court in the decisions referred *supra* is again reiterated by the Apex Court in an unreported judgment dated 15.04.2009 in **Shyam Lal @ Kuldeep Vs. Sanjeev Kumar and others**. Therefore, the principle culled out from the above decisions is that, the presumption is in favour of legitimacy and it is a rebuttable presumption, it can be rebutted by adducing satisfactory and cogent evidence that the husband (1st defendant) had no access with the 5th defendant (plaintiff) and there is no possibility of conceiving. The burden is on the husband to rebut the presumption, otherwise the presumption is highly in favour of the legitimacy of the child.

32. In the present case though the defendants denied the paternity, did not adduce any evidence to dispel the presumption under Section 112 of Indian Evidence Act, more particularly, to prove that the 1st defendant and 5th defendant had no access. Hence, it is difficult to hold that plaintiff is not the legitimate child of defendants 1 and 5, in view of the presumption under Section 112 of the Indian Evidence Act, since the defendants failed to dispel or rebut the presumption available under Section 112 of Indian Evidence Act, in favour of the paternity.

33. The trial Court discussed about the presumption contained under Section 112 of Indian Evidence Act; since the 1st defendant failed to rebut the legal presumption, the trial Court concluded that the plaintiff is the legitimate son of defendants 1 and 5. Even after reappraisal of entire evidence on record, it is difficult to set-aside the finding recorded by the trial Court about the legitimacy of plaintiff. Hence, I find that the plaintiff is the legitimate son of defendants 1 and 5 and became coparcener by birth under the Hindu law and entitled to claim share in the coparcenary property. Accordingly, the point is answered in favour of the plaintiff-1st respondent and against the defendants-appellants.

34. **POINT No.3:** One of the contentions of learned counsel for the plaintiff-1st respondent before the trial Court and this Court is that defendants 2, 3 and 6 to 8 are the legitimate children of 1st defendant but according to the pleadings, defendants 1 to 3 and the plaintiff are the coparceners entitled to claim 1/4th share each but the trial Court held that the defendants 2 and 3 are not the legitimate children as they were born due to void marriage between defendants 1 and 4 (2nd wife), granted a decree for half share in items 1 and 3 of A schedule and Items 1 and 4 of B schedule in favour of the plaintiff.

35. The said finding is assailed by the 1st defendant raising several contentions, more particularly during course of argument contended that when the plaintiff claimed 1/4th share in the schedule property, the trial Court is not supposed to pass a preliminary decree granting half share in the schedule property since the Court cannot travel beyond pleadings to grant the relief.

36. In ***State of Maharashtra Vs. Hindustan Construction Company Limited***^[8] and ***Kalyan Singh Chouhan Vs. C.P. Joshi***^[9],

the Apex Court in similar circumstances consistently ruled as follows:

"Pleadings and particulars are required to enable the Court to decide the rights of the parties in the trial. Thus, the pleadings are more to help the Court in narrowing the controversy involved and to inform the parties concerned to the question in issue, so that the parties may adduce appropriate evidence on the said issue. It is a settled legal proposition that "as a rule, relief not founded on the pleadings should not be granted". Therefore, a decision of a case cannot be based on grounds outside the pleadings of the parties. The pleadings and issues are to ascertain the real dispute between the parties to narrow the area of conflict and to see just where the two sides differ."

37. In ***Union of India Vs. Ibrahim Uddin and another***^[10], the Apex Court ruled as follows:

"Relief not founded in pleading cannot be granted. A decision of a case cannot be based on ground outside the pleadings of the parties. No evidence is permissible to be taken on record in absence of pleadings in that respect. No party can be permitted to travel beyond its pleadings and that all necessary and material facts should be pleaded by the parties in support of the case set up by it."

It was further held as follows:

"Where evidence was not in lines of pleadings, the said evidence cannot be looked into or relied upon."

38. In the absence of specific plea, the Court cannot look into the evidence whatever brought on record, based on the subsequent events, since the pleading is the vital part in civil proceedings as held by the Apex Court in ***Maria Margarida Sequeria Fernandes Vs. Erasmo Jack De Sequeria***^[11] and it is also settled law that unless there is a plea, evidence whatever adduced before the trial Court cannot be looked into.

39. In view of the specific contention of the defendants, it is necessary to advert to Para 5 of the pleadings of the amended plaint,

wherein the plaintiff pleaded as follows:

“5. The plaintiff having one-fourth share in the suit properties and defendant Nos.1 to 3 are also entitled to a like share. The total extent of schedule ‘A’ properties are Ac.4-12 guntas (four acres twelve guntas) of went land.
.....”

40. In view of the specific pleading of the plaintiff in Para 5 of the amended plaint extracted above, defendants 1 to 3 are entitled to 1/4th share each though they were born due to void or voidable marriage between defendants 1 and 4, during subsistence of marriage between defendants 1 and 5. In the evidence of PW.1, PW.1 admitted that 1st defendant is his father and defendants 2 and 3 are his step-brothers who are the sons of defendants 1 and 4, did not claim any specific share. However, the plaintiff got issued a legal notice marked as Ex.A-1, which discloses the earliest version of the plaintiff and in Paragraphs 1 and 2 of the notice, the plaintiff demanded for partition of the property into 4 equal shares and allot one such share to him. Ex.A-2 is the reply notice got issued by 1st defendant denying his share. The consistent case of the plaintiff from the beginning is that he is entitled to 1/4th share both in the legal notice and in the amended plaint but strangely a contention was urged before the trial Court that defendants 2 and 3 being the illegitimate children are not entitled to claim share in the property and this contention was accepted by the trial and passed the decree traveling beyond pleadings.

41. It is settled principle of law that admission is the best piece of evidence and more particularly when there is a judicial admission in the pleadings and in Ex.A-1 notice, which is the best piece of evidence, it is for the plaintiff to explain under what circumstances such admission was made. According to Section 58 of Indian Evidence Act, a judicial admission need not be proved by a party to the proceedings and the person who made such admission is

estopped to raise any contention contrary to the admission, in view of Section 31 of Indian Evidence Act though admission is not a conclusive proof.

42. Undoubtedly, the judicial admissions *i.e.*, admissions and pleadings are best piece of evidence, unless they are explained, in view of the principle laid down by the Apex Court in ***Sita Ram Bhau Patil Vs. Ramachandra Nago Patil (dead) by L.Rs. and another***^[12], wherein it was held as follows:

“Admission is the best piece of substantive evidence that an opposite party can rely upon, though not conclusive, is decisive of the matter, unless successfully withdrawn or proved erroneous. Admission may in certain circumstances, operate as an estoppel. The question which is needed to be considered is what weight is to be attached to an admission and for that purpose it is necessary to find out as to whether it is clear, unambiguous and a relevant piece of evidence, and further it is proved in accordance with the provisions of the Evidence Act. It would be appropriate that an opportunity is given to the person under cross-examination to tender his explanation and clear the point on the question of admission. In view of the above, the law on the admissions can be summarized to the effect that admission made by a party though not conclusive, is a decisive factor in a case unless the other party successfully withdraws the same or proves it to be erroneous. Even if the admission is not conclusive it may operate as an estoppel. Law requires that an opportunity be given to the person who has made admission under cross-examination to tender his explanation and clarify the point on the question of admission. Failure of a party to prove its defence does not amount to admission, nor it can reverse or discharge the burden of proof of the Plaintiff.”

43. In another decision of the Apex Court in ***Nagubai Ammal and others Vs. B. Shama Rao and others***^[13], it was held as follows:

“Admission made by a party is admissible and best evidence; unless it is proved that it had been made under a mistaken belief. While deciding the said case reliance has been placed upon the judgment in ***Slatterie v. Pooley***, wherein it had been observed "What a party himself admits to be true, may

reasonably be presumed to be so."

44. In view of the principle laid down by the Apex Court, the case of the plaintiff is consistent that he is entitled to 1/4th share and whereas defendants 1 to 3 are entitled to 1/4th share each in the schedule property but the trial Court ignoring the law declared by the Apex Court in the decisions referred supra, erroneously held that the plaintiff is entitled to half share in the schedule property.

45. No doubt, there is a controversy about legitimacy of children born during void or voidable marriage and this controversy is now referred to Larger Bench of the Apex Court in ***Jinia Keotin***¹, ***Parayankandiyal Eravath***² and ***Revanasiddappa***³. Leave alone the above judgments; the factual position is that when the legal marriage, if any, between defendants 1 and 4 is not proved, the children born to them are only illegitimate children, 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***^[14], 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."

46. If the principle laid down by the Division Bench of this Court in ***Rasala Suryaprakasarao***¹⁴ is applied to the present facts of the case, defendants 2 and 3 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.”

47. 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.

48. 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 sons born out of *void* marriage (second marriage) are 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***^[15], 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***¹⁴, defendants 2 and 3 are not entitled to claim any share in the coparcenary property though they were born to the defendants 1 and 4, whose marriage was not proved.

49. Learned counsel for the plaintiff-1st respondent contended that the defendants 2 and 3 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***^[16]

wherein the Apex Court relying on its earlier judgment in ***Jinia Keotin***¹ 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***¹⁶, defendants 2 and 3 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 defendants 2 and 3 had not acquired the status of legitimate children so as to claim share in the property of 1st defendant.

50. As long as the decision of the Apex Court in ***Neelamma***¹⁶ is not reversed, the law declared therein is binding precedent and I am bound by the decision of the Apex Court in ***Neelamma***¹⁶ and if the same is followed defendants 2 and 3, are not entitled to claim any share in the Hindu coparcenary property and the finding of the trial Court is in accordance with law declared by the Apex Court in ***Neelamma***¹⁶ and the same cannot be found fault by this Court while deciding this Appeal as the marriage took place in contravention of the provisions of the Hindu Marriage Act. Accordingly, the point is held in favour of the plaintiff-1st respondent and against the defendants-appellants.

51. **POINT No.4:** From the beginning the claim of the plaintiff is that plaintiff and defendants 1 to 3 are entitled to 1/4th share each since the defendants 2 and 3 are his step-brothers and 1st defendant is his natural father. In the 1st Para of the examination-in-chief, the plaintiff testified as follows:

“I am the plaintiff. Defendant No.1 is my father. Defendant No.5 is my mother. Defendant No.4 is my step mother. Defendant Nos.2 and 3 are my brothers who are sons of defendant No.4.”

52. This admission further supports the case of the defendants 1 to 3. As per the evidence adduced by the plaintiff, defendants 1 to 3 and the plaintiff are entitled to 1/4th share each. Similarly, in Para 9 of the amended plaint, 1/4th share of the joint family was valued at Rs.2,08,259-00 and further in Para 11(a) claimed a preliminary decree for 1/4th share, after dividing the entire property into 4 equal shares and allot 1 such share to the plaintiff and also put him in separate possession of his 1/4th share but the trial Court strangely held that the defendants 2 and 3 are the illegitimate children of 1st defendant born through 4th defendant, granted a preliminary decree for partition allotting half share to the plaintiff totally ignoring the share of defendants 2 and 3, if any they are entitled. The decree passed by the trial Court allotting half share in the joint family property is challenged before this Court on the ground that the Court cannot pass a decree for the relief more than what the plaintiff claimed, travelling beyond pleadings. Undoubtedly, the plaintiff claimed 1/4th share, the trial Court allotted half share in the property. In the entire pleadings, it is the consistent case of the plaintiff that he is entitled to 1/4th share in the entire schedule property; grant of preliminary decree allotting half share to the plaintiff is totally in deviation of the plea of the plaintiff in the plaint and evidence adduced by him. It is settled law that the Court

cannot travel beyond pleadings in view of the principles laid down by the Apex Court in the decisions referred supra. In fact, no issue was framed by the trial Court as to the entitlement of half share by the plaintiff. In the absence of issue and affording opportunity to both the parties to adduce evidence in support of their contentions, recording such finding that the plaintiff is entitled to half share in the property is apparently erroneous on the part of the trial Court and the decree is liable to be set-aside by applying the principles laid down in the decisions referred supra. Hence, the decree and judgment of the trial Court to the extent of allotting half share to the plaintiff is hereby set-aside while granting only $\frac{1}{4}$ th share in Items 1 and 3 of A schedule and Items 1 and 4 of B schedule properties. Accordingly, the point is answered in favour of the defendants-appellants and against the plaintiff-1st respondent.

53. In view of my finding on Point Nos.1 to 3, the marriage between defendants 1 and 5 was not dissolved and their marital relationship is subsisting till date; further, defendants 2 and 3 born to the 4th defendant through the 1st defendant are the illegitimate children; apart from that, the plaintiff claimed only $\frac{1}{4}$ th share and hence the decree is required to be modified to that extent.

In the result the Appeal Suit No.25 of 2007 is allowed in part granting a preliminary decree for partition of Items 1 and 3 of A schedule and Items 1 and 4 of B schedule property into 4 equal shares, allotting $\frac{1}{4}$ th share to the plaintiff and the remaining $\frac{3}{4}$ th shares to the 1st defendant, as claimed by the plaintiff, instead of half share each to the plaintiff and 1st defendant as granted by the trial Court. Except this modification, the impugned decree and judgment is confirmed in all respects. Consequently, the Appeal Suit No.1381 of 1997 is dismissed.

In consequence, miscellaneous petitions, if any, pending in these Appeals, shall stand closed. No order as to costs.

**M. SATYANARAYANA MURTHY,
J**

Date: 07-08-2015.
Dsh

HON'BLE SRI JUSTICE M. SATYANARAYANA MURTHY



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APPEAL SUIT No.1381 OF 1997

AND

APPEAL SUIT No.25 OF 2007

Date.07-08-2015

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- [\[1\]](#) 2003 (1) SCC 730
 - [\[2\]](#) 1996 (4) SCC 76
 - [\[3\]](#) 2011 (11) SCC 1
 - [\[4\]](#) 2007 (6) ALD 805
 - [\[5\]](#) AIR 1954 SC 1761
 - [\[6\]](#) AIR 1971 SC 2352
 - [\[7\]](#) AIR 2001 SC 2226
 - [\[8\]](#) 2010 (4) SCC 528
 - [\[9\]](#) AIR 2011 SC 1127
 - [\[10\]](#) 2012 (8) SCC 148
 - [\[11\]](#) AIR 2012 SC 1727
 - [\[12\]](#) AIR 1977 SC 1712
 - [\[13\]](#) AIR 1956 SC 593
 - [\[14\]](#) AIR 1992 234 (AP)
 - [\[15\]](#) 1983 2 MLJ 445
 - [\[16\]](#) (2006) 9 SCC 612