

***HON'BLE SRI JUSTICE D.V.S.S. SOMAYAJULU**
+AS No.936 of 1999

% 20-09-2018

Gollapinni Reddy Balaprasad
and another

... Appellant/
Plaintiffs

Vs.

\$ Kota Venkataiah (died)
per LRs. and others.

... Respondents/
Defendants

! Counsel for the appellants: Sri G. Ramesh Babu

Counsel for the Respondents: Sri B. Sudhakar Reddy
and Sri Keerthi Kiran Kota

< Gist:

> Head Note:

? Cases referred:

¹ AIR 1981 Punjab and Haryana 130

² (2008) 8 SCC 521

³ 1999 (1) ALD 676

⁴ AIR 1988 Madras 117

⁵ AIR 1994 Rajasthan 31

⁶ AIR 1963 AP 15

⁷ AIR 1979 Punjab & Haryana 194

⁸ (2010) 2 SCC 162

⁹ (2010) SCC 277

¹⁰. (1999) 5 SCC 590

¹¹. AIR 1994 SC 152

¹². AIR 1999 SC 1136

¹³. AIR 1965 SC 1153

¹⁴. AIR 1964 SC 993

¹⁵. AIR 1971 AP 74

¹⁶. AIR 1979 SC 551

¹⁷. (2000) 3 SCC 350

¹⁸. (2014) 12 SCC 696

¹⁹. (2005) 11 SCC 189

²⁰. (2005) 8 SCC 67

²¹. 1994 (1) ALT 673 (DB)

²². 2017 (4) ALD 386 (DB)

²³. AIR 1954 SC 280

²⁴. AIR 1982 Calcutta 428

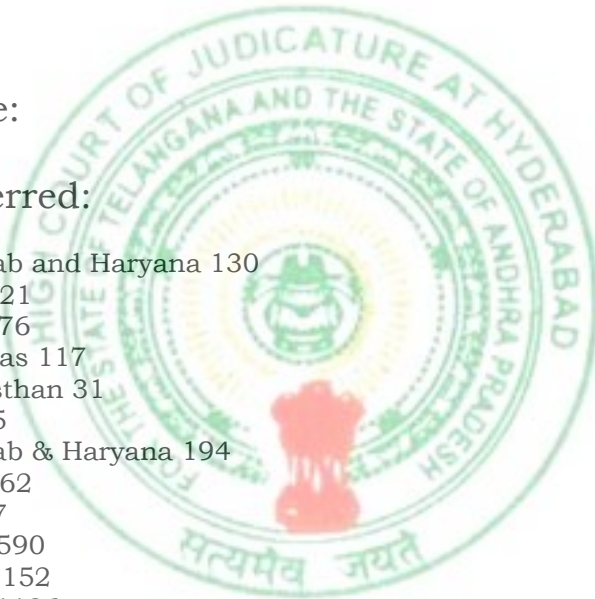
²⁵. AIR 1974 SC 1999

²⁶. AIR 1959 SC 443

²⁷. AIR 1965 SC 354

²⁸. AIR 1972 SC 2492

²⁹. AIR 1962 Punjab 196



HON'BLE SRI JUSTICE D.V.S.S. SOMAYAJULU**A.S.No.936 of 1999****JUDGMENT:**

This appeal is filed by the defendants against the judgment and decree dated 26.02.1999 passed in Original Suit No.54 of 1996 by the Senior Civil Judge, Piler, which was originally filed as O.S.No.182 of 1983 on the file of the Sub-Court, Madanpalle, Chittoor District.

2. For the sake of convenience, as this is a first appeal, the parties are referred to as in the suit only viz., 'plaintiffs' and 'defendants'.

3. The suit for a declaration of the joint half share of plaintiffs 1, 2, 4 and 5 in plaint-A schedule properties and for partition and division of the said properties and to put them in separate possession and enjoyment of it, to direct the defendants or such other defendants to render true, correct and proper past share-in-profits from the date of suit till the date of actual delivery and also to direct them to pay the ascertained sum with interest at 12% per annum by way of damages from the date of suit till the date of realization and for costs.

4. The averments in the plaint briefly are that the 8th defendant is the father of plaintiffs 1 and 2 and husband of the 3rd plaintiff. The 2nd defendant is the wife of 1st defendant. The 6th defendant is the Karanam of

Devalapalle Village of Vayalpad Taluk, where the plaint-A schedule properties are situated. The plaint-A schedule properties are the ancestral properties of plaintiffs 1 to 3, which originally belonged to G. Venkata Chalamaiah (father of 8th defendant) and paternal grandfather of plaintiffs 1 and 2. He died on 06.02.1948 in an undivided status. Subsequent to his death, his wife-G. Venkamma succeeded to his entire estate including the suit properties as per the Hindu Women's Right to Property Act, 1937. They were enjoying the same jointly without any actual division by metes and bounds as co-heirs. The joint properties in the hands of the mother of 8th defendant became enlarged by the advent of the Hindu Succession Act 1956. Thus, she became the absolute owner of her husband's properties to the extent of half share. She perfected her right, title and possession to the same for more than the statutory period. Venkamma, mother of 8th defendant died on 29.11.1977. During her life time, she executed a last and final Will dated 30.10.1974 in favour of the plaintiffs in a sound and disposing state of mind. Thus, by virtue of the said Will, the plaintiffs have succeeded to her share of the suit properties and became co-owners along with 8th defendant.

5. During the life time of Venkamma, she learnt about the unauthorized nominal bogus and illegal sales, effected by 8th defendant in favour of defendants 1 to 7. The alleged purchasers do not get any valid title or legal possession to the joint half share of Venkamma in the suit properties. Immediately, after coming to know about the unauthorized and illegal sales effected by 8th defendant, she got issued a registered notice dated 12.08.1974 to the defendants with true and correct facts. When the defendants failed to comply with the legitimate requests of Venkamma, she filed O.S.No.2 of 1975 on the file of the Sub-Court, Madanapalle for declaration of her half right and title to the plaint-A schedule properties and for partition and separate possession of the same through court. It was a pauper suit originally filed as OS No.36 of 1974, which was later numbered as O.S.No.2 of 1975. During the pendency of O.S.No.2 of 1975, Venkamma died on 29.11.1977. She executed a Will dated 30.10.1974 and as per the same, the plaintiffs 1 to 3 became the rightful and legitimate joint owners of her half share in the suit properties. Therefore, the plaintiffs filed I.A.No.779 of 1977 for impleading them as legal representatives of the deceased-sole plaintiff in O.S.No.2 of 1975 on the strength of the above Will, as her interest devolved upon them during the pendency of O.S.No.2 of

1975. Both sides were heard in IA No.779 of 1977 and the petition was dismissed on 10.04.1979 after an enquiry under Order 22 Rule 5 CPC. The plaintiffs preferred a CRP No.2388 of 1979 before this Court, which was also dismissed on 09.09.1980, as there was no error of law apparent on the face of the record. Stating that there was no finality attached to the orders passed in IA No.779 of 1977 and arguing that the same cannot be deemed to either a decree or judgment within the four corners of law, the present suit is filed. The plaintiffs plead that the substantive rights of plaintiffs 1 to 3 are not either destroyed or extinguished or taken away by the disposal of IA No.779 of 1977. Hence, there is no bar for the plaintiffs 1 to 3 to file a regular suit on the strength of the valid Will dated 30.10.1974 executed by Venkamma in their favour.

6. The defendants 1 to 3 and 5 to 7 filed a written statement contending that the date of death of Venkata Chelamaiah given as 06-02-1948 is not correct. He died much earlier. It is false to state that after the death of Venkata Chelamaiah, his wife Venkamma succeeded to her husband's half share as per the Hindu Women's Right to Property Act, 1937. After the death of Venkata Chelamaiah, his share devolved upon the 8th defendant, who is his sole surviving son by the law of survivorship.

As per the law then in force, Venkamma had only a right of maintenance and she did not get any right in the suit properties. The 8th defendant became the full and absolute owner of all the properties after the death of his father and he had been in exclusive possession and enjoyment of the said properties in his own independent right and he had also perfected his right and title to the same by adverse possession. The allegation that Venkamma became the full and absolute owner by virtue of the Hindu Succession Act, 1956 is false. The alleged Will dated 30.10.1974 said to have been executed by Venkamma is a forged document brought into existence by 8th defendant and plaintiffs. After the death of Venkamma, her only legal heir is her son i.e., 8th defendant. Even if Venkamma had any share that was inherited by 8th defendant only. The 8th defendant forged the Will in order to overcome the provisions contained in Section 43 of the Transfer of Property Act. The registered sale deeds executed by 8th defendant are all for valid consideration and those documents are true and valid and were also acted upon. They are all binding on the plaintiffs. It is true that 8th defendant got filed O.S.No.2 of 1975 through his mother. These defendants filed written statements and contested the said suit. After the death of Venkamma, 8th defendant set up a forged Will

dated 30.10.1974 and got I.A.No.779 of 1977 filed for impleading the plaintiffs herein as legal representatives of his deceased mother. The said petition was dismissed, after due enquiry. Both sides let in evidence and filed documents in the said IA. The allegation that it was only a summary enquiry is not correct. The Court gave a clear finding that the Will dated 30.10.1974 was a forged document. The said order was upheld and confirmed by this Court in CRP No.2388 of 1979. The allegation that there was no finality attached to the order passed in IA No.779 of 1977 and confirmed by this Court and they are not a judgment and a decree and that the alleged substantive rights of the plaintiffs are not extinguished by the decision in the above IA is not correct. The further allegation that there is no bar of *res judicata* and this court has got jurisdiction to entertain the suit again is not correct. The decision in IA No.779 of 1977 clearly operates as *res judicata*. The said order has become final and conclusive. The matter cannot be once again agitated. They are not entitled for the relief of declaration for half share in the plaint-A schedule properties and for rendition of accounts.

7. The defendants 1, 5 and 6 filed an additional written statement contending that item No.11 of the plaint schedule was also purchased by 5th defendant

from 8th defendant for valid consideration. The plaintiffs have no right in it. The very fact that the plaintiffs were not aware of even the correct extents and survey numbers will show that neither their grandmother nor they were in joint possession of the suit lands at any time. Hence, the suit is liable to be dismissed with costs. The defendants 4 and 8 remained set *ex parte*.

8. On the above pleadings, the lower Court framed the following 13 issues:

- i) Whether the Will dated 30.10.1974 is true, valid and executed by late Venkamma in favour of the plaintiff?
- ii) Whether the decision in IA No.779 of 1977 in OS No.2 of 1975 on the file of Sub-Court, Madanapalle as confirmed by the High Court in CRP No.2388 of 1979 operates as res judicata and the debar the plaintiffs from relying upon the Will dated 30.10.1974?
- iii) Whether the suit is barred by limitation?
- iv) Whether the defendants 1 to 3 and 5 to 7 who have purchased the suit lands have also perfected their right and title to the suit properties?
- v) Whether the plaintiffs are estopped by their conduct and record from relying upon the Will dated 30.10.1974?
- vi) Whether the suit is maintainable in view of the abatement of the earlier suit OS No.2 of 1975 on the file of this Court?
- vii) Whether Venkamma had any right or title to any share in the suit properties?

- viii) Whether the defendants 1 to 3 and 5 to 7 had made and if so what improvements to the properties purchased by them and whether they are entitled to the improvements made by them and the equities as pleaded by them?
- ix) Whether the various sale deeds executed by 8th defendant in favour of defendants 1 to 3 and 5 to 7 are for consideration and were binding on Venkamma also?
- x) Whether the plaintiffs are entitled for rendition of accounts?
- xi) Whether the suit is frivolous and vexatious and the plaintiffs are liable to pay compensatory and exemplary costs to defendants 1 to 3 and 5 to 7?
- xii) Whether the plaint schedule is correct?
- xiii) To what relief?

9. The parties went to trial. For the plaintiffs, PWs.1 to 5 were examined and Exs.A.1 to A.33 were marked. For the defendants, DWs.1 to 9 were examined and Exs.B.1 to B.19 were marked. After considering the oral and documentary evidence, the lower Court dismissed the suit with costs. It is this judgment that is now assailed in the appeal.

10. This Court has heard Sri G. Ramesh Babu, learned counsel for the appellants/plaintiffs and Sri B. Sudhakar Reddy and Sri Keerthi Kiran Kota, learned counsel for the respondents/defendants. Both the learned counsel proceeded to argue the matter in line

with the issues that were decided by the lower Court. The fundamental points that were urged by both the learned counsel are on issue Nos.7, 2, 6 and 1. Hence, this Court is proceeding to decide the same at the outset.

11. The facts which clear are that plaintiffs 1 and 2 are the sons and 3rd plaintiff is the wife of 8th defendant. The 8th defendant is the son and his mother Venkamma is the wife of late Venkata Chelamaiah. The plaint-A schedule properties originally belonged to the said Venkata Chelamaiah and they are ancestral properties. Venkata Chelamaiah died intestate and subsequently on 29.11.1977 his wife Venkamma died. The defendants 1 to 3 and defendants 5 to 7 purchased the suit properties from 8th defendant and they are in possession and enjoyment of the same. Venkamma filed a suit in OS No.2 of 1975 on the file of the Sub-Court, Madanapalle and she died during the pendency of the said suit. After the death of Venkamma, the plaintiffs filed IA No.779 of 1977 in OS No.2 of 1975 for impleading them as plaintiffs 2 to 4 in the above suit on the strength of a Will dated 30.10.1974 under which Venkamma is alleged to have bequeathed the suit properties in their favour. The said IA was dismissed after a full fledged enquiry. The plaintiff filed a revision against the said order before this Court in CRP No.2388 of 1979 and the

same was also dismissed on 09.09.1980. As a result of the dismissal of CRP No.2388 of 1979, the suit O.S.No.2 of 1975 was dismissed as abated. The plaintiffs have filed the present suit for the same relief of declaration of their half joint right and partition and separate possession of the suit properties.

12. Issue No.7 is whether Venkamma had any right or title to any share in the suit properties. As noticed in the facts, which are clear, Venkamma is the wife of Venakata Chelamaiah. According to the case of the plaintiffs, the said Venkata Chelamaiah died on 06.02.1948. On the contrary, the defendants contend that Venkata Chelamaiah died prior to 1947. To prove that Venkata Chelamaiah died on 06.02.1948, the plaintiffs filed Ex.A.1-death certificate through PW.1. The death register extract has also been marked through PW.1. This Court notices in line with the observation of the lower Court that there is no effective cross-examination on Ex.A.1. Therefore, this Court has no reason to disbelieve the evidence of PW.1 on Ex.A.1. It is a certified extract and this Court agrees with the finding of the lower Court that Venkata Chelamaiah died on 06.02.1948. In view of the death of Venkata Chelamaiah on 06.02.1948, the rights that were conferred on Venkamma were enlarged into full rights as per the

Hindu Succession Act and the share possessed by Venkata Chelamaiah devolved on his wife-Venkamma. Therefore, this Court agrees with the finding of the issue No.1 that Venkamma became a co-owner and shared along with the 8th defendant. Therefore, issue No.7 is rightly decided by the lower Court in the opinion of this Court.

13. The next issue that was urged by both the learned counsel during the course of arguments in the appeal is whether the decision in IA No.779 of 1977 in OS No.2 of 1975 on the file of the Sub-Court, Madanapalle, as confirmed by this Court operates as *res judicata*. Both the learned counsel largely concentrated on this issue during the course of submissions. The entire case law relied upon by both the parties is on the issue of *res judicata* and on the question of whether the orders passed in IA No.779 of 1977 in OS No.2 of 1975 operates as *res judicata*.

14. Venkatamma, the wife of Venkata Chelamaiah filed a suit against O.S.No.2 of 1975 on the file of the Sub-Court, Madanapalle in respect of the plaint-A schedule property. She sought a declaration of right, title and interest against the present defendants. Venkamma died on 29.11.1979. Ex.A.2 bears testimony to this. According to her legal representatives she executed a Will

dated 31.10.1974 in favour of the plaintiffs. After she died, IA No.779 of 1977 in OS No.2 of 1975 was filed by the present plaintiffs to implead them as legal representatives of the deceased-Venkamma on the basis of the Will. A counter affidavit was filed and an enquiry was conducted in IA No.779 of 1977. Witnesses were also examined in the said petition. As the legal representatives were coming on record basing on the Will, the attestor and the scribe were also examined. After taking in the oral and documentary evidence, the lower Court held that the Will is not a genuine document and therefore, IA No.779 of 1977 was dismissed. The plaintiffs in the suit who are the petitioners therein filed CRP No.2388 of 1979 on the file of this Court. This Court by order dated 09.09.1980 concurred with the orders of the lower Court in IA No.779 of 1977 and held that the Will is not a genuine document. As a result of this, O.S.No.2 of 1975 was held to be abated on the death of Venkamma.

15. In the plaint filed in the present suit also, the plaintiffs have clearly pleaded about the suit O.S.No.2 of 1975, about IA No.779 of 1977 about the enquiry under Order 22 CPC etc. They also pleaded in para-11 of the plaint that the order in IA No.779 of 1977 is not a decree and judgment and that *res judicata* will not apply. Therefore, they urged that the present suit is

maintainable. The defendants have in their written statement denied these allegations and in para-2, they clearly pleaded that the order passed in IA No.779 of 1977 operates as *res judicata*. Their contention is that a Court of competent jurisdiction after due enquiry held that the Will is a forged Will and that therefore, the issue cannot be reopened or re-agitated in the present suit. Issue No.2 was framed for this point which is to the following effect:

“Whether the decision in IA No.779 of 1977 in OS No.2 of 1975 on the file of Sub-Court, Madanapalle as confirmed by the High Court in CRP No.2388 of 1979 operates as *res judicata* and the debar the plaintiffs from relying upon the Will dated 30.10.1974?”

16. The lower Court held that the decision in IA No.779 of 1977 operates as *res judicata* and that once the Will is held to be fake Will, it cannot be re-agitated in the present case once again.

17. The learned counsel for the appellants argued that IA No.779 of 1977 was filed under Order 22 Rule 4 CPC to bring on record the legal heirs of the deceased-Venkamma. His submission is that an enquiry under Order 22 Rule 5 CPC is only for the limited purpose for continuation of the suit or the proceedings and that a finding in such summary enquiry will only decide the

question as to who is the legal representative to continue the suit and nothing more. He relied upon Order 22 Rule 5 CPC which is to be following effect.

“Where a question arises as to whether any person is or is not the legal representative of a deceased plaintiff or a deceased defendant, such question shall be determined by the Court.”

Therefore, the contention of the learned counsel for the appellants is that the only question that has been decided is whether any person is a legal representative of the deceased party. He argues that the substantive rights are not being decided.

18. In reply to this, the learned counsel for the respondents submits that in deciding the right of a party to contest the lis, the lower Court went into the correctness of the document on which they rely namely the Will. The Court after taking oral and documentary evidence came to a conclusion that the Will introduced by the petitioners' legal representatives is not a genuine document. Therefore, their right to continue the lis OS No.2 of 1975 was negatived. Hence, the learned counsel submits that the finding given is a final finding on the merits of the matter and that the same cannot be reopened. He strongly argued that the principle of *res judicata* applies.

19. The learned counsel for the appellants cited the following judgments:

- i) ***Mohinder Kaur v. Para Singh***¹;
- ii) ***Jaladi Suguna v. Satya Sai Central Trust***²;
- iii) ***Dokala Buchiraju v. Dokala Bangaramma (died) by LR***³;
- iv) ***Muniappa Nadar v. K.V. Doraipandi Nadar***⁴;
- v) ***Kalu Ram, s/o. Shri Ganga Ram v. Charan Singh***⁵;
- vi) ***Kondapalli Ayyanna v. Venka Bhadraiah, minor by Guardian Venka Subba Rao***⁶;
- vii) ***Mangat v. Surja***⁷;
- viii) ***Suresh Kumar Bansal v. Krishna Bansal***⁸; and
- ix) ***Dashrath Rao Kate v. BRU Mohan Srivastava***⁹.

20. The learned counsel for the appellants relied upon the Full Bench decision of the Punjab and Haryana High Court in ***Mohinder Kaur*** (1 supra). The question framed for decision before the Full Bench is reproduced in para-1 of the said judgment and it is to the following effect:

“Whether, in no case, a decision under Order 22, Rule 5 Civil Procedure Code, would operate as *res judicata* between the same parties or their successors-in-

¹ AIR 1981 Punjab and Haryana 130

² (2008) 8 SCC 521

³ 1999 (1) ALD 676

⁴ AIR 1988 Madras 117

⁵ AIR 1994 Rajasthan 31

⁶ AIR 1963 AP 15

⁷ AIR 1979 Punjab & Haryana 194

⁸ (2010) 2 SCC 162

⁹ (2010) SCC 277

interest or their privies n subsequent proceedings even when the contested issue in the earlier proceedings had been decided by the Court on merits after affording fair and due opportunity to the contesting parties to lead evidence and of hearing?”

The final conclusion to this reference is at para-10 and the same is to the following effect:

“In view of the above discussion we are clearly of the opinion that the answer to the above referred to question stated in the opening part of the judgment has to be in the affirmative and we accordingly hold that in no case a decision under Order 22, Rule 5, Civil Procedure Code, would operate as *res judicata* between the same parties or their successors in interest or their privies, in a subsequent proceeding, even when the said parties had been provided an opportunity to contest the issue and lead the evidence thereon. With this answer to the question posed, we send back the case to the learned single Judge for decision on merits.”

21. In **Jaladi Suguna**’s case (2 supra), the Hon’ble Supreme Court of India in para-15 held that the determination as to who is the legal representative under Order 22 Rule 5 CPC will be for the limited purpose of representation of the estate of the deceased, for adjudication of that case. To the same effect is the judgment of a single Judge of this Court in **Dokala Buchiraju** (3 supra). In this case also, both oral and documentary evidence were introduced to prove a Will on the basis of which the legal representatives of the

deceased to come on record. The learned single Judge held that the enquiry under Order 22 Rule 5 CPC is only for the purpose of enabling the further conduct of the case. To the same effect are the decisions of **Muniappa Nadar's** case (4 supra) and **Kalu Ram's** case (5 supra). The next judgment relied upon by the learned counsel for the appellants is a Division Bench judgment of this Court in **Kondapalli Ayyanna's** case (6 supra). In para-14, the Division Bench of this Court held as follows:

“14. If we apply that test, our decision cannot be regarded as either a judgment, decree or final order. The order sought to be appealed against was one passed under Order 22 Rule 5 and it is limited to the purpose of continuing the appeal. As such, it is only a collateral matter and it is not germane to the real issue arising in the suit or appeal viz., as to the factum and the validity of the adoption of the respondent. The question as to who is the legal representative of the plaintiff or the defendant does not touch the subject matter of the suit as it does not relate to any of the issues arising in the suit, the only concern of the Court in that enquiry being as to who should be admitted to be such a legal representative for the purpose of prosecuting the suit or the appeal. The point as to who should be substituted in the place of the deceased party for the purpose of proceeding with the litigation does not affect the ultimate rights and liabilities of the parties. Consequently, it could not be postulated that there is any final adjudication on the questions arising in the suit itself. It is also to be borne in mind that there is no appeal against an order passed under Order 22 Rule 5 C. P. C. which clearly

indicates that the legislature did not intend to invest such an order with finality.”

22. This is followed by the judgment of a learned single Judge of the Punjab and Haryana High Court in **Mangat's** case (7 supra) and also the judgment of the Hon'ble Supreme Court in **Suresh Kumar Bansal's** case (8 supra). In this case also, before the Hon'ble Supreme Court, the legal representative sought to come on record. The Supreme Court also held that the legal representatives should come on record on the basis of the Will subject to the grant of a probate by a Court of competent jurisdiction. The last judgment cited by the learned counsel for the appellants is **Dashrath Rao Kate's** case (9 supra). In this case, apart from considering the provisions of Order 22 Rule 5 CPC, the Hon'ble Supreme Court also considered the Full Bench of **Mohinder Kaur's** case (1 supra), which is the first decision relied upon by the learned counsel for the appellants. After considering the fact that the oral and documentary evidence was let in at the stage of impleadment of the legal representatives, the Hon'ble Supreme Court held that normally the enquiry under Order 22 Rule 5 CPC is summary in nature and the findings cannot amount to *res judicata*. The Supreme Court also held that where witnesses were examined including the attestors, it would

be factually incorrect to let in the same evidence again in the same suit. Therefore, the Hon'ble Supreme Court in the facts and circumstances of that case held that after the evidence was let in at the stage of impleading about the correctness of a Will and witnesses were also examined etc., leading evidence once again on the same issue in the same suit is not correct. The learned counsel for the appellants relied upon this part of the judgment and strongly argued that if the issue of Will is re-agitated in the same suit once again the bar would apply, but he submitted that as the present suit is different from the original OS No.2 of 1975, there is no bar under the principles of *res judicata*. This was the last alternative submission made by the learned counsel.

23. In response to this argument, the learned counsel for the respondents cited the case law on the salutary principles of *res judicata*. The judgments cited by the learned counsel for the respondents are reproduced here.

- i) ***Hope Plantations Ltd v. Taluk Land Board, Peermade***¹⁰;
- ii) ***Sulochana Amma v. Narayanan Nair***¹¹;
- iii) ***Wali Mohammed (dead) by L.Rs v. Smt. Rahmat Bee***¹²;

¹⁰ (1999) 5 SCC 590

¹¹ AIR 1994 SC 152

¹² AIR 1999 SC 1136

- iv) ***Gulabchand Chhotalal Parikh v. State of Gujarat***¹³;
- v) ***Arjun Singh v. Mohindra Kumar***¹⁴;
- vi) ***Chitturi Perraju v. Yednapudi Venkamma***¹⁵;
- vii) ***Ishwardas v. the State of M.P.***¹⁶;
- viii) ***Sajjadanashin Sayed v. Musa Dadabhai Ummer***¹⁷; and
- ix) ***State of Tamil Nadu v. State of Kerala***¹⁸.

24. It is pertinent to note here that all these judgments are under the general principles of *res judicata*. None of the judgments cited are only on the question of an order passed under Order 22 Rule 5 CPC. While this Court cannot really dispute the salutary principles of *res judicata* that are settled over a period of time, the question is whether the enquiry under Order 22 Rule 5 CPC operates as *res judicata* or estoppel against proving of the Will in a subsequent suit. This is the crux of the matter.

25. The Full Bench decision of the Punjab and Haryana High Court in ***Mohinder Kaur's*** case (1 supra) was considered by the Hon'ble Supreme Court in ***Dashrath Rao Kate's*** case (9 supra). The Full Bench clearly held that in no cases a decision under Order 22

¹³ AIR 1965 SC 1153

¹⁴ AIR 1964 SC 993

¹⁵ AIR 1971 AP 74

¹⁶ AIR 1979 SC 551

¹⁷ (2000) 3 SCC 350

¹⁸ (2014) 12 SCC 696

Rule 5 CPC would operate as *res judicata* between the same parties or their successors in a subsequent proceeding even when the said parties have been provided an opportunity to contest the issue and lead evidence. The very same principle that an enquiry under Order 22 Rule 5 CPC will not operate as *res judicata* in subsequent proceedings has been upheld by the Hon'ble Supreme Court in **Dashrath Rao Kate's** case (9 supra). In addition, a Division Bench of this Court in **Kondapalli Ayyanna's** case (6 supra) clearly held that the purpose of an enquiry under Order 22 Rule 5 CPC is limited for the purpose of continuing the proceedings. In the words of the Division Bench, it cannot be regarded as a judgment and decree or as a final order. A single judge of the Madras Court held that in **Muniappa Nadar's** case (4 supra), there is no appeal against an order passed under Order 22 Rule 5 CPC. Therefore, the Madras High Court held that the absence of the provision of an appeal from an order passed under Order 22 Rule 5 CPC also leads to a conclusion that the order is not a final order.

26. After a review of the entire case law on the subject, more so the cases produced by the learned counsel for the appellants, this Court is of the opinion that a decision under Order 22 Rule 5 CPC is in the nature of collateral proceeding for the purpose of

determining who are the legal representatives for the purpose of continuing the suit. The order passed is not a final order or a final adjudication of the matters involved in the suit. The fact that there is no appeal against the order passed under Order 22 Rule 5 CPC is an important factor in coming to this conclusion. Therefore, this Court holds that the limited question decided in IA No.779 of 1977 in OS No.2 of 1975 cannot operate as *res judicata* in a subsequent proceeding. The last judgment cited by the learned counsel for the appellants in **Dashrath Rao Kate's** case (9 supra) clearly notices the Full Bench of the Punjab and Haryana High Court in **Mohinder Kaur's** case (1 supra) and proceeds to conclude that a finding recorded after the oral and documentary evidence in a proceeding under Order 22 Rule 5 CPC cannot be re-agitated in the same suit.

27. Both the learned counsel also made their alternate submissions on the issue of whether they wanted to remand the matter to the lower Court or whether the matter can be decided before this Court as per the provisions of Order 41 Rule 33 CPC in view of the availability of the material. Both the learned counsel agreed that the material available on record should also be used to arrive at a final decision in the matter and that remanding the matter at this point of time was not

in the interest of either party. Both the learned counsel argued in the alternative on the correctness of the Will, since the evidence indicated that the scribe and the witnesses were examined in the present suit and the Will which is the subject of so much of controversy is also marked as Ex.A.3 in this Court. This Court notices that apart from Ex.A.3, the depositions of P. Sivaiah and of K. Rama Subbaiah are marked as Exs.A.8 and A.9.

28. This Court also notices the evidence of PW.3 (an attester), PW.4 who is the scribe and PW.5 (another attester) were recorded in this case. The learned counsel for the appellants relied upon the following cases also:

- i) ***Durga v. Anil Kumar***¹⁹;
- ii) ***Pentakota Satyanarayana v. Pentakota Seetharatnam***²⁰;
- iii) ***Chanumolu Nirmala v. Chanumolu Indira Devi***²¹;
- iv) ***R. Seethamma Seetha Lakshmi v. M. Thimma Reddy***²²;
- v) ***Ishwardeo Naraian Singh v. Smt. Kamta Devi***²³;
- vi) ***Probodh Kumar Das v. Prafulla Kumar Das***²⁴;
- vii) ***Surendra Pal v. Dr.(Mrs.) Saraswati Arora***²⁵.

¹⁹ (2005) 11 SCC 189

²⁰ (2005) 8 SCC 67

²¹ 1994 (1) ALT 673 (DB)

²² 2017 (4) ALD 386 (DB)

²³ AIR 1954 SC 280

²⁴ AIR 1982 Calcutta 428

²⁵ AIR 1974 SC 1999

The learned counsel for the appellants supported the Will and argued that the Will has been duly proved and therefore, prayed for a finding consequent thereto.

29. In reply to this, the learned counsel for the respondents argued that the Will has not duly proved and that there are suspicious circumstances surrounding the same. He cited the following decisions:

- i) ***H. Venkatachalalyengar v. B.N. Thimmajamma***²⁶;
- ii) ***Ramachandra Rambux v. Champabai***²⁷;
- iii) ***Pushpavati v. Chandraja Kadamba***²⁸; and
- iv) ***Smt. Kamala Devi, w/o. Banarsi Dass v. Kishori Lal Labhu***²⁹.

30. This Court after going through the evidence of three witnesses (PWs.3 to 5) notices that all the three of them have clearly said that the Will was executed as per the desire and instructions of Venkamma. They deposed that the contents of the Will were read over to Venkamma also. They also stated that the testatrix affixed her thumb mark in the presence of attestors and the scribe. In turn, the attestors stated that they have attested Ex.A.3 in the testators presence. Therefore, an examination of the oral evidence clearly shows that all the necessary ingredients for proving the due execution of the Will are present in this case.

²⁶ AIR 1959 SC 443

²⁷ AIR 1965 SC 354

²⁸ AIR 1972 SC 2492

²⁹ AIR 1962 Punjab 196

31. The learned counsel for the respondents, however, argued that there are suspicious circumstances surrounding the Will. This Court after going through the evidence is of the opinion that the alleged discrepancy in handing over the duly executed Will is not a material fact and in any way of the matter there is not much discrepancy in the evidence of witnesses in handing over the Will. The crux of the matter is whether the Venkamma executed the Will of her own will and volition and whether the attestation of the Will is proved as per law. In this case, this Court is of the opinion that the Will has been duly proved.

Conclusions:

32. This Court is also of the opinion that the finding of the lower Court in the earlier suit will not operate as *res judicata* in the present case. Issues 2 and 6, which were held against the plaintiffs, are held in favour of the plaintiffs by reversing the findings of the lower Court. The judgment of the suit O.S.No.2 of 1975 holding that the suit has abated is not correct and the decision in IA No.779 of 1977 in OS No.2 of 1975 does not debar the plaintiffs for relying upon the Will.

33. This Court holds that in view of the discussion made earlier issue No.1 is to be held in favour of the plaintiffs. The Will executed by Venkamma in favour of

the plaintiffs is held to be true and valid. As a consequence, issue No.5 is also held in favour of the plaintiffs and in view of the discussion on the issues 2 and 6, this Court is of the opinion that the plaintiffs are not estopped from relying upon Ex.A.3-Will.

34. With regard to issue No.10, the plaintiffs have not adduced any evidence and in the absence of any such foundation in the evidence for rendition of accounts, it is difficult to order the same at this stage. This Court holds that in the absence of any proof for the income being generated etc., the plaintiffs are not entitled to for rendition of accounts. With regard to issue No.11, it is held that the suit is not vexatious or frivolous. Issues 7, 9, 4 and 8, 3, 11 and 12 are not challenged at all. The appeal is filed against the findings on issues 1, 2, 5, 6, 10 and 13 only.

35. Issue No.13: In view of the above discussion, this Court is of the opinion that the plaintiffs are entitled to a declaration as sought for. It is clear that the plaintiffs 1 and 3 have a joint half share in the plaint-A schedule property and a preliminary decree is passed in favour of the plaintiffs 1 to 3 granting them a half share in plaint-A schedule property. The plaintiffs are at liberty to file a separate application for ascertaining of the

mesne profits from the date of the suit. However, the plaintiffs are not entitled to costs.

36. In view of all of the above, the appeal is allowed. The judgment and decree dated 26.02.1999 passed in OS No.54 of 1996 by the Senior Civil Judge, Piler, are set aside in so far as the findings on issues 1, 2, 5, 6, 10 and 13. In the circumstances of the case, there shall be no order as to costs.

37. Miscellaneous petitions, if any, pending in this appeal shall also stand closed.

Date: 20.09.2018
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Note: L.R. Copy marked.

D.V.S.S. SOMAYAJULU, J

