

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

AS No.1999 of 1992 and TRAS No.548 of 2014

AS No.1999 of 1992:

Between:

Haripriya.

... Appellant/1st defendant

And

Rukkamma.

... Respondent/plaintiff

TRAS No.548 of 2014:

Between:

Nalla Haripriya
and three others.

... Appellants/plaintiffs

And

Rukkamma.

... Respondent/defendant

DATE OF JUDGMENT PRONOUNCED: 16.08.2017

SUBMITTED FOR APPROVAL:

THE HON'BLE SRI JUSTICE U. DURGA PRASAD RAO

1. Whether Reporters of Local Newspapers

may be allowed to see the judgments?

Yes / No

2. Whether the copies of judgment may be

marked to Law Reporters / Journals?

Yes / No

3. Whether His Lordship wish to

see the fair copy of the Judgment?

Yes / No

U.DURGA PRASAD RAO, J

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! Counsel for Appellant : M/s. B. Kavita Yadav

^ Counsel for Respondent : Sri Koneti Raja Reddy

< Gist:

> Head Note:

? Cases referred:

- 1) AIR 1978 Calcutta 123
- 2) AIR 1952 SC 354
- 3) AIR 1982 Allahabad 248
- 4) AIR 1994 Supreme Court 135
- 5) AIR 1974 SC 471
- 6) (2005)5 SCC 784
- 7) (2008) 7 SCC 85
- 8) AIR 2005 SC 485
- 9) 2000(1) ALD 607
- 10) AIR 2008 SC 1193
- 11) AIR 1989 Kant 45
- 12) (1987) 2 Kar LJ 369
- 13) 2004 (2)ALD 635

HONOURABLE SRI JUSTICE U.DURGA PRASAD RAO

AS No.1999 of 1992 and TRAS No.548 of 2014

COMMON JUDGMENT:

Aggrieved by the common judgment dated 27.08.1992 in O.S.No.63 of 1987 and O.S.No.115 of 1987 passed by learned Subordinate Judge, Peddapalli, the 1st defendant in O.S.No.115 of 1987 and plaintiffs in O.S.No.63 of 1987 preferred AS No.1999 of 1992 and TRAS No.548 of 2014 respectively.

2) O.S.No.63 of 1987 is filed by the plaintiff seeking declaration that 1st plaintiff, but not the defendant, is the wife of late Nalla Pentaiah and plaintiffs 2 to 4 are their children and for perpetual injunction restraining the defendant from interfering with their peaceful possession and enjoyment of the suit schedule properties. It is the case of plaintiffs that Nalla Pentaiah of Peddapalli married 1st plaintiff in the year 1971 and begot plaintiffs 2 to 4 and the defendant has nothing to do with Nalla Pentaiah. However, in the amended pleadings, the plaintiffs mentioned that Nalla Pentaiah married one lady and after her death, married the defendant but their marital life was not harmonious and ultimately they took divorce in 1961 and later he married the 1st plaintiff and died in 1983. While-so, the defendant filed a counter suit—O.S.No.115 of 1987 claiming herself as the legally wedded wife of late Nalla Pentaiah and there was never any divorce between them and 1st plaintiff in O.S.No.63 of 1987 who was their tenant, developed illicit intimacy with N.Pentaiah. 1st plaintiff was the wife of one Venkateshwar Raju of Mogilicherla.

Thus she sought for declaration of her title and recovery of possession of the suit schedule properties after evicting the defendants.

3) The trial Court conducted common evidence in O.S.No.63 of 1987. PWs.1 to 9 were examined and Exs.A.1 to A.18 were marked on behalf of plaintiffs. DWs.1 to 5 were examined and Exs.B.1 to B.3 were marked on behalf of defendant.

4) The trial Court considering the oral and documentary evidence observed that there was no divorce between N.Pentaiah and Rukkamma (plaintiff in O.S.No.115 of 1987); Haripriya (1st plaintiff in O.S.No.63 of 1987) is concerned, it is observed she could not prove that she was the legally wedded wife of late N.Pentaiah and the evidence produced by her will not confer her the status of a legal marriage as she failed to prove the solemnization of marriage according to customary rites and ceremonies under Section 7 of Hindu Marriage Act (for short “HM Act”); even assuming there was marriage between PW1(Haripriya) and N.Pentaiah the same is void in view of Section 5(1) of HM Act as there was no legal divorce between N.Pentaiah and Rukkamma under Section 13 of HM Act. Regarding alternative relief prayed for by the plaintiffs in O.S.No.63 of 1987 that in the event the marriage of Haripriya with N.Pentaiah was held not valid still the children born to them would get a share under Section 16 of HM Act, the trial Court observed such an alternative relief cannot be granted as the same was ill-founded as the said relief cannot be treated as ancillary relief to the main relief and granting such a relief would amount to changing the nature of the suit. The trial Court further

observed, the defendant i.e. Rukkamma failed to prove PW1 earlier married one Venkateswara Raju of Mogilicherla. The trial Court finally held, plaintiffs in O.S.No.63 of 1987 were in unlawful possession of the properties acquired after the death of N.Pentaiah and ultimately dismissed their suit—O.S.No.63 of 1987 and decreed O.S.No.115 of 1987 with costs.

Hence, the instant appeals.

5) The parties in the appeals are referred as they were arrayed in O.S.No.63 of 1987.

6) Heard arguments of Sri Vedula Venkataramana, learned senior counsel appearing for Smt. B.Kavita Yadav, learned counsel for appellants and Sri Koneti Raja Reddy, learned counsel for respondent.

7 a) Learned senior counsel Sri Vedula Venkata Ramana, would firstly argue that in this case both the 1st plaintiff and defendant claimed themselves as wives of late N.Pentaiah. Plaintiffs in O.S.No.63 of 1987 sought for a specific relief of declaration that they are the wife and children of late N.Pentaiah however, the defendant in her suit—O.S.No.115 of 1987 did not seek for declaration of her legal status as wife of N.Pentaiah except seeking a declaration that she is the owner of plaint schedule properties. Therefore, the frame of her suit is defective and no relief can be granted to her.

b) Secondly, he would argue that it is the specific case of plaintiffs that 1st plaintiff is the legally wedded wife of N.Pentaiah and their

marriage took place in 1971 and defendant falsely claimed as the wife of late N.Pentaiah. In that view, suffice for PW1 to prove that she is the legally wedded wife of late N.Pentaiah. Equally, the burden is on the defendant to establish that she is in fact the legally wedded wife of N.Pentaiah. Admitting that plaintiffs amended their pleadings and took the plea that after the death of 1st wife, N.Pentaiah married defendant, learned senior counsel would strenuously argue that such an amended plea cannot be isolatedly taken as an admission on the part of plaintiffs that the defendant is the wife of late N.Pentaiah because, in their amended pleadings the plaintiffs further pleaded that there was a customary divorce between N.Pentaiah and defendant. He thus argued that the entire amended pleadings have to be taken as an admission in which case both the marriage and divorce between N.Pentaiah and defendant should be accepted. If it is the case of the defendant that no customary divorce was prevalent in their community and no divorce indeed took place between her and N.Pentaiah, she has to establish that fact but not plaintiffs. However, the trial Court erroneously fixed burden of proof on the plaintiffs and held as if plaintiffs failed to prove the existence of customary divorce and the factum of divorce between N.Pentaiah and defendant. He relied upon the following decisions to buttress his contention that entire amended pleadings have to be taken as admission but not isolated pleadings:

(1) *J. Mc. Gaffin and another vs. Life Insurance Corporation of India*¹

¹ AIR 1978 Calcutta 123

(2) *Palvinder Kaur vs. State of Punjab (Rup Singh-Caveator)*²

He would thus ultimately argue that when the entire admission is considered, the burden squarely rests on the defendant to establish that she is the legally wedded wife of N.Pentaiah and no customary divorce took place between them and she still continues to be his wife which she failed to establish. He placed reliance in *Smt. Bibbe vs. Smt. Ram Kali and other*³ to argue that when the factum of marriage is disputed, all the essential ceremonies constitute the marriage must be proved.

c) Thirdly, learned senior counsel would argue, the plaintiffs by placing cogent oral and documentary evidence, proved the factum of marriage between N.Pentaiah and 1st plaintiff that took place in 1971 at Hanuman Temple, Mukarampura, Karimnagar. In this regard, apart from PW1, PW3 who attended their marriage was examined. Further, PW4 was examined to speak that in LIC policy of N.Pentaiah PW1 was shown as the wife and nominee. PW5 was examined to show that in Fixed Deposit issued by Indian Bank, Peddapalli Branch, 1st plaintiff was shown as wife of N.Pentaiah. PW7 the Head Master of Kakatiya English Medium School was examined to show while admitting 2nd plaintiff in the school, N.Pentaiah mentioned himself as father. Besides, Ex.A3—passport would show the plaintiffs as wife and children of N.Pentaiah. All the aforesaid evidence, he argued, would probablise the fact that plaintiffs are wife and children of N.Pentaiah. Added to it, the defendant never questioned the relationship of 1st plaintiff and N.Pentaiah. If really

² AIR 1952 SC 354

³ AIR 1982 Allahabad 248

she alone was the legally wedded wife of N.Pentaiah and no divorce did take place between them and if really N.Pentaiah got only illicit connection with 1st plaintiff, certainly defendant would have taken legal recourse like filing a complaint under Section 498A IPC. Her conspicuous silence, he pointed out, would infer the fact that she obtained divorce from N.Pentaiah and thereafter, he married 1st plaintiff. Learned senior counsel argued that without considering the evidence and other probabilities the trial Court erroneously held as if 1st plaintiff failed to prove that she is the legally wedded wife of N.Pentaiah on the ground that she did not let in evidence to prove the solemnisation of marriage in terms of Section 7 of HM Act.

He thus prayed to allow both the appeals.

8) Per contra, while supporting the common judgment in both the suits, learned counsel for respondent Sri K.Raja Reddy would argue that due to the categorical admission of plaintiffs that N.Pentaiah married to defendant, she need not prove that fact in view of Section 58 of Evidence Act and there is no requirement for her to claim a declaration to that effect and hence, her suit is legally perfect. Opposing the argument of the plaintiffs, he would contend that in the amended pleadings the factum of marriage between N.Pentaiah and defendant alone amounts to admission and rest of the pleadings about the alleged divorce amount to contention of the plaintiffs which they are bound to prove by cogent evidence since the defendant categorically denied such divorce. He would further argue that N.Pentaiah and defendant are Vysyas and

customary divorce was not prevalent in their community. Since the plaintiffs contended otherwise, they should make a clear cut pleading about the existence of such custom and also adduce evidence. However, plaintiffs utterly failed in that regard and the contra evidence adduced by the defendant amply established absence of such custom. He would thus contend that in view of own admission of plaintiffs about the marriage between N.Pentaiah and defendant and their inability to prove the divorce, the fact remains that Rukkamma alone is the legally wedded wife of N.Pentaiah. Consequently, 1st plaintiff's claim that she married N.Pentaiah, even if true, is void under Section 11 of HM Act. Learned counsel vehemently argued that except stating that her marriage took place in a temple, she did not adduce cogent evidence about its solemnisation in customary form. He would contend mere placing some evidence that N.Pentaiah and 1st plaintiff long cohabitated as husband and wife will not confer her legal status except concubinage. He placed reliance in *Surjit Kaur vs. Garja Singh and others*⁴. He thus prayed to dismiss both the appeals.

9) The points for determination in both the appeals are:

(1) *What is the legal effect of the admission regarding the marriage between N.Pentaiah and defendant made in the pleadings of the plaintiffs?*

(2) *Whether the suit filed by defendant is not maintainable without seeking a declaratory relief that she is the legally wedded wife of N.Pentaiah?*

⁴ AIR 1994 Supreme Court 135

(3) *Whether the defendant is bound to establish that she is the legally wedded wife of N.Pentaiah and no divorce took place between them and if she is not so bound to prove, whether plaintiffs are bound to prove the factum of divorce between N.Pentaiah and defendant?*

(4) *Whether 1st plaintiff could prove that she is the legally wedded wife of N.Pentaiah and if not, what is her legal status?*

(5) *To what relief?*

10) **POINT No.1:** It is to be noted that in the original pleadings the plaintiffs took the plea that 1st plaintiff is the legally wedded wife of N.Pentaiah and their marriage took place in the year 1971; Pentaiah died on 09.02.1983 and three months after his death the defendant put-forth a false claim as being the wife of late Pentaiah. However, they amended pleadings and introduced para-5(A) in O.S.No.63 of 1987 as follows:

“The late husband of plaintiff after the death of his first wife married the defendant. The marriage between them was never harmonious and they never lived happily as husband and wife. Ultimately in the year 1961 the defendant and her father committed theft of Gold and Silver ornaments from the house of late Nalla Pentaiah and his father Ramaiah. A criminal complaint was filed in this regard by Nalla Ramaiah against the defendant and her father which dragged on for a long time. Due to this further strain of relations developed between defendant and Pentaiah and ultimately divorce took place between them as per the custom prevalent in the Vysya community of Peddapalli, in the presence of caste elders namely late Todupunuri Rajesham, late Devunuri Shankaraiah, Elenki Vaikuntam (alive) and one or two others. The said divorce was oral and the properties which were stolen away by the defendant and her father were deemed sufficient and tantamount to return of the dowry and jewellery etc., given to the defendant by the parents at the time of marriage. Since then defendant was ceased to

be the wife of Pentaiah and has been living with her parents at Sircilla and never came to Peddapalli. Thus the defendant is not the wife of Pentaiah and Pentaiah had no living wife at the time he married the plaintiff.”

In the written statement filed in O.S.No.115 of 1987 also, they took similar plea. The substance of the amended plea is that plaintiffs admitted the marriage between defendant and N.Pentaiah. However, under the circumstances narrated, a customary divorce took place between them in 1961. The legal effect of aforesaid pleas is in dispute now.

11) Law on admissions is no more *res integra*. Sections 17 to 31 of Indian Evidence Act deal with admissions. As per Section 17 of Evidence Act, an admission is a statement, oral or documentary or in electronic form which suggests an inference as to any fact in issue or relevant fact which is made by any of the persons under circumstances mentioned in the chapter of admissions. Admission of guilt in criminal cases is known as ‘confession’ dealt with under Sections 24 to 30 with which we are not concerned now. Civil cases are concerned, admissions are generally the statements made by the parties either in their pleadings or in the evidence, mostly affecting against their interest in a case.

a) Then, Section 21 says about who can take advantage of an admission and against whom. It lays down that admissions are relevant and they may be proved against persons who makes them or his representative in interest but they cannot be proved by or on behalf of the makers of the admission or by his representative except in one of the

three instances narrated in that Section. The reason for the maker of an admission prohibited from proving his own admission to his advantage is that if he is allowed to do so, he will make a statement though a false one and take advantage for his own.

12) Then, legal effect of an admission is explained by the Apex Court thus:

a) In ***Nagindas Ramdas vs. Dalpatravn Ichharam @ Brijram and others***⁵, the Apex Court held thus:

“Para 27: xx xx Admissions, if true and clear, are by far the best proof of the facts admitted. Admissions in pleadings or judicial admissions, admissible under Section 58 of the Evidence Act made by the parties or their agents at or before the hearing of the case, stand on a higher footing than evidentiary admissions. The former class of admissions are fully binding on the party that makes them and constitute a waiver of proof. They by themselves can be made the foundation of the rights of the parties. On the other hand, evidentiary admissions which are receivable at the trial as evidence are by themselves, not conclusive. They can be shown to be wrong.”

b) In ***Divisional Manager, United India Insurance Co. Ltd. and another vs. Samir Chandra Chaudhary***⁶, it was held:

“Para 11: xx xx ... As observed by Phipson in his Law of Evidence (1953 Edition, Para 678) as the weight of an admission depends on the circumstances under which it was made, these circumstances may always be proved to impeach or enhance its credibility. The effect of admission is that it shifts the onus on the person admitting the fact on the principle that what a party himself admits to be true may reasonably be presumed to be so, and until the presumption is

⁵ AIR 1974 SC 471

⁶ (2005)5 SCC 784

rebutted, the fact admitted must be taken to be established. An admission is the best evidence that an opposing party can rely upon, and though not conclusive is decisive of matter, unless successfully withdrawn or proved erroneous.”

c) In ***Gautam Sarup vs. Leela Jetly and others***⁷, it was held:

“Para 13: An admission made in a pleading is not to be treated in the same manner as an admission in a document. An admission made by a party to the lis is admissible against him proprio vigore.”

13) On the anvil of above law, the effect of the extracted pleadings should be tested.

14) The statement that *the late husband of plaintiff (N.Pentaiah) after the death of his wife married the defendant* is undoubtedly a statement of admission on the part of plaintiffs because, it is made against their original contention that 1st plaintiff alone is the legally wedded wife of N.Pentaiah and defendant is an interloper. Hence, as per Section 21, said admission can be proved against the plaintiffs by the defendant. The rest of the pleading narrating the circumstances under which a customary divorce was effected between N.Pentaiah and defendant is not admission, but only the statement of contention put-forth by the plaintiffs. A self-serving statement cannot be used by a party for his advantage. Ofcourse, under Section 21 (3) of Evidence Act, the plaintiffs can treat their contention as relevant otherwise than as an admission by duly proving the same. In this regard, the contention of learned senior counsel that the

⁷ (2008) 7 SCC 85

entire pleadings of plaintiffs have to be treated as admission cannot be accepted.

a) In *Palvinder Kaur*'s case (2 supra), relied on by the appellants, the facts are that a wife was tried for murdering her husband by administering potassium cyanide poison. The post-mortem doctor did not find positive signs of poisoning. There was no direct evidence to establish the wife of the deceased or her paramour administered potassium cyanide. The trial Court basing on circumstantial evidence convicted the wife, as the alleged paramour absconded. The High Court however convicted the accused for the offence under Sec.201 IPC for disposing of the dead body by keeping it in a trunk box throwing in a well by the accused and her paramour, basing on her alleged confessional statement. On appeal, the Apex Court found that the statement of the accused before the Magistrate is in the nature of exculpatory statement but not an incriminating statement inasmuch as, she stated that by mistake her husband took the poison bottle instead of medicine bottle kept in almyrah and consumed and died. Out of fear, herself and Mahinderpal Singh disposed of the dead body by keeping it in a trunk box and throwing in a well. The Apex Court found fault with the High Court taking only latter part of her statement of disposing of the dead body as sufficient to sustain the charge under Sec.201 IPC without considering the entire statement. In that context, it was held that confession and admission shall be accepted or rejected as a whole and allowed the appeal.

In the instant case, it must be noted, the latter part of the pleadings is not altogether omitted or excluded but the evidentiary burden is only placed on the plaintiffs to establish the same. Without there being a marriage, the question of divorce subsequently does not arise. So the aspect of marriage between N.Pentaiah and defendant as pleaded by the plaintiffs can be accepted as an admission. The divorce aspect is concerned, since defendant denies the same, the plaintiffs have to prove it for the Court to accept.

b) *J. Mc. Gaffin*'s case (1 supra) is a suit for eviction of tenant. The tenant admitted that tenancy had commenced on 25th of English Calendar month as pleaded by the plaintiff-landlord but contended that by mutual agreement, rent was agreed to be paid according to English Calendar month. In the appeal before the Division Bench of Calcutta High Court, it was argued that entire admission has to be taken into consideration which would establish that rent was agreed to be paid as per the English Calendar month but not on 25th. In that context, the Division Bench observed that no doubt, when an admission is made in the pleadings along with a further statement which depends on the admission, all the statements have to be taken and considered together. However, if the statement of admission is made unconditional and thereafter a further statement is made which is not conditional or based on such earlier admission but it was only an assertion of a specific case not depending or conditional upon the earlier admission, the above principle would not be applicable. Applying the above principle, the Division Bench observed that the assertion of the plaintiff was that tenancy was created on 25th of

the month and the said fact was admitted by D.1 and the said admission was an unconditional one and did not depend on any other admission made by the defendant in respect of commencement of the tenancy. The defendant's further specific case was that the tenancy was converted to a tenancy according to English Calendar month later on. The said specific statement had nothing to do with the admission about the creation of tenancy and its commencement. Hence it was not necessary to take the subsequent statement as a part of the original admission. Since the defendant failed to prove the conversion of the tenancy into English Calendar Month, the eviction ordered was held correct.

In the instant case, the admission regarding the marriage between N.Pentaiah and defendant has nothing to do with the subsequent assertion of the divorce. Therefore, the admission can be proved against the plaintiffs. The factum of divorce being an independent fact, the same has to be established by the plaintiffs. Thus the decisions cited by the plaintiffs are of no avail.

c) So, to sum up the point No.1, the statement of marriage between N.Pentaiah and defendant can be treated as admission and proved against the plaintiffs by the defendant without necessity of further establishing the said fact by adducing evidence in view of Section 58 of Evidence Act. The rest of the statement of the plaintiffs cannot be treated as admission. Of course, since it is a relevant fact of divorce, the plaintiffs can take burden upon them and prove the same.

15) **POINT No.2:** In view of the admission of the plaintiffs and finding in point No.1, the defendant need not seek a declaratory relief that she is the legally wedded wife of N.Pentaiah. Hence this point is answered in favour of defendant.

16) **POINT No.3:** In view of the findings in point No.1, no burden rests on the defendant to establish her marriage with Pentaiah, however since she denies the divorce, the burden is on the plaintiffs to prove the existence of customary divorce in the community of N.Pentaiah and defendant and factum of their divorce.

a) It is to be noted that after the advent of Hindu Marriage Act w.e.f. 18.05.1955, divorce has to be obtained by any spouse by pleading the grounds under Section 13 of the HM Act. However customary divorce is saved by Section 29(2) of the HM Act. It lays down:

“Section 29 - Savings:

(1) xx xx

(2) Nothing contained in this Act shall be deemed to affect any right recognised by custom or conferred by any special enactment to obtain the dissolution of a Hindu marriage, whether solemnized before or after the commencement of this Act.”

Law is well settled as to how a customary divorce has to be pleaded and established.

b) In *Subramani and others vs. M.Chandralekha*⁸, the Apex Court held thus:

⁸ AIR 2005 SC 485

“Para 10: It is well established by long chain of authorities that prevalence of customary divorce in the community to which parties belong, contrary to general law of divorce must be specifically pleaded and established by the person propounding such custom.”

c) In ***Doddi Appa Rao (dead) per LRs. vs. General Manager, Telecom, Rajahmundry, East Godavari District and another***⁹, a learned Judge of this Court held thus:

“Para 11: xx xx ... In spite of making provisions and grounds for dissolution of marriage in Section 13 of the Hindu Marriage Act, still the Hindu Marriage Act recognises the divorce by custom. The said provision is contained in Section 29(2) of the said Act. The provision is based on the very principle of Hindu Law "HINDI MATTER" it means that the custom prevails over the statutory law provided the custom is ancient continues and not against the public policy etc.”

In view of the above law, the plaintiffs have to establish that customary divorce is prevalent in Vysya community to which N.Pentaiah and defendant belonged to and divorce indeed took place between them.

17) Regarding the above aspects, the plaintiffs pleaded that N.Pentaiah and defendant took divorce as per the caste customs prevalent in the Vysya community of Peddapalli in the presence of caste elders namely Thodupunuri Rajesham, late Devunuri Shankaraiah, Elenki Vaikuntam and one or two others and the said divorce was oral. Of the above elders, the plaintiffs examined Yellanki Vaikuntam as PW.9. He deposed that he is a native of Peddapalli and belongs to Vysya community and he knows N.Pentaiah and plaintiff; prior to marriage with PW.1, Pentaiah

⁹ 2000(1) ALD 607

had marriage with one lady hailing from Sircilla but subsequently some misunderstandings arose in between them; later she took away some gold, clothes from the house of Pentaiah; father of N.Pentaiah filed complaint against that lady and also against her father and in that case father of that lady was sent to Jail; when this witness and others went to Sircilla and asked to send her to the house of Pentaiah, that lady and her relatives refused and stated that if necessary, Pentaiah can have a second marriage and they also refused to return the gold and jewellery; this witness along with Pentaiah, his father, Thodupunuri Rajesham and late Devunuri Shankaraiah had talks with that lady and her father and the said mediation took place 30 years back and since then she did not come to Peddapalli and the relationship was cut-off. This witness further stated that in their community, there were instances to separate the husband and wife when their relations were strained by exchanging the ornaments and cash; there were instances where the husband and wife separated as per the advice of elders which was held in the case of Shivanathri Vykuntam and daughter of one Kanna Laxmaiah and Keserry Veeresham of Peddakalvala and Patta Narayana of Peddakalvala and Kesetti Rajaiah etc.,. In the cross-examination he stated that the custom was prevalent in the Vysya community of Telangana area; one Yada Rajaiah, Sheshaiah, Pashupathi Venkateshwarlu, Pyda Vishwanatham, Thammiseti Rajesham, who are the caste elders know about the prevalence of customary divorce in Vysya community. He further stated, the father of N.Pentaiah namely Ramaiah took them to the father of defendant at Sircilla; the father of defendant was present and he called his elder

brother's sons; the father of defendant refused to send defendant with them and so they returned to Peddapalli; even though Pentaiah and his father demanded to return the gold but they did not return the same; the father of defendant scolded Pentaiah. The witness denied that there was no customary divorce in Vysya community. He further stated that he does not know whether as per law in their community a divorce has to take place officially and there was no oral and customary divorce. He denied that after the death of Pentaiah, the defendant went to Peddapalli and got performed the obsequies through the son of Shankaraiah. When the evidence of PW.9 is scrutinized, one fact is clear. Earlier Pentaiah married a lady of Sircilla, who is none other than the defendant. Thus the factum of their marriage is spoken by none other than the witness of the plaintiffs. Coming to the aspect of divorce, as rightly observed by the trial court, except stating that the defendant was not sent to the house of N.Pentaiah inspite of their request and due to the theft of the ornaments committed by the defendant and her father and due to filing of criminal complaint by the father of N.Pentaiah the relations were strained and cut-off, there was no specific assertion by PW.9 that a customary oral divorce was effected between N.Pentaiah and defendant. Mere refusal to send the defendant to the house of N.Pentaiah, even if true, cannot be construed as divorce. On the other hand, one of the elders enlisted by PW.9 namely Pashupathi Venkateshwarlu was examined as DW.4 by the defendant. He categorically deposed that there is no oral divorce in their Vysya community and to his knowledge, he has not come across a case where oral divorce was taken in their Vysya community. He stated that

there were some disputes between defendant and her husband N.Pentaiah but he never heard about their separation by way of divorce. In the cross-examination he pleaded ignorance about the customary divorce purported to be taken place between Shivanathri Vykuntam and his wife and also one Bhudevi of Kanna Laxmi. Since PW.9 himself referred DW.4 as an elder and no reason is suggested as to why he should speak falsehood to help defendant, the evidence of DW.4 can be accepted, which reveals that there was no custom of oral divorce prevalent in their Vysya community. The plaintiffs have not examined any of the couple in Peddapalli area, who underwent customary divorce. Above all, DW.5, who is none other than the brother-in-law of the Pentaiah (sister's husband of Pentaiah) deposed in clear terms that the defendant is the wife of N.Pentaiah and in their community there was no customary divorce and after the death of Pentaiah, as he had no issues, the defendant and the son of the third brother of Pentaiah performed his obsequies. Thus the plaintiffs failed to establish the prevalence of customary divorce much-less oral divorce in the community of Pentaiah and defendant. They also failed to prove their divorce.

18) **POINT No.4:** The first plaintiff claims that she married Pentaiah in the year 1971 in a temple situated at Mukarampura locality in Karimnagar, after the death of first wife of Pentaiah. It must be noted that in amended pleadings, the first plaintiff mentioned that she married N.Pentaiah after the customary divorce between defendant and N.Pentaiah. The trial Court dismissed her claim mainly on the ground that she failed to prove that her marriage was solemnized in accordance

with the provisions under Sec.7 of HM Act. In view of the findings in points 1 to 3, even if her marriage was duly solemnized in accordance with the customary rites as per Section 7 of HM Act, still the first plaintiff cannot claim herself to be the legally wedded wife of N.Pentaiah because she could not establish the factum of divorce between N.Pentaiah and the defendant. Therefore, what is germane for consideration is whether she is the married wife of late N.Pentaiah though second marriage is void under Sec.11 of HM Act or whether she is his exclusively kept mistress. If she could establish her marriage though void, plaintiffs 2 to 4 will be legitimised and get the share in the properties of N.Pentaiah as per Sec.16 of HM Act. On the contrary, if she is only a concubine, her children do not get legitimacy.

a) To prove her marriage, besides examining herself as PW.1 and she also examined PW.3. She produced supporting oral and documentary evidence to show that the plaintiffs were treated as wife and children of N.Pentaiah. This Court carefully scrutinized the evidence.

b) PW.1, in her evidence deposed that her marriage with Pentaiah took place in 1971 in a temple in Mukarampura at Karimnagar and she was unmarried by then; she came to Peddapalli as a teacher about one month prior to her marriage with Pentaiah and lived in the house of Pentaiah as a tenant at Peddapalli by which time he was a widower and having no issues; while living in the house of Pentaiah, both of them decided to marry and got married and plaintiffs 2 to 4 were born to them; defendant had no concern with Pentaiah and she never married him; after

marriage, both of them lived in item No.1 of suit schedule property until his death and even now also. In the cross-examination she stated that she was aged 19 years when she came to Peddapalli; in the year 1971 she came to Peddapalli and stayed in the house of Pentaiah as a tenant at Pochammawada and even after marriage she stayed in the house upto 1980 and thereafter they shifted to Item No.1 suit schedule. She admitted that she belongs to Battaraju community and Pentaiah was of Vysya community. She denied the suggestion that she was married to one Venkateshwar Raju of Mogilicherla.

c) Then PW.3, who is a childhood friend of Pentaiah deposed that they were schoolmates and he attended the marriage of Pentaiah and first plaintiff held in the year 1971 in Anjaneya temple of Mukarampura, Karimnagar; prior to the said marriage, Pentaiah had married once but his wife died; Pentaiah had two children through plaintiff No.1 before his death and by the time of his death, plaintiff No.1 was pregnant; Pentaiah invited him for the cradle ceremony of his two children which was held in Item No.1 of plaint schedule; Pentaiah died in Government Civil Hospital at Karimnagar and he was in unconscious stage for about 8 days and he visited during his illness and noticed plaintiff No.1 was attending Pentaiah in the hospital; on knowing about his death through plaintiff No.1, he went to the Hospital and brought the dead body by engaging a Jeep and he attended the funeral of Pentaiah performed by plaintiff No.1; plaintiff No.2 lit the funeral pyre; his obsequies were also performed by her through one Kunti Gopalam, Brahmin. He denied the suggestion that he did not visit the hospital and due to his intimacy with plaintiff No.1,

he was speaking falsehood and plaintiff No.1 was only a concubine of Pentaiah.

d) Thus PWs.1 and 3 have deposed about the marriage of 1st plaintiff with Pentaiah. No doubt, Pentaiah and PW.1 belonged to different communities and these witnesses did not depose about the date of marriage, name of the Purohit and particulars of the ceremonies as observed by the trial Court. However, in the considered view of this Court, on that ground alone the factum of marriage cannot be rejected. PW.3 is an independent witness and a friend of late Pentaiah and this fact was not disputed. That being so, there is no reason for him to speak falsehood regarding their marriage. Long after the marriage, it would be difficult for any person to give the minute details about the Purohit and particulars of the ceremonies. Further, it should not be forgotten that theirs being an inter caste marriage, non-adherence to the customary rites, cannot be ruled out. The oral evidence of PWs.1 and 3 gets corroboration from the other facts and evidence. Firstly, there was a long cohabitation between 1st plaintiff and N.Pentaiah till his death and 1st plaintiff conducted funeral and obsequies of N.Pentaiah. Admittedly, 1st plaintiff joined as tenant in the house of Pentaiah in 1971. The defendant (DW.1) admitted in her cross-examination that plaintiff was a tenant in the house constructed at Pochammawada by her husband in the year 1973 and in 1975, the 1st plaintiff came to the house purchased by her husband in the main bazar of Peddapalli and she did not lodge any complaint to his relations about the illegal connection between her husband and 1st plaintiff and she knew about her husband and plaintiffs visiting to Sri

Lanka. If 1st plaintiff was only a tenant or a concubine, she would not have shifted houses along with Pentaiah and defendant. Secondly, in Ex.A.3—passport, the plaintiffs are referred as the wife and children of N.Pentaiah and they had been to Sri Lanka. Generally passport will be issued after thorough verification of the facts mentioned therein. Unless Pentaiah avouched truth of the contents, the authorities might not have issued passport to plaintiffs with the details mentioned in Ex.A.3. Thus this document is a proof positive of their marital relationship. Thirdly, E.A.8—photograph which is not disputed, would show that Pentaiah and 1st plaintiff performed Kanyadanam to the sister of 1st plaintiff during her marriage. If PW.1 was only a concubine, it is quite unlikely that Pentaiah would sit along with her and perform Kanyadanam of her sister. In Exs.A.4 and A.5—certificates issued by the Gram Panchayat, Peddapalli, plaintiffs 2 and 3 are referred as children of N.Pentaiah. Similarly, in Ex.A.10—LIC policy, Pentaiah mentioned 1st plaintiff as his wife and nominee. So a long association of Pentaiah and PW.1 coupled with variety of documentary and oral evidence would suggest a presumption of their marital status, though void. It is to be noted that the trial Court gave a finding that the defendant failed to prove, PW.1 earlier married one Venkateshwar Raju of Mogilicherla. There is no strong ground to disturb that finding. It is to be further noted that DW.2, who is the cousin brother of defendant and DW.5, who is the brother-in-law of Pentaiah though stated that Pentaiah's marriage was held with defendant, they did not specifically state that there was no marriage between

N.Pentaiah and PW.1. They only pleaded their ignorance about that fact.

Thus the marriage between PW.1 and Pentaiah can be safely presumed.

19) In *Tulsa and others vs. Durghatiya and others*¹⁰, the Apex Court considering several decisions reiterated about the presumption of marriage as follows:

“Para 9: At this juncture reference may be made to the Section 114 of the Indian Evidence Act, 1872 (in short the 'Evidence Act'). The provision refers to common course of natural events, human conduct and private business. The court may presume the existence of any fact which it thinks likely to have occurred. Reading the provisions of Sections 50 and 114 of the Evidence Act together, it is clear that the act of marriage can be presumed from the common course of natural events and the conduct of parties as they are borne out by the facts of a particular case.

*Para 10: A number of judicial pronouncements have been made on this aspect of the matter. The Privy Council, on two occasions, considered the scope of the presumption that could be drawn as to the relationship of marriage between two persons living together. In first of them i.e. **A. Dinohamy v. W.L. Blahamy (AIR 1927 P.C. 185)** their Lordships of the Privy Council laid down the general proposition that:*

Where a man and woman are proved to have lived together as man and wife, the law will presume, unless, the contrary be clearly proved that they were living together in consequence of a valid marriage, and not in a state of concubinage.

*Para 11: In **Mohabhat Ali vs. Md. Ibrahim Khan (AIR 1929 PC 135)** their Lordships of the Privy Council once again laid down that:*

¹⁰ AIR 2008 SC 1193

The law presumes in favour of marriage and against concubinage when a man and woman have cohabited continuously for number of years.

Para 12: It was held that such a presumption could be drawn under Section 114 of the Evidence Act.

*Para 13: Where the partners lived together for long spell as husband and wife there would be presumption in favour of wedlock. The presumption was rebuttable, but a heavy burden lies on the person who seeks to deprive the relationship of legal origin to prove that no marriage took place. Law leans in favour of legitimacy and frowns upon bastardy. (See: **Badri Prasad vs. Dy. Director of Consolidation and others** (AIR 1978 SC 1557)).*

*Para 14: This Court in **Gokal Chand vs. Parvin Kumari** (AIR 1952 SC 231) observed that continuous co-habitation of woman as husband and wife and their treatment as such for a number of years may raise the presumption of marriage, but the presumption which maybe drawn from long co-habitation is rebuttable and if there are circumstances which weaken and destroy that presumption, the Court cannot ignore them.”*

In view of the thicket of citation, the decision in **Surjit Kaur**’s case (4 supra) cited by respondent is ignored.

In the instant case, their marriage can be safely presumed since no strong circumstances debilitating such presumption are brought forth. The trial Court erred in disbelieving their marriage. Hence regarding this point, it is held that there was indeed a marriage between N.Pentaiah and 1st plaintiff which ofcourse was a void marriage. Consequently, plaintiffs 2 to 4, who are born to them, are legitimate children by virtue of Sec.16 of HM Act.

20) **POINT No.5:** Summing up the findings in points 1 to 4,

- (i) Rukkamma i.e, defendant is the legally wedded wife of late N.Pentaiah and their marriage is subsisting as plaintiffs failed to prove the divorce;
- (ii) 1st plaintiff is the second wife of N.Pentaiah and their marriage is void under Sec.11 of HM Act and consequently she is not entitled for declaration.
- (iii) Plaintiffs 2 to 4 in O.S.No.63 of 1987, who are the children of 1st plaintiff and N.Pentaiah, are their legitimate children in terms of Section 16 of HM Act.
- (iv) Plaintiffs 2 to 4 and defendant in O.S.No.63 of 1987 are entitled to equal shares in plaint schedule properties in O.S.No.63 of 1987 and consequently, plaintiffs in O.S.No.63 of 1987 are not entitled to the relief of injunction and plaintiff in O.S.No.115 of 1987 is not entitled to declaration and possession.

21) With the above findings, generally both the suits are liable to be dismissed for the reason that plaintiffs in O.S.No.63 of 1987 are not entitled to seek injunction in respect of whole of the plaint schedule properties because defendant is a co-sharer and entitled to 1/4th share. Similarly, the plaintiff in O.S.No.115 of 1987 is also not entitled to declaratory and possessory reliefs as the defendants 1 to 3 therein are the co-sharers in respect of the 3/4th share. Hence, the question before this Court is when the parties have been litigating since 1987 for the

properties of N.Pentaiah, is it worthwhile to dismiss their suits and drive them to another suit for partition for vindicating their rights. Or whether the Court in the interest of justice can grant suitable relief to the parties though not asked for.

a) Order VII Rule 7 CPC provides the answer. It reads as follows:

“Rule 7: Relief to be specifically stated—

Every plaint shall state specifically the relief which the plaintiff claims either simply or in the alternative, and it shall not be necessary to ask for general or other relief which may always be given as the Court may think just to the same extent as if it had been asked for. And the same rule shall apply to any relief claimed by the defendant in his written statement.”

The precedential jurisprudence with reference to Order VII Rule 7 CPC is to the effect that when a party makes a larger claim but deserves only a smaller relief, the Court in the interest of justice, can grant the same though not asked for but converse is not the rule.

i) In *Neelawwa vs. Shivawwa*¹¹, the facts are more or less similar to the instant case. The Division Bench of Karnataka High Court considering their earlier judgment reported in *Rangappa vs. Jayamma*¹², held thus:

“Therefore we are of the view that instead of driving the plaintiff to another suit for partition, in conformity in the right she has established, it is just and appropriate to pass a preliminary decree for partition and separate possession of her half share.”

¹¹ AIR 1989 Kant 45

¹² (1987) 2 Kar LJ 369

ii) In similar circumstances, the Division Bench of this Court in a decision reported in ***Kusam Satyanarayana Reddy and others vs. Kusam Sambrajjamma (died) by LRs and others***¹³, observed thus:

*“Para 18: In view of this judgment and in view of the mandate of Order 7, Rule 7 of the Code which clothes the Courts with inherent power to grant either general relief or other relief which appears to be just, legitimate and proper in any case even though such reliefs have not been specifically asked for. We find no difficulty in this case in upholding the Trial Court's judgment. It may also be, however, noted that under Order 7, Rule 7 of the Code although the Court can grant a relief which has not been asked for, but it cannot grant a relief which is larger than the relief claimed by the plaintiff, but where the relief claimed by the plaintiff is larger and the Court grants a relief which is smaller than the one claimed, it would be legal. In the present case the plaintiffs claimed whole property, but on facts the Trial Court found that they could claim part of the property as legal representatives of the original owner along with some of the defendants. Therefore, in our view, the Trial Court was right in granting the decree of partition. Same view was expressed by the Orissa High Court in a judgment reported in ***Managobinda vs. Brajabandhu Misra (AIR 1986 Ori 281 = MANU/OR/0088/1986)***, where the plaintiff had claimed a declaration of exclusive title, confirmation of possession and consequent permanent injunction, but the Court found it to be joint property and did not agree with the plaintiff that he had the exclusive title and possession. In the result the Court passed a decree that the plaintiff had joint title and possession over the suit property.”*

iii) In the instant case also, the plaintiffs in both the suits sought for a larger claim that they are entitled to the suit properties as the legal heirs of late N.Pentaiah but ultimately they were found entitled to smaller extent than they claimed. So instead of dismissing their suits and driving

¹³ 2004 (2)ALD 635

them to seek for partition, such a relief can be granted in the present proceedings itself.

22) In the result, the common judgment dated 27.08.1992 in O.S.No.63 of 1987 and O.S.No.115 of 1987 passed by the trial Court is set aside by ordering both the appeals as follows:

a) TRAS No.548 of 2014 is partly allowed and consequently O.S.No.63 of 1987 is partly decreed as follows:

- (i) Plaintiffs 2 to 4 are declared as the legitimate children of N.Pentaiah and 1st plaintiff; Plaintiffs 2 to 4 are entitled to 3/4th share and defendant is entitled to 1/4th share in the plaint schedule property and accordingly, a preliminary decree for partition is passed.
- (ii) 1st plaintiff's prayer for a declaration that she, but not the defendant, is the wife of late N.Pentaiah is dismissed.
- (iii) Plaintiff's prayer for perpetual injunction in respect of plaint schedule properties is dismissed in view of the relief of partition granted.

b) AS No.1999 of 1992 is allowed and the suit in O.S.No.115 of 1987 is dismissed in view of granting relief of partition to the present plaintiff and others in O.S.No.63 of 1987.

c) No costs in both the appeals.

As a sequel, miscellaneous applications pending, if any, shall stand closed.

U.DURGA PRASAD RAO, J

Date: 16.08.2017
Murthy/scs