(2007) 09 AP CK 0021

Andhra Pradesh High Court

Case No: Second Appeal No. 44 of 1999

M. Venkata Seshamma		APPELLANT
	Vs	
Brahmandam Venkata Kusala Rao		RESPONDENT

Date of Decision: Sept. 22, 2007

Acts Referred:

- Evidence Act, 1872 - Section 107, 108, 68
- Hindu Marriage Act, 1955 - Section 11, 5
- Hindu Succession Act, 1956 - Section 14, 17, 6
- Penal Code, 1860 (IPC) - Section 109, 323, 494, 498A

Citation: (2008) 2 ALD 367 : (2008) 4 ALT 601

Hon'ble Judges: P.S. Narayana, J

Bench: Single Bench

Advocate: R. Radha Krishna Reddy, for the Appellant; M.Y.K. Rayudu, for the Respondent

Judgement

P.S. Narayana, J.
Heard Sri Radhakrishna Reddy, learned Counsel representing the appellant and Sri M.Y.K. Rayudu, learned Counsel representing the respondent.

2. The following substantial questions of law would arise for consideration in this Second Appeal:

(i) Whether the decree granted by the lower appellate Court for permanent injunction in favour of the plaintiff respondent herein though the plaintiff failed to prove his exclusive possession and enjoyment of suit schedule properties by adducing any evidence is not contrary to law?

(ii) Whether the defendant/appellant herein has not become a co-owner in view of Section 14 of Hindu Succession Act, 1956 in respect of the share of her husband in the suit schedule properties, which are admittedly joint family properties and entitle

to enjoy the same, as her husband where about he is not known since 1991?

(iii) Whether the defendant/appellant herein being a legally wedded wife of Sri Bramhandam Raghava Rao who is one of the coparceners in the joint family of the plaintiff being his younger brother, can be restrained from enjoying the suit schedule properties, holding that she is a third party?

3. Sri Radhakrishna Reddy, learned Counsel representing the appellant had taken this Court through Ex. B-13 and also referred to Exs.B-1 to B-3 and would maintain that in the light of the facts and circumstances inasmuch as there is sufficient evidence to establish the marital tie, the same cannot be doubted and in such a case a restraint order of this nature cannot be made as against the appellant. Learned Counsel also would maintain that even the evidence of P.W.1 would go to show that the husband of the appellant had nothing to do with the other properties and when that being so, as far as the properties of the husband of the appellant is concerned, she cannot be restrained especially in the absence of any evidence that the respondent herein is the kartha of the family. Learned Counsel incidentally pointed out to Section 11 of the Hindu Marriage Act, 1955 (the Act, for brevity) and would maintain that the respondent herein is a third party as far as the matrimonial status is concerned and the husband of the appellant being unheard of for sufficiently a long time, judicial notice can be taken relating to the civil death. Learned Counsel also pointed out to Section 108 of the Indian Evidence Act, 1872 (the Evidence Act, for short) and further pointed out to the incidental findings which had been recorded by the lower appellate Court. Learned Counsel also specifically pointed out to the re-examination of P.W.1 and certain admissions made by P.W.1. Hence learned Counsel would maintain that there cannot be an injunction against the family member even if it is to be considered that the family continues or in the alternative the wife of a sharer cannot be restrained by way of an injunction or in the alternative even if injunction is to be confirmed, the other appropriate reliefs and directions to which the appellant would be entitled to, may have to be made. Learned Counsel also placed strong reliance on certain decisions.

4. Per contra, Sri M.Y.K. Rayudu, learned Counsel representing the respondent would maintain that no acceptable evidence had been placed relating to the marital tie between the appellant and the brother of the respondent. The mother was not examined. No relative at least had been examined. The sole surviving coparcener of the family and being the eldest of the family as kartha of the family, the respondent has been managing the properties and in such a case, a stranger like the appellant cannot interfere with the management of the respondent as kartha of the family and hence the restraint order is well justified. Learned Counsel placed strong reliance on certain decisions to substantiate his submissions.

5. Heard the learned Counsel on record.

6. The substantial questions of law, which had been pointed out in this Second Appeal, already had been referred to above. The parties hereinafter would be referred to as the plaintiff and the defendant as shown in O.S. No. 285 of 1994 on the file of the Principal Munsif Magistrate, Bapatla, for the purpose of convenience. The plaintiff filed the suit for the relief of permanent injunction restraining the defendant, her men etc., from interfering with the plaintiff''s peaceful possession and enjoyment of the suit schedule property and for costs of the suit. The Court of first instance in the light of the respective pleadings of the parties, having considered the issues, examined P.W. 1 and D.W. 1 and marked Exs.B-1 to B-13 and came to the conclusion that the plaintiff is not entitled to any relief prayed for and accordingly dismissed the suit without costs. Aggrieved by the same, the matter was carried by way of appeal - A.S. No. 64 of 1996 on the file of the Court of the Senior Civil Judge, Bapatla, and the lower appellate Court, having observed that the defendant by way of separate suit can protect the interest of Bramhamdam Raghava Rao in the suit schedule property, if so advised, and further observing that she cannot cause any obstruction for the plaintiff to enjoy the suit schedule property, allowed the appeal accordingly. Hence the present Second Appeal.
7. It was pleased in the plaint as hereunder:

That the suit schedule land originally belongs to the father of the plaintiff by name Bramhamdam Nageswararao and it is also an ancestral property. The said Bramhamdam Nageswararao died on 12-8-1992 while in possession and enjoyment of the suit schedule property in the capacity of Manager of Hindu undivided joint family. On the death of the said Nageswara Rao, the plaintiff, being his eldest son, became the Kartha of the Hindu undivided joint family consisting of himself and his two younger brothers. The plaintiff, in his capacity as a kartha, is legally entitled to hold possession and other rights over the plaint schedule property, even with a right to sell either whole or part of the same, in accordance with the provisions of Hindu Law.

His second brother by name, Hanumantharao, who remained as unmarried, is not heard of. The 3rd brother, Bramhamdam Raghavarao said to have been married on 2-6-1991 in the absence of plaintiff, even without the knowledge of the plaintiff as contended by the defendant. In fact, the said Bramhamdam Raghavarao married on Chandravathi, an elementary school teacher on 30-8-1995 at Tirupathi.

The defendant is a woman constable working at Ongole. Whether this defendant married the said Raghavarao legally, or not, she has no right in the properties according to Hindu law, or even she is not heir of Raghavarao, as admittedly, he was not heard of even by 2-6-1991. The plaintiff''s brother Raghavarao may come at any time and demand the plaintiff about his share in the plaint schedule property and so long as the above said Raghavarao is presumed to believe, the defendant cannot have any interest in the plaint schedule properties. The above said Raghava Rao has no issues and the defendant did not claim any issues.

The defendant filed a Criminal case against the father of the plaintiff and also against the said Raghavarao u/s 498-A of I.P.C., on the file of II Additional Munsif Magistrate, Bapatla, on 24-10-1991. The above said complaint was forwarded to police for investigation and after, investigation, the crime was registered in crime No. 121/91. Late Nageswararao, the father of the plaintiff obtained an anticipatory bail, thereafter, he died on 12-8-1992. The above said Raghavarao, who became horrified in the hands of the defendant, under the influence in Police department, left home and his whereabouts are not known subsequently. The defendant not having been satisfied in driving away the plaintiff''s brother, whom she claims to be her husband, did not stop her torture of plaintiff''s family with the active help of the police department. The plaintiff in his capacity, as kartha as stated above, has been in possession and enjoyment of the suit schedule property, by cultivating the same through one Patan Haneef Saheb of Returu village by paying yearly salary to him. The said Patan Haneef Saheb was illegally confined in Kakumanu police station by the defendant for the offence of blackmailing 10 bags of paddy.

The plaintiff is an employee in Central Government and staying at Madras, could not think of taking any action as his employment requires his presence at head quarters, that the defendant has confined the said Haneef Saheb in police station for about 10 days and extract 24 bags of paddy on 5-2-1994 without plaintiff''s knowledge and permission. The defendant has no manner of right over the suit schedule property, and she cannot, therefore, claim any rights. Hence, the suit is filed for permanent injunction against the defendant and prays the Court to decree the suit with costs.

8. The defendant filed written statement denying the plaint averments and had taken a plea that Bramhamdam Raghava Rao married one Chandravathi on 30-08-1995 at Thirupathi and due to some family disputes cropped up between the spouses, said Raghava Rao divorced as per the orders in H.M.O.P. No. 8 of 1990 dated 31-07-1990 as such said Chandravathi is not at all a wife of Raghava Rao. It was further pleaded in the written statement as under:

After the said divorce decree obtained by he said Raghavarao the parents of the defendant performed her marriage with Raghavarao on 02-06-1991, as per Hindu custom and usage in Kamakshi temple at Jannawada village of Nellore. Soon after the marriage, the defendant joined her husband at Bapatla, in the house of her father-in-law and lead conjugal life with him for about 2 months.

During this period, the father-in-law and husband of the defendant made the life of the defendant miserable and tortured her physically and mentally for their unlawful demands. At last, the defendant lost her patience and got filed the private complaint before the II Addl. Munsif Magistrate''s Court, Bapatla against her father-in-law Nageswararao and her husband Raghavarao. The Court, on that private complaint, directed the Bapatla town police to enquire into the matter and police after investigating registered the case as Crime u/s 498-A and 323 IPC. In that case,

charge sheet was also filed and during the pendency of the case, A-2, the father-in-law of the defendant died and warrant was pending against A-1 who is the husband of the defendant. At that stage, the husband of the defendant went to the house of the plaintiff at Madras and from there itself, he was disappeared. Prior to the marriage of the defendant, the 2nd brother, Hanumantha Rao''s whereabouts are not known. So, this defendant is doubting the conduct of the plaintiff as he is the only person can give the answer for disappearance of his two brothers. The grab the shares of the said Hanumantha Rao and Raghavarao, the plaintiff might have get rid of the lives of his two brothers. The defendant is a legally wedded wife of Raghavarao, as such she is a co-parcener in Hindu joint undivided family, as such, the defendant is at bounded duty to protect the properties that are to be fell to the share of her husband.

The defendant further submits that the said Bramhamdam Nageswararao, who was the father of the plaintiff had filed a suit in O.S.No. 105/87 before the Sub Court, Bapatla, against his brother Bramhamdam Vara Prasad Rao for partition and separate possession by metes and bounds with respect to the suit schedule properties, when that matter is pending, Bramhamdam Nageswararao died on 12-08-1992, after the demise of the said Nageswararao, this defendant filed an I.A. No. 449/94 in O.S. No. 105/87 under Order I Rule 19(2) C.P.C. for impleading her as a party in the place of her husband Raghavarao and the same is pending before the Sub Court, Bapatla. The plaintiff also filed a petition for adding L.Rs. duly mentioning himself as petitioner and the Hanumantha Rao and Raghavarao and his two sisters as the respondents in the petition I.A. No. 1628/92. Since the defendant herein became the co-parcener to the Hindu undivided joint family of the plaintiff, no injunction can be granted against the defendant. Therefore, she prays the Court to dismiss the suit with costs.

9. On the strength of these pleadings, the following issues were framed by the Court of first instance.

1. Whether the plaintiff is entitled for permanent injunction as prayed for?

2. Whether the suit is bard by res judicata?

3. Whether the suit is bad for non-joinder of necessary parties?

4. To what relief?

10. The Court of first instance recorded the evidence of P.W. 1 - the plaintiff, and D.W. 1 - the defendant, and marked Exs.B-1 to B-13 and came to the conclusion that a relief of perpetual injunction cannot be granted since the defendant also is a member of the family and accordingly dismissed the suit. Ex. B-1 is the receipt of payment for marriage fee issued by the Executive Officer, Sri Mallikharjuna Swami Kamakshithai Devasthanam, Jannawada, Nellore. Ex. B-2 is the wedding card. Ex. B-3 is the receipt for payment of room rent. Ex. B-4 is the letter of the receipt. Ex. B-5 is

the wedding card envelope. Exs. B-6 to B-12 are the positive photos and Ex. B-13 is the certified copy of the order in H.M.O.P. No. 8 of 1990. Being aggrieved of the dismissal of the suit, the unsuccessful plaintiff preferred A.S. No. 64 of 1996 and the lower appellate Court framed the following points for consideration:

1. Whether the defendant became a co-parcener in the joint family of the plaintiff?

2. Whether the plaintiff is entitled to permanent injunction?

11. The lower appellate Court also observed at para 10 of the judgment that before dealing the points in controversy it is better to have a look at the admitted facts and they are as follows:

1. Plaintiff, Bramhamdam Raghava Rao and Bramhamdam Hanumantha Rao and their father Nageswara Rao constituted Hindu joint family.

2. Bramhamdam Nageswara Rao died.

3. Whereabouts of Bramhamdam Hanumantha Rao is not known.

4. Whereabouts of Bramhamdam Raghavarao is unknown since August, 1991.

5. The suit property is the joint family property wherein the plaintiff, Bramhamdam Hanumantha Rao and Bramhamdam Raghava Rao are having rights.

6. Bramhamdam Nageswara Rao filed O.S.No. 105 of 1987 on the file of Sub Court, Bapatla, against his brother Bramhamdam Vara Prasada Rao for partition and separate possession of his share and the same is pending.

7. One Chandravathi is the first wife of Bramhamdam Raghavarao.

12. The lower appellate Court recorded reasons commencing from paras 11 to 15 and allowed the appeal. Certain admissions in the evidence of P.W. 1 had been referred to and in reexamination this witness, no doubt deposed that about three months back a preliminary decree was passed in O.S.No. 105 of 1987 on the file of the Sub Court, Bapatla, as prayed for and final decree was pending before the Sub Court, Bapatla. Further P.W.1 deposed that his brother Raghava Rao was given separate share in the said suit while passing preliminary decree. Certain submissions were made on the strength of the evidence of P.W.1 as well.

13. Section 11 of the Act reads as under:

11. Void Marriages:- Any marriage solemnized after the commencement of this Act shall be null and void and may, on a petition presented by either party thereto, against the order party be so declared by a decree of nullity if it contravenes any one of the conditions specified in Clauses (i), (iv) and (v) of Section 5.

14. Certain submissions were made that while questioning the status or the validity of the marital tie the locus standi of a stranger would be limited and here is a case where the whereabouts of the husband of the appellant/defendant being not known

for sufficiently long time at least for sixteen years or even more, the same can be taken judicial notice and the civil death can be presumed. Further submissions were made that even if she is to be considered as the member of the family, a decree for perpetual injunction of the nature definitely cannot be sustained. In Srinivasa v. Narayana AIR 1920 Mad 162 the Division Bench of the Madras High Court held that the remedy of injunction should not ordinarily be granted to one member of a Hindu family in possession of certain property against other members of the family who are out of possession. Reliance also was placed on the decision in Kanahaya Lal Vs. Jumna Devi and Others, wherein the Division Bench of the Delhi High Court, while dealing with Section 6 of the Hindu Succession Act, 1956, observed that although the widow and daughters of the deceased are not members of the coparcenary, the interest of the deceased in the coparcenary property will devolve upon them and not upon the coparceners by survivorship. However, learned Counsel representing the respondent/ plaintiff had placed strong reliance on the decision in Sreerama Sarma v. Krishnavenamma 1995 (1) AW.R. 565 , wherein it was held that in case of Hindu joint family a suit to set aside an alienation filed by the younger of two brothers within three years of his attaining majority would be barred by limitation if the elder brother, who was the manager and an adult, had failed to sue within three years of his attaining majority. It was also observed that in the absence of a plea that the senior most brother (of a joint family) was not a manager, it must be presumed according to Hindu Law notions, that he was a manager. Further reliance was placed on the decision in Venkata Subbarayudu Chetty Vs. Tanguturu Venkatiah Shresti and Others, wherein the essentials of a Hindu marriage had been explained and at paras 4 and 5 and it was observed as under:
The Supreme Court in Bhaurao Shankar Lokhande v. State of Maharashtra AIR 1965 SC 1565 held:

Section 17 provides that any marriage between two Hindus solemnized after the commencement of the Act is void if at the date of such marriage either party had a husband or wife living, and that the provisions of Sections 494 and 495 I.P.C., shall apply accordingly. The marriage between two Hindus is void in view of Section 17 if two conditions are satisfied: (i) the marriage is solemnized after the commencement of the act; (ii) at the date of such marriage, either party had a spouse living.

The word ''solemnize'' means, in connection with a marriage, ''to celebrate the marriage with proper ceremonies and in due form'', according to the Shorter Oxford Dictionary. It follows, therefore, that unless the marriage is ''celebrated or performed with proper ceremonies and due form'' it cannot be said to be ''solemnized''. It is, therefore, essential, for the purpose of Section 17 of the Act, that the marriage to which Section 494 I.P.C. applies on account of the provisions of the Act, should have been celebrated with proper ceremonies and in due form. Merely going through certain ceremonies with the intention that the parties be taken to be married, will not make the ceremonies prescribed by law or approved by any

established custom.

It was further observed:

If the marriage is not a valid one, according to the law applicable to the parties, no question of its being void by reason of its taking place during the life of the husband or wife of the person marrying arises. If the marriage is not a valid marriage, it is no marriage in the eye of law.

To the same effect is the view taken by the Supreme Court in a later decision in Kanwal Ram and Others Vs. The Himachal Pradesh Admn., wherein their Lordships observed that in a bigamy case, the second marriage as a fact, that is to say, the essential ceremonies constituting it, must be proved Admission of marriage by the accused is not evidence of it for the purpose of proving marriage, in an adultery or bigamy case. It was further laid down that where in prosecution for offences under Sections 494/109 I.P.C. the evidence of the witness called to prove the marriage ceremonies, showed that the essential ceremonies had not been performed, the conviction of the accused persons on statement of the alleged bridegroom that he had sexual relationship with the alleged bride and on admission of the accused in a written statement that the parties married after the first marriage was dissolved, was not justified.

In the instant case, the evidence of P.W. 5, the priest, and also the evidence of the other witnesses does not indicate that the couple went through the required ceremonies. Mere tying of "Tali" is not enough to establish that the marriage has been solemnized. The Supreme Court in Bhaurao Shankar Lokhande and Another Vs. State of Maharashtra and Another, referred to supra, extracted a passage from Mulla, which is to the following effect:

There are two ceremonies essential to the validity of a marriage, whether the marriage be in the proper form and hence it has to be held that the marriage has not been solemnized. The convictions and sentences of A-1 and A-3 are, therefore, set aside, and the revision is allowed. The appeal against acquittal preferred by the complaint is dismissed.

15. Strong reliance was placed on the decision of the Apex Court in Sumitra Devi Vs. Bhikan Choudhary, , wherein at para 3, it was observed as under:

We are impressed by the fact that the respondent had not seriously disputed the fact of marriage and had taken the stand that such marriage was void being vitiated by fraud and suppression of material facts as also for non-performance of religious rites. The Additional Sessions Judge and the High Court, have adopted a technical approach while considering the question of marriage. There is no doubt that in order that there may be a valid marriage according to Hindu law, certain religious rites have to be performed. Involving the fire and performing Saptapadi around the sacred fire have been considered by this Court to be. two of. the basic requirements

for a traditional marriage. It is equally true that there can be a marriage acceptable in law according to customs which do not insist on performance of such rites as referred to above and marriages of this type give rise to legal relationship which law accepts. The Additional Sessions Judge as also the learned single Judge of the High Court did not refer to the fact that for about a decade the parties had lived together. Public records including voters'' lists described them as husband and wife and competent witnesses of the village of the wife as also the husband had supported the factum of marriage. Witnesses have also spoken about the reputation of the appellant being known in the locality as the wife of the respondent. These facts should not have been totally overlooked while considering the case of marriage. It is possible that on account of the lawyer''s mistake the appellant''s witnesses have not referred to the religious rites which might have been performed at the time of marriage, It is equally possible that the learned Magistrate while recording the evidence has not specifically recorded the details and has only indicated that witnesses have spoken to the fact of marriage. Since the form of marriage has not been found and traditional marriage according to Hindu law requires performance of certain religious rites, we consider it proper in the peculiar facts of the case to remit the matter to the learned Magistrate for a fresh inquiry at which apart from the evidence already on record both sides should be entitled to lead further evidence particularly in support of their respective stands relating to the factum of marriage.

16. In Surjit Kaur v. Garja Singh 1994 (1) APLJ 34 (SC) : 1994 (1) ALT 13 (DN SC), the Apex Court at para 9 observed as under:

In opposition to this, the learned Counsel for the respondents would urge that in the written statement, there was no plea as to the custom prevalent in the area which governs the parties. Further the ingredients of the alleged custom and the essential ceremonies of the marriage were neither set out nor pleaded. Hence, the High Court was right in its conclusion. The custom must be proved to be ancient, certain and reasonable if the Court of law were to accept the same. Merely because they lived as husband and wife, the status of wife is not conferred as laid down in Bhaurao Shankar Lokhande and Another Vs. State of Maharashtra and Another, . This is not a case of widow''s remarriage to the husband''s brother. Gulaba Singh was a stranger.

Therefore, no exception could be taken to the judgment of the High Court.

17.The main controversy between the parties is whether there was a marriage at all between the brother of the plaintiff and the defendant. No doubt strong reliance was placed on Ex. B 13. It is, however, not in controversy that the whereabouts of said brother of the plaintiff, alleged husband of the defendant, are not known at least for the last sixteen years.

18. Sections 107 and 108 of the Evidence Act read as under:

Section 107. Burden of proving death of person known to have been alive within thirty years.-When the question is whether a man is alive or dead, and it is shown that he was alive within thirty years, the burden of proving that he is dead is on the person who affirms it.

Section 108. Burden of proving that person is alive who has not been heard of for seven years.• Section 108 of the Evidence Act

[Provided that when] the question is whether a man is alive or dead, and it is proved that he has not been heard of for seven years by those who would naturally have heard of him if he had been alive, the burden of proving that he is alive is Section 108 of the Evidence Act [shifted to] the person who affirms it.

19. A similar question had been decided by this Court in S.A. No. 651 of 1998 dated 26-9-2007.

20. In Balkrishna Koundar Vs. Amirthavalli Ammal and Another, , the learned Judge of the Madras High Court, while dealing with the presumption and proof under Sections 107 and 108 of the Evidence Act observed as under:

Under Sections 107 and 108 of the Evidence Act, the burden is on the person, who asserts that the man is dead or alive to prove that he is dead or alive as required by the sections. Where there is no proof that the husband has not been heard of for seven years by those, who would have naturally heard of him if he were alive, it should be held that the woman has not discharged the burden that lay on her to prove that the husband was dead in order to enable her to attain to the position of a widow.

21. In Tadepalli Ram Rathnam Vs. Kantheti Varadarajulu and Others, , a learned Single Judge of this Court, while dealing with the presumption about continuance of life and death under Sections 107 and 108 of the Evidence Act, observed in paras 8, 14, 18, 19, 38, 43 and 44 as follows:

8. Section 107 deals with the presumption of continuance of life and Section and 108 deals with the presumption of death. Both the presumptions under Sections 107 and 108 come into play after a suit is instituted. These sections deal with the procedure to be followed when in such a suit a question is raised before a court as to whether a person is alive or dead. Section 107 enjoins that when a person''s existence is in question, and if he is shown to have been living at a given time within thirty years and there is nothing to suggest the probability of his death, the continuance of life will be presumed, and the person who asserts the contrary has the burden to prove it.

10. In either case, it would be evident that the presumption is always rebuttable. It is not an absolute presumption. The Presumption embodied in Section 108 is by way of a proviso to Section 107.

14. If the two sections are read together it would be evident that it would be erroneous to seek to apply both Sections 107 and 108 to one and the same case and at the same time because a person cannot at the same time both be alive and dead. The court therefore should not attempt to apply to a given case both the presumptions relating to the continuance of life and the counter presumption relating to death. It must always be borne in mind that Section 108 although separately enacted comes only as a proviso to Section 107.

18. Now the question is whether there is any warrant either on the language of Section 108 or on the authority of the decided cases thereunder for the view that if the exact date of death is not proved the earliest date on which the death could be presumed is the date on which the suit was filed. A plain reading of Section 108 in my view does not warrant any such contention. Section 108 relates to burden of proof. It must be remembered that the presumption of life u/s 107 can get rebutted because of the counter presumption available u/s 108, and if the counter presumption holds the field, there is no place for the presumption of life u/s 107 because that stands replaced.

19. It is true that before a presumption u/s 108 is raised, if has to be found out by making an appropriate enquiry that the person has not been heard of for seven years by those who ought to have been heard of him. In that enquiry it is permissible to show that the allegation that the person has not been heard of for over seven years is not true and that there is evidence to show that he is alive or has been heard of within that period. If it is proved that the person has been heard of within seven years, it is obvious then that the presumption of death u/s 108 cannot be raised. And in such a situation the presumption of life u/s 107, since he has been shown to be alive within 30 years will continue to hold the field. There is however, no warrant for any contention that u/s 108 not only person who has not been heard of for seven years shall be presumed to have died but further that he shall be presumed to have died on the date of the suit in which the question of his life or death has arisen. Any such contention would mean that the proviso is being interpreted so as to give it a greater effect than strict construction of the proviso i.e., Section 108 renders necessary. This is not permissible. The exact time of death is not a matter of presumption but is a matter of evidence and the onus of proving that fact is not cast u/s and 108 but is cast under the general principles of burden of proof. That death took place at any particular time whether prior to seven years before the suit was laid or within seven years prior to the said suit lies upon the person who claims a right to the establishment of which the exact date of death of the said person is essential. There is no presumption that death took place at the close of seven years or earliest on the date of the institution of the suit. No provision of law warrants any such presumption.

38. I am fully fortified in my view by the following two decisions of this court; Venkateswarlu v. Bapayya AIR 1957 A.P. 380 and Adusumilli Venkata Subba Rao Vs.

Gullapall Subba Rao and Others, .

43. From the above said discussion it would be clear that the decisions relied upon by the learned Advocate for the appellant such as AIR 1065 Mad 440 , Parikhit Muduli and Others Vs. Champa Dei and Others, , Smt. Narbada and Another Vs. Ram Dayal, cannot be considered as good law.

44. The view which I have taken is not only supported by the two Bench decisions of this Court to which reference has already been made but also supported by the following decisions: Suburamu Pillai v. Ramayi Ammal (1965) 78 MLW 624 , Narayana Pillai Vs. Velayuthan Pillai, and Gnanamuthu Udayar and Another Vs. Anthoni and Others, .

22. In M. Rami Reddi and Anr. v. K. Aravindamma 1984 (1) ALT 60 ,(A.S. No. 482 of 1979 dated 5-3-1984), a learned Judge of this Court, while dealing with the presumption u/s 108 of the Evidence Act, held as under.

Section 108 of the Indian Evidence Act, dies not have anything to say on the question when a particular person is dead. It only says that when a person is not heard of, for a period of seven years by those who are expected to know about him, that person should be presumed to be dead. It does not go further and say that there is any presumption as to the exact date of death. Section 68 of the Evidence Act does not help to fix the year of death. So whenever, it becomes necessary to establish in any particular suit that a particular person, whose whereabouts are not known for over seven years, and who, therefore, may be presumed to be dead u/s 108 of the Indian Evidence Act, is dead on a particular date, party alleging the fact viz., specific date of his death must prove that fact. In other words, Section 108 of the Indian Evidence Act, has nothing to do with laying down any presumption whatsoever as to the exact date of death of a person.

23. In Balwant Rao v. Kerba AIR 1953 Hyd. 187, it was held that unless it has been established that the whereabouts of a person are not known and he has not been heard of for the past seven years before the date of the suit, the presumption would be that he is alive.

24. Strong reliance was placed on the decision reported in Venkateswarlu v. Bapayya AIR 1957 A.P. 380 and further reliance was placed on the decision in Bulli Abbayi v. Sreeramulu ILR 1964 A.P. 823.

25. The aspect of the availability of the presumption; the nature of presumption; the burden of proof in relation thereto and the essentials to be satisfied so as to attract the presumption relating to the civil death of a party being unheard of, these aspects being well-settled, the same need not detain this Court any longer.

26. It is no doubt true that Exs.B-1 to B-3 and B-13 has been relied upon and further the photos also had been relied upon. Submissions at length were made that a stranger like the brother, that too divided brother of the husband of the defendant,

cannot dispute the marital status of the defendant in the light of Section 11 of the Act. It is also true that it is the plaintiff who approached the Court and the defendant, who is claiming to be the wife of the alleged deceased Raghava Rao, did not approach the Court. The circumstances under which the suit had been instituted also had been explained. It is pertinent to note that except the evidence of P.W. 1, there is no other evidence available on record. Equally except the evidence of D.W. 1, there is no other evidence available on record. Serious attempts had been made to prove the marital tie of the defendant and all the facts had been narrated in detail by D.W. 1.

27. However, the standard of proof required to establish the marital tie had not been satisfied. It may be that in the event of the appellant as the defendant being able to establish her marital tie, a perpetual injunction of this nature cannot be granted especially in the light of the facts and also the subsequent event that even after a lapse of sixteen years, the whereabouts of the alleged husband of the defendant being not known and in the light of the fact that a presumption may have to be drawn in relation to the civil death of such a party, in the light of the decisions referred to supra. It is also equally important to note that the standard of proof required to establish the marital tie and the essentials to be satisfied in this regard also had been repeatedly laid down by the High Courts and also the Apex Court as well. There cannot be any doubt whatsoever that in the event of the appellant as the defendant establishing the marital tie with the brother of the plaintiff, there cannot be perpetual injunction of this nature. As already specified supra, though the oral evidence of D.W. 1 and the documentary evidence is available on record and though certain attempts had been made by the appellant as the defendant to establish the marital tie, the standard of proof required had not been satisfied and hence in the light of the peculiar circumstances and also especially in the light of the views expressed by the lower appellate Court just prior to making the operative portion, this Court is of the considered opinion that the findings recorded by the lower appellate Court being totally unsatisfactory and equally the findings recorded by the Court of first instance also not being in accordance with law, this Court is also of the considered opinion that the matter be remanded to the Court of first instance to give opportunity to both the parties to let in evidence on all aspects, especially further evidence apart from the evidence which is already on record in relation to the marital tie between the appellant as the defendant and the brother of the respondent as the plaintiff and let the Court of first instance decide the matter afresh in accordance with law in the light of such evidence which may be adduced by the respective parties. It is also made clear that in vie w of the subsequent events, the parties are at liberty to amend their respective pleadings also suitably in accordance with law. It is needless to say that the parties also are at liberty to adduce further evidence on all aspects.

28. In the light of the observations made by this Court as specified above, the Second Appeal is allowed to the extent indicated above. No costs.