

* HON'BLE SRI JUSTICE SURESH KUMAR KAIT
AND
HON'BLE SRI JUSTICE D.V.S.S. SOMAYAJULU

+ L.P.A.Nos. 194 of 2000 and 14 of 2001

% 14-11-2017

Mallamma & others

... Appellants/
Defendants

Vs.

\$ N. Gangamma (died) per LRs

... Respondents/ Plaintiff

! Counsel for the appellants: Sri K.K. Waghray

Counsel for the Respondents: Damodar Mundra

< Gist:

> Head Note:

? Cases referred:

¹ (1974) 2 SCC 492

² (2016) 3 SCC 449

³ (1995) 4 SCC 459

⁴ (2012) 4 SCC 387

⁵ (2005) 8 SCC 67

⁶ AIR 2009 SC 1776

⁷ AIR 1968 SC 1332

⁸ 2007 AIR SC 300

⁹ Manu/SC/0115/1958

¹⁰ AIR 2003 SC 3109

¹¹ AIR 1999 SC 1441



**HON'BLE SRI JUSTICE SURESH KUMAR KAIT
AND
HON'BLE SRI JUSTICE D.V.S.S. SOMAYAJULU**

LPA Nos.194 of 2000 and 14 of 2001

COMMON JUDGMENT (per Hon'ble Sri Justice D.V.S.S. Somayajulu):

These appeals arise out of a common judgment pronounced in CCCA Nos.14 of 1987 and 57 of 1986 dated 27.04.2000. LPA No.194 of 2000 is filed against the orders in CCCA No.14 of 1987 and LPA No.14 of 2001 is filed against the finding in CCCA No.57 of 1986, therefore, this Court has decided to dispose of these appeals by this common judgment.

2. The said CCCAs' arise out of two suits O.S.No.477 of 1983 and O.S.No.476 of 1983. O.S.No.476 of 1983 is a suit filed by one Smt. Gangamma against J. Sriramulu and 6 others. The suit is filed for a declaration that she is the owner of schedule-A to schedule-C properties being the daughter of one Railu Patel. She also sought for a direction to deliver the vacant possession of plaint A to C schedule properties and for other reliefs.

3. The defendants, who are the children of the brother of Railu Patel, have contested the suit raising various defences of which the main defences are that the plaintiff is not the daughter of Railu Patel and that Railu Patel also executed a registered Will dated 11.10.1976 in a sound state of mind in which the plaintiff is not given any share.

4. The second suit O.S.No.476 of 1983 was initially numbered as O.S.No.587 of 1982. The said suit is filed by the same plaintiff-Smt. Gangamma for a declaration that the Will dated 11.10.1976 allegedly executed by late Railu Patel be declared as null and void, inoperative and cancelled and for other reliefs.

5. In this case, the defendants filed a written statement contending *inter alia* among other things that the Will in question is a genuine Will and it is neither fraudulent nor fabricated. In a protracted trial in the suit Nos.477 of 1983 and 476 of 1983, 6 witnesses were examined for the plaintiff and 5 witnesses were examined for the defendants. Exs.A.1 to A.13 were marked for the plaintiff and Exs.B.1 to B.3 and B.8 to B.29 were marked for the defendants.

6. After hearing the parties, the learned trial Judge held by his common judgment dated 24.03.1986 that the plaintiff-Smt. Gangamma in O.S.No.477 of 1983 is not the daughter of late Railu Patel and dismissed the suit. Simultaneously, the trial Judge also held that the suit O.S.No.476 of 1983 is decreed in favour of the plaintiff and the Will dated 11.10.1976 is declared as null and void.

7. Against the same, CCCA Nos.14 of 1987 and 57 of 1986 were filed. The learned single Judge of this High Court, vide his common order dated 27.04.2000, dismissed the appeal in CCCA No.14 of 1987 pertaining to O.S.No.476 of 1983. However, the learned Judge allowed the appeal in

CCCA No.57 of 1986 pertaining to O.S.No.477 of 1983 by converting the suit into one of partition and the suit was remanded to the Court below for the purpose of determining the shares held by parties as tenants in common. This common order is impugned in these LPAs.

8. Heard the counsels, Sri K.K. Waghray for the appellants and Sri Damodar Mundra for the respondent. Since the said two LPAs are from a common judgment of a learned single Judge, the facts are also being looked into in the present two LPAs. We derive support from **Smt. Asha Devi v. Dukhi Sao and another**¹ and move particularly from **B. Venkatamuni v. C.J. Ayodhya Ram Singh and others**².

9. It is the admitted case of both the parties that the properties acquired by Railu Patel are self-acquired properties. The evidence and pleadings make it clear that the properties are self-acquired properties.

10. The first Court initially decreed the suit O.S.No.476 of 1983 on the ground that the Will dated 11.10.1976 is not a valid and proper document. A reading of the judgment of the first Court shows that the first Court felt that the Will in question is not a genuine document for the reason that there were a lot of suspicious circumstances surrounding the execution of Will. The first Court took pains to explain and enumerate what it felt were the suspicious circumstances that were present in the Will.

¹ (1974) 2 SCC 492

² (2016) 3 SCC 449

11. Therefore, the essential question that falls for consideration is whether the Ex.B.8-Will, dated 11.10.1976 is a genuine and valid document or not and whether the first Court was right in holding that there was number of suspicious circumstances surrounding the same.

12. It is important to note that the Will was challenged by the plaintiff-Smt. N.Gangamma by filing the suit O.S.No.587 of 1982. In the suit, she pleads that she filed the suit O.S.No.1021 of 1980 which is renumbered as O.S.No.477 of 1983 and in that suit this Will dated 11.10.1976 was produced. After seeing the contents of the Will, she challenges the Will on the ground that a) the Will was not executed by Rayalu Patel, b) he was bedridden since 1974 and was unable to understand the nature of the transaction, c) that the plaintiff and her husband were residing with the deceased-Rayalu Patel in his residential house and if any Will was made, they would have information of the same and their signatures would have been obtained. For all these reasons, she pleads that the Will is not a genuine document.

13. Evidence was recorded in O.S.No.476 of 1983 and both the issues of the plaintiff being the daughter and the validity of the Will are raised in evidence. The plaintiff examined six witnesses. She did not, however, appear in the witness box. PWs.1 to 6 were examined on her behalf. Exs.A.1 to A.13 were marked on behalf of the plaintiff.

14. To disprove the case of plaintiff and to prove that the Will was genuine, the second defendant was examined as DW.1, first defendant was examined DW.2. DW.3 is the Registrar of Assurances of the Government servant. DW.4 is the Doctor, who medically examined the attesor and DW.5 is the attesor of Ex.B.8-Will.

15. The Will in question was also put in a sealed cover and was left with the Registrar of Assurances. The sealed cover was opened in the open court.

16. These factors are being highlighted since the essential for this Court to decide whether the finding of the first Court on the question of suspicious circumstances is correct or not. The learned counsel for appearing on behalf of the appellants, who are the defendants in this suit, cited the following judgments contending that the suspicious circumstances pointed out by the first Court are not correct.

- a) ***Rabindra Nath Mukherjee v. Panchanan Banerjee***³,
- b) ***Mahesh Kumar v. Vinod Kumar***⁴ and
- c) ***Pentakota Satyanarayana v. Pentakota Seetharatnam***⁵

17. In reply to this, learned counsel for the respondent/plaintiff to support the finding of the first Court cited a decision in ***Bharpur Singh and others v. Shamsheer Singh***⁶.

18. A reading of these judgments would make it clear that a propounder of the Will has to prove that a) the Will was

³ (1995) 4 SCC 459

⁴ (2012) 4 SCC 387

⁵ (2005) 8 SCC 67

⁶ AIR 2009 SC 1776

validly executed by the testator in a sound and disposing state of mind, b) the attestation of the Will was done as per law and the attestation should also be proved by examining at least one of the attestors and c) if there are suspicious circumstances surrounding the Will, the person who urges that there are suspicious circumstances will have to prove the same.

19. Against this backdrop, the evidence available in this case should be discussed. It is pertinent to state here that the plaint which is filed in O.S.NO.476 of 1983 raises only three grounds and no other ground is urged to challenge the Will. The Plaintiff, Smt.N. Gangamma states that a) the Will is fraudulent, b) the testator was bed ridden since 1974 and was not in a sound state of mind and c) she and her husband were the natural witnesses and should have signed the Will since they were residing with the testator (as mentioned in para-4 of the plaint in O.S.No.476 of 1983). She did not raise any other grounds about the propounder of the Will being party to the proceedings etc., as held by the first Court. Nevertheless, as the issue was discussed by the first Court at length, both the matters are being considered in this appeal.

20. PW.1-N.V. Jagannathan is the husband of Smt.N. Gangamma. He deposed as the General Power of Attorney holder of the plaintiff. He deposes to the fact that he and his wife resided with Railu Patel and that the testator was closely

connected with the plaintiff and her husband. He also states in his cross-examination that defendants 1 to 6 in the said O.S.No.476 of 1983 are the children of Balaiah, who is the elder brother of Railu Patel. He deposes that he does not have any differences with Railu Patel. He also states in page No.7 of his cross examination that he has no record to show that Railu Patel was ailing between 1974 to 1977. Therefore, it is clear that the first ground urged that Railu Patel does not have a good mental state of mind to execute the Will is not proved.

21. PW.2 is also not a party to the Will in any way. PW.2 was a known acquaintance of the parties to the suit. He also admits that the defendants in the suit are the children of Balaiah. He admits that Ibrahim Khan-DW.5 is known to Railu Patel. He admits in the cross examination in the last but one line, which is as follows:

“I do not know whether he wrote a Will or not.”

22. PW.3-Gandamma, the sister of Mutthamma in her chief examination speaks of the fact that Railu Patel and the plaintiff lived together and Railu Patel has performed the marriage with the plaintiff. The cross-examination of this witness, is on the issues raised in the chief. Hence, there is nothing about the Will in question. So is the case with PW.4. PW.5 also speaks of the marriage of the plaintiff being performed by Railu Patel. He also states that as he did not see Railu Patel execute a Will; he stated that Railu Patel did

not execute a Will. PW.6 states that one Sankaraiah told him that a Will was brought into existence by and on behalf of Railu Patel. He also deposes that Sankaraiah told that the said Will was produced before the District Registrar with Sankaraiah as a witness. He states that after hearing his version of the created Will, he went to the Sub-Registrar's office and obtained a certified copy of the Will. In the cross-examination, he admits to the facts that he has no personal knowledge about the Will. He admits that Sankaraiah had enmity with the plaintiff and that he has seen the original Will in the Registrar's office. It is important to note that Sankaraiah is the second witness to the Will and he is not alive. So not much credence can be given to P.W.6 who deposes about what he was allegedly told by a deceased person.

23. In contra distinction of this evidence, the defendants have produced the Will and the evidence of six witnesses.

24. As far as DW.1 is concerned, he deposes to the fact that Railu Patel was in sound state of mind when he executed the Will, that Railu Patel got the draft of the Will prepared and he got himself examined by Dr. Jai Ramchander Pingle. He also states that Railu Patel executed the Will of his own. He deposes that Railu Patel went to the Sub-Registrar's office and deposited the Will in an original envelope, which was sealed. The Will was marked as Ex.B.8 and the original

envelope, in which the Will was sealed, was marked as Ex.B.28. The sealed cover bears the signatures and thumb impression of the testator and the witnesses. Ex.B.9(a) is the signature of Railu Patel and Ex.B.9(b) is his thumb impression. He deposes also about the presence of the witnesses at the Registrar's Office.

25. DW.3 is the Registrar who was working as the Hyderabad District Registrar of Assurances between April 1976 to August 1990. He identified Ex.B.28 envelope and also states that the contents written on the envelope that was marked as Ex.B.28 (a) are in his handwriting. He deposes to the fact that Railu Patel produced the original envelope before him for keeping it in a sealed cover. He states that the testator signed on Ex.B.28(a) in his presence and his signature was marked as Ex.B.28 (b) and his thumb impression was marked as Ex.B.28(c). Exs.B.29(a) and B.29(b) are the signature and the thumb impression of the executor of the Will, which were taken in his presence. He identifies the signature and thumb impression of Railu Patel (Ex.B.9(a) and 9(b) on the Will Ex.B.9). In the cross-examination, he also identified MO.1 which is a seal that was put on the envelope at the time of presentation of Ex.B.28-Will.

26. DW.4 was a Doctor, who examined the testator on 11.10.1976 and issued a medical certificate stating that Railu Patel was in a good state of mind. He also identified Railu

Patel from a photograph (Ex.B.16). DW.5 is Ibrahim Khan, who worked in the Municipal Corporation of Hyderabad. He is the attesor to the Will. He clearly deposes in the chief examination that he read the entire document, which was a Will. He states that he saw Railu Patel, affix his signature and thumb impression in his presence and that later he and Sankaraiah also signed as attesting witnesses. He states that Railu Patel placed it in an envelope and handed over it to the Registering Officer. The Registering Officer took the signatures and the thumb impression of this witness and other witnesses. In the cross-examination, lot of emphasis was laid on the marriage/relationships of Railu Patel. He admits in the cross-examination that by the time he reached the house of Railu Patel, the Will was already typed. He also states that defendant No.1 was present in the office of the Sub-Registrar. He denies the suggestion that Railu Patel was unable to read and understand anything after 1974. He states that the Will was presented between 12 noon and 1 p.m. on 11.08.1976. He denied the suggestion that it is a forged and fabricated Will.

27. Against this background, the finding of the first Court is examined. The finding of the first Court is essential turning on the fact that the beneficiary of the Will (DW.1) has actively participated in the process of execution of registration of the Will. The learned Judge relied upon **Gorantla Thataiah**

v. Thotakura Venkata Subbaiah and others⁷ and held that where the propounder of Will participates in making of the Will, it is a suspicious circumstance. The case law since then has undergone a sea change as can be seen in the later judgments cited of the Hon'ble Supreme Court by the learned counsel for the appellants. The Supreme Court held that participation of the beneficiary is not by itself a suspicious circumstance. Equally in para-25 of the judgment in **Pentakota Satyanarayana**,⁸ case (3 stated supra), the Hon'ble Supreme Court held after considering all the decisions on the subject that the active participation in the execution of the Will by the beneficiary is not by itself a sufficient cause to disbelieve the Will. The Supreme Court also held that in case the person attesting the Will alleged undue influence, fraud or coercion, the onus would be on him to prove the same. The Hon'ble Supreme Court in all these decisions held that mere presence of the beneficiary is not a ground to hold that the Will is suspicious.

28. The learned Judge of the first Court also held that the contents of bequest are unnatural in the sense that the property was bequeathed to the brother's children and that the wives were given only a life estate etc. It is a fact that Railu Patel did not have any children of his own. It is also apparent from the record that the defendants (brother's children) were also residing with Railu Patel and the exhibits like Ex.B.10 to B.12 are showing the close connection

⁷ AIR 1968 SC 1332

between the defendants and Railu Patel. Further, the two ladies living with him were given a life estate. Considering the assets involved in this case and giving a “life estate” by itself cannot be said to be an unnatural bequest. The very concept of life estate for a widow/wife is to ensure that she has a roof over ahead and some income to lead a normal life till her death. If these women were ignored it would be a different issue but the fact that the two ladies were given a life estate indicates a thought out Will.

29. The first Court also failed to realize that there is a presumption under law albeit rebuttable that all official acts are done properly (Section 114 of the Evidence Act). In this case, it is clear that the Will dated 11.10.1976 was presented to the Sub-Registrar to keep the same in a sealed cover. The procedure stipulated under the Registration Act, more particularly, Sections 42 to 45 of the Registration Act were followed in this case. The Registrar accepted the Will in deposit from the testator himself. The same can be seen from his deposition. The Registrar (DW.3) was an official witness and was not in any way connected with the family or that the Will was examined as DW.3 and he clearly deposed as follows:

“I worked as Hyderabad District Registrar of Assurances from April 1976 to August 1980. Prior to that, I was working in the office of Registrar of Assurances. I see Ex.B.28-cover. The contents written on the envelope marked as Ex.B.28 (a) are in my handwriting. The executant named Railu Patel produced the original envelope Ex.B.28 before me for keeping it in sealed cover. Ex.B.28 (a) contains my signature. The executant signed on

Ex.B.28 (a) in my presence. The signature of executant is Ex.B.28 (b). I also obtained thumb impression of executant marked as Ex.B.28 (c) on the said cover..... I see Ex.B.9(a) and B.9(b), which are the thumb impression and signature of executant. They were taken in my presence.”

30. In the cross-examination, nothing was elicited about these exhibits which are marked as Ex.B.28 (a) to (c). The witness states in the cross-examination that he does not have personal acquaintance with the execution of the Will. This fact was highlighted by the first Court in the judgment and the Court observed in para-10 of its judgment that DW.3 candidly admitted that neither was he acquainted with Railu Patel nor with DW.5 or with Sankaraiah. The finding of the first Court overlooks the standard of proof that is required in a civil Court. It is preponderance of probabilities that are relevant in civil Courts and not proof beyond reasonable doubt.

31. It is a fact that every day many people appear for registration of documents before the Registrar office and to presume and to expect that the Registrar should have personal acquaintance with every person to appear before him is stretching things too far. The plaintiff was of the opinion that Ex.B.8 is not genuine. There should have been cross-examination on this matter, more so on Ex.B.28; Ex.B.28(a); 28(b); Ex.B.8 (a); 8(b) etc. There was no cross-examination on vital aspects. The critical aspects which this witness deposes are that Ex.B.28 cover contains his signature. He also deposes that executant of the Will signed

on Ex.B.28 in his presence. Therefore, disowning testimony of this witness was not correct in the eye of law. The presumption under Section 114 of the Evidence Act is squarely applicable in this case. The cross-examination or other evidence does not in any way rebut this presumption.

32. Similarly, the comment made by the first Court about the evidence of Doctor-DW.4 is also not correct. This Doctor was examined as DW.4 to prove the certificate dated 11.10.1976, which is marked Ex.B.27. This certificate of the Doctor clearly states that he examined the testator of the Will- Railu Patel and that he found him to be in sound state of mind and that he was in good mental condition to make his Will. The first Court perfunctorily disowned the evidence of this Doctor. The Doctor clearly deposed that he was practicing medicine since 1972. He is an eminently qualified man holding FRCS and MS degrees in Orthopedics. He admits that Railu Patel has been his patient since 1975 with complaint of knees problem. He clearly admits that on 11.10.1976 the said Railu Patel was examined by him and that his mental condition was quite normal and alert. In the cross-examination, nothing much was elicited from the deposition to discredit this witness. On the contrary, he denied the suggestion that Railu Patel, the testator was ill and bedridden since 1971. He also clearly states in his cross examination as follows:

“I am not an expert on mental diseases, but any Doctor can give a finding of mental state of a person.”

The first Court simply said that the certificate given by this Doctor does not support the case of DW.1. The first Court also stated that DW.4 was not a witness to the execution of Ex.B.8. The first Court lost track of the fact that this witness was examined only to prove Ex.B.27 and not to prove the execution of the Will. The mental state of the testator was proved through this witness and this Court sees no reason to believe the evidence of the Doctor.

33. Similarly, DW.5-Sri Ibrahim Khan was examined to prove the attestation of the Will. As required by law at least one attesting witness should be examined to prove the execution of the Will. In this case, DW.5, who is working as Vehicle Inspector of the Municipal Corporation of Hyderabad, was examined as a witness. The witness deposes that he knew Railu Patel due to the family relationship with him and his family since the times of his father. He also deposes that the family of Railu Patel also visited his house. The judgment of the first Court discards the evidence of this witness on the ground that the presence of DW.5 as an attesting witness is unnatural. The Court notices his age states that at the time of execution of Ex.B.28 he must have aged 34 years of age and therefore, he is neither contemporary of Railu Patel nor does he has the special relationship. Therefore, his evidence is disqualified.

34. The first Court failed to notice that there is no legal requirement that a document should be attested only by

a relative or somebody near and dear. It is the prerogative of the executant of the document to decide on the person who should attest a document. It is not unknown that people often call an uninterested third party as a witness to sign/attest documents. This is to eliminate a challenge that interested parties was shown as witness. Therefore, discrediting this witness merely on the ground that he is young when compared to testator and that the other relatives who were present at that time were not considered as good attestors does not appear to be a correct view and the learned Judge missed the fact that if interested parties are taken as attestors or witnesses, it can lead to a comment that they are not disinterested witness. Therefore, the finding of the first Court that the presence of DW.5 is a suspicious circumstance by itself is not truly correct.

35. The first Court failed to realize that the Will in this case was deposited in October 1976 and that Railu Patel was alive for two years thereafter and that he did not in any way change the Will or cancel the Will till he died on 04.12.1978.

36. In ***Savithri and others v. Karthyayani Amma and oathers***⁸ the Hon'ble Supreme Court of India also noticed certain important features which are similar to the case on hand. The testator in that case before the Supreme Court was a) depending on his relatives to whom he bequeathed the property b) the Will was registered and testator did not take

⁸ 2007 AIR SC 300

steps to change his mind or cancel the Will, c) the attestor/ the second witness was examined to prove the Will as per the provisions of the Evidence Act. The Supreme Court also noticed that the appellant in that case stated that the signature of the testator on the Will was obtained under influence or coercion. Therefore, the Supreme Court held that onus was on them to prove the case. It is settled law that requires no reiteration that a person alleging a fact more so like undue influence, coercion etc. should clearly plead and prove the same.

37. In the case on hand, before the first Court, the plaint merely stated in para-4 that a) the alleged Will is fraudulent b) the testator was bedridden since 1974 and unable to understand the transactions and c) the plaintiff and her husband were residing in the same address and therefore, they would have been naturally called as witness. All these three grounds are not proved by the plaintiff. No medical evidence was adduced to show that the testator was sick since 1974. It is not clear as to what is the fraud perpetrated as per the pleadings. The reason for excluding the plaintiff and her husband who is an M.L.A. was explained in page-3 of the Will itself (translated copy). The plaintiff did not examine herself as a witness. Necessarily, an adverse inference has to be drawn against him. Even PW.1 did not depose anything to disprove the contents of the Will, more so page-3 wherein the testator gave reasons for not including the plaintiff and her

husband in the Will, which is evident from Ex.B.8-Will and the relevant portion reads thus:

“That I have nourished ;Smt. Gangamma, w/o. Sri Jagannadham as my own daughter and I have performed her marriage with my own expenses with my real nephew. Sri Jagannadham, whose education and training was done by me and at the time of the marriage. I had borne the expenses of two sides but I ahd also given wealth and ornament as per my capacity.

That after the marriage, I continued to have enough relationship and behaviour with the husband and wife. Now Sri Jagannadham is M.L.A. and by the grace of God both these wife and husband are presently happy and prosperous. Now they no longer need anything from me in any manner whatsoever, as such there does not arise any question of giving them any property under this Will as they do not need any concession.”

If this statement is not true; the plaintiff should have contradicted the same in her plaint and in her evidence.

38. The Supreme Court clearly noticed that the burden of proof that the Will has been validly executed and is a genuine document is on the propounder. The propounder is also required to prove that the testator has signed the Will and that he had put his signature out of his own free will having a sound disposition of mind and understood the nature and effect thereof. If sufficient evidence in this behalf is brought on record, the onus of the propounder is held to have been discharged. The onus would be on the applicant to remove the suspicion by leading sufficient and cogent evidence if there exists any suspicious circumstances. Similarly, the Supreme Court also took into consideration the

case of ***H. Venkatachala Iyengar v. B.N. Thimmajamma and others***⁹ in para 17 and held that the following are the suspicious circumstances:

- “(i) When a doubt is created in regard to the condition of mind of the testator despite his signature on the Will;
- (ii) When the disposition appears to be unnatural or wholly unfair in the light of the relevant circumstances;
- (iii) Where propounder himself takes prominent part in the execution of Will which confers on him substantial benefit.”

39. In paras 18 & 19 of the said judgment, the Supreme Court clearly held that a rational approach is to be taken in cases of Will and also held that deprivation of a due share by the natural heirs itself is not a factor which would lead to the conclusion that there exist suspicious circumstances. The Hon'ble Supreme Court in the said judgment in para-20 relied upon a judgment reported in ***Ramabai Padmakar Patil v. Rukminibai Vishnu Vekhande***¹⁰ and held that the Will is executed to alter the mode of succession. The fact that the natural heirs have been excluded or the lesser share has been allotted to them is not a suspicious circumstance *per se*. The Supreme Court also held that if suspicious circumstances exist than a propounder of the Will must remove the same.

40. In the case on hand, the pleadings do not lay any foundation for the same. The evidence on record does not

⁹ Manu/SC/0115/1958

¹⁰ AIR 2003 SC 3109

prove any suspicious circumstances of the extent required to disbelieve the Will. From all the above reasons, this Court is of the opinion that the impugned order passed by the learned single Judge is to be set aside, as he did not consider the evidence on record or the pleadings of the document. The impugned orders dated 27.04.2000 passed by the learned single Judge in CCC Nos.14 of 1987 and 57 of 1986 are hereby set aside.

41. It is held that Ex.B.28-Will executed is a genuine document and the contents of the same have been proved as required by law by examining the attesor. The deposit of the same is supported by evidence of the Registrar and mental state of the testator is proved by a medical certificate given by DW.4. The attesor was examined as DW.5. Thus, all the elements of law, as required to prove Ex.B.28-Will, are made out. Consequently, the suit O.S.No.587 of 1982 is dismissed. The finding of the single Judge of this Court that the parties are residing in the property and that they are tenants in common and therefore, the appeal is converted into one partition and remanded to the Court below is also erroneous. In view of the above, as Ex.B.28-Will has been held to be valid, the suit O.S.No.587 of 1982 is dismissed.

42. Coming to O.S.No.477 of 1983, this suit is filed by Smt. N. Gangamma for a declaration that she is the daughter of late Railu Patel and that consequently, she is entitled to a declaration that she is the owner of schedule A to D property

described in the suit plaint. The evidence on record does not clearly show that the plaintiff is the daughter of late Railu Patel. The learned single Judge noticed the fact that in a plaint, which is marked as Ex.A.13, Smt. N.Gangamma, the plaintiff was described as the daughter of late Railu Patel. In contra distinction to this, the first Court noticed that Smt. N.Gangamma did not enter into the witness box to prove her case as plaintiff. The Hon'ble Supreme Court of India in a decision reported in ***Vidhyadhar v. Manikrao and another***¹¹ clearly drew an adverse influence against the party who did not enter the witness box to prove his/her case. The Hon'ble Supreme Court held as follows:

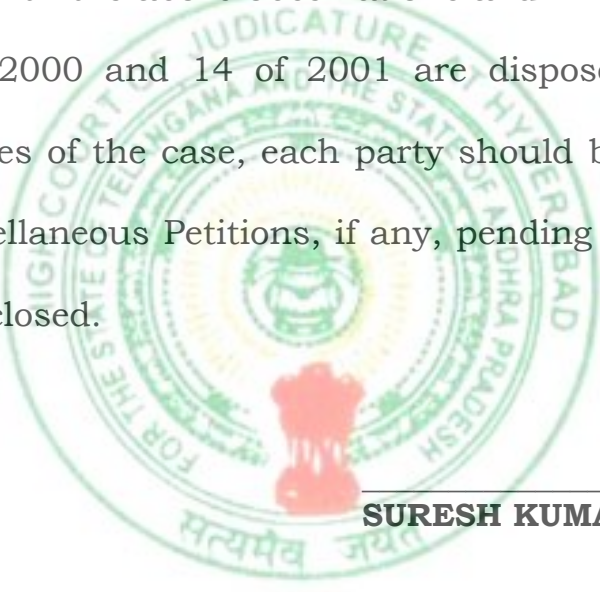
“Where a party to the suit does not appear into the witness box and states his own case on oath and does not offer himself to be cross examined by the other side, a presumption would arise that the case set up by him is not correct.”

43. While it is true that as per the provisions of Evidence Act, the husband is a competent witness on behalf of wife still when issues of paternity and declaration of rights are sought to be established, it is expected that the plaintiff should enter the witness box and depose about her status. The veracity of her case would be tested by cross-examination. In this case, admittedly the plaintiff was not examined as a witness. Her husband cannot have any personal knowledge of her paternity with certainty. Therefore, for all these reasons, this Court holds that the

¹¹ AIR 1999 SC 1441

findings of the first Court in O.S.No.477 of 1983 are correct and similarly, the finding of the single Judge of this Court on this aspect is also upheld. The plaintiff is not entitled to a declaration that she is the daughter of the Railu Patel. It is also pertinent to note that she is seeking a declaration of her status to claim the suit schedule properties. As the properties are admittedly self-acquired properties and the Will dated 11.10.1976 by which they are bequeathed to many is upheld, the declaration is not really material anymore.

44. With the above observations and findings, the LPA Nos.194 of 2000 and 14 of 2001 are disposed off. In the circumstances of the case, each party should bear their own costs. Miscellaneous Petitions, if any, pending in this appeal shall stand closed.



SURESH KUMAR KAIT, J

D.V.S.S. SOMAYAJULU, J

Date: 14.11.2017

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Note: L.R. Copy marked.