(2016) 01 AP CK 0021

Andhra Pradesh High Court

Case No: C.C.C.A. No. 335 of 2004

Sushila Bai Vasudev Rao Bodhanker and Others		APPELLANT
	Vs	
Govind Rao Bodhankar and Others		RESPONDENT

Date of Decision: Jan. 21, 2016

Acts Referred:

- Evidence Act, 1872 - Section 68
- Hindu Marriage Act, 1955 - Section 11, Section 16, Section 5(1)
- Succession Act, 1925 - Section 63
- Transfer of Property Act, 1882 - Section 3

Citation: (2016) AIR(Hyderabad) 221 : (2016) 3 ALT 228 : (2016) 3 AndhLD 1 : (2016) 2 HLR 718

Hon'ble Judges: U. Durga Prasad Rao, J.

Bench: Single Bench

Advocate: P. Sri Raghu Ram, for the Appellant; Chaitanya G. Barupati, for the Respondent

Final Decision: Allowed

Judgement

U. Durga Prasad Rao, J.

1. This appeal is preferred by the plaintiffs aggrieved by the judgment dated 16.06.2004 passed by learned V Senior Civil Judge, City Civil Court, Hyderabad dismissing their suit O.S. No. 345 of 1995 for partition of the suit schedule property into two equal shares and allotment of one such shares to them.

2. Factual matrix of the case is thus:

"a) The plaintiffs case is that Khande Rao Bodhanker (for short Khande Rao) and Anandi Bai (for short Anandi Bai) are couple. Khande Rao died intestate on 02.12.1976 and Anandi Bai also died intestate on 16.02.1995. They have two son''s of

whom the D1 Govind Rao Bodhanker (for short Govind Rao) is the elder son and one Vasudev Rao Bodhanker (for short Vasudev Rao) is the younger son. D15 is the son and D14 is the daughter-in-law of D1. D16 to D19 are son''s of D14 and D15. Whereas the second son Vasudev Rao is concerned, he died intestate on 01.08.1977. His first wife Ambu Bai died intestate on 06.06.1972. Their marriage was held in the year 1945 and they begot a son Dhananjay Bodhanker (for short Dhananjay) who is the second plaintiff. First plaintiff Sushila Bai Bodhanker (for short Sushila Bai) is the younger sister of Ambu Bai and she is the second wife of Vasudev Rao. Ambu Bai had a paralytic stroke and completely disabled and therefore, Vasudev Rao married the first plaintiff as his second wife on 09.03.1953 and through her begot the children who are plaintiffs 3 to 6.

b) The further case of the plaintiffs is that plaint A schedule property was acquired by Khande Rao during his lifetime with joint family funds, but the acquisition was nominally made in the name of late Anandi Bai. Nevertheless it is a joint family property and was treated as such. Defendants 2 to 13 are the tenants of some portions of plaint A schedule property whose details are given in plaint B schedule.

c) Subsequent to the death of Anandi Bai on 16.02.1995, the relationships between the branch of first defendant and branch of Vasudev Rao were not cordial and there were no speaking terms. The first defendant is residing at Aurangabad. Taking advantage of the death of Anandi Bai, first defendant and his son''s were playing mischief. Plaint schedule property being joint family property the two branches of Khande Rao i.e. first defendant and Vasudev Rao''s branch have right in equal moieties. Since the plaintiffs represented Vasudev Rao branch, they are entitled to half share in the plaint schedule properties. Hence, the suit for partition.

d) Defendant Nos. 1, 14 and 15 filed their individual written statements and other defendants remained ex parte.

e) The defendants inter alia contended that the suit schedule property was the self-acquired property of Anandi Bai which she acquired with her own funds and it is not a joint family property. Anandi Bai did not die intestate as claimed by the plaintiffs, but during her life time she executed a Will dated 09.04.1990 whereunder she bequeathed all her properties i.e. plaint A and B schedule properties to the children and members of first defendant and also a part of the property in favour of D14. Anandi Bai bequeathed her jewellery and her valuable property to the defendants as well as plaintiffs and the plaintiffs were well aware of the Will executed by Anandi Bai and they refused to receive the jewellery of Anandi Bai in spite of their knowledge that the cash and jewellery of Anandi Bai were obtained from the bank. The defendants contended that in view of the Will executed by Anandi Bai, plaintiffs have no right in the plaint A and B schedule properties.

f) The defendants further contended that plaintiff No. 1 is not the legally wedded wife of Vasudev Rao, as she eloped with him against the wishes of parents of

Vasudev Rao. Plaintiffs 3 to 6 being the children born to first plaintiff, they are not the legal heirs of Vasudev Rao. Therefore, the first plaintiff and plaintiffs 3 to 6 have no legal right in the plaint schedule properties and only the second plaintiff is the legal heir of Vasudev Rao. D1 being the employee of Government of Maharashtra, he was residing at Aurangabad along with his wife. So, D15 and his son''s who were residing with Anandi Bai in the suit property, obtained loans and repaired the suit property and hence, Anandi Bai bequeathed the suit property to them.

g) Basing on the above pleadings, the trial Court framed the following issues for trial.

1. Whether the plaintiffs are entitled for partition and separate possession as prayed for?

2. Whether the plaint schedule properties are available for partition?

3. Whether the valuation and Court Fee paid is sufficient?

4. To what relief?

The trial Court framed the following additional issues:

1. Whether the plaintiff No. 1 is legally wedded wife of late Vasudev Rao Bodhanker?

2. Whether the plaintiffs 3 to 6 can claim inheritance in ancestral properties?

3. Whether the suit properties are joint family properties after the death of Smt. Anandi Bai Bodhanker?

4. Whether the plaintiffs are co-owners and joint family properties after the death of Smt. Anandi Bai Bodhankar?

5. Whether the successor of the testator can change the mode of the devolution of the suit schedule property contrary to the wishes of the Testator?

6. Whether the registered Will deed dated 09.04.1990 is a genuine one?

7. Whether the plaintiffs are entitled for relief of equal share and delivery of separate possession and half share from the suit schedule properties?

8. To what relief?

h) During trial, PWs.1 to 3 were examined and Exs.A1 to A8 were marked on behalf of plaintiffs. DWs.1 to 4 were examined and Exs.B1 to B21 were marked on behalf of defendants.

i) Judgment shows, the trial Court gave a finding that marriage between Vasudev Rao and first plaintiff was an invalid marriage. Sofaras plaintiffs 3 to 6 are concerned, the trial Court held in view of Section 16 of Hindu Marriage Act, 1955 (for short HM Act, 1955) they have a right of inheritance in the suit property. With regard to the nature of plaint schedule property, the trial Court agreed with the defendants

and held that plaintiffs could not establish that the suit schedule properties were acquired by late Khande Rao with the joint family funds in the name of Anandi Bai. Then, on the crucial issue touching the genuinity of registered Will dated 09.04.1990, the trial Court basing on the evidence of DWs.2 and 3 coupled with other evidence held that the Will is a genuine one. Thus, the trial Court agreed with the defendants and held that the suit schedule properties are self-acquired properties of late Anandi Bai. The trial Court ultimately held that the plaintiffs are not entitled for partition and accordingly dismissed the suit. Hence, the appeal by the plaintiffs."

3. The parties in the appeal are referred as they were arrayed before the trial Court.

4. Pending appeal, appellant No. 1 died and appellants 2 to 6 who are already on record are recognized as her LRs. as per Court order dated 06.11.2013.

5. Heard arguments of Sri P. Sri Raghu Ram, learned counsel for appellants; Sri Chaitanya G. Barupati, learned counsel for R.1, R.16 to R.19; Sri Fazal Yousufuddin, learned counsel for R2; Sri Ch. Ravindranath, learned counsel for R15. Case against R12 was dismissed for default. Notice sent to R3 to R11 and R13 and R14 was served but there is no representation on their behalf.

5a. Fulminating the judgment, learned counsel for appellants/plaintiffs firstly argued that trial Court grossly erred in appreciation of facts and law relating to the legality of marriage between the first plaintiff and Vasudev Rao and the legitimacy of their children i.e. plaintiffs 3 to 6. He submitted that though their marriage took place during the subsistence of legal marriage between Vasudev Rao and his first wife Ambu Bai, still their marriage was solemnized on 09.03.1953 i.e. long prior to the Hindu Marriage Act, 1955 (for short HM Act, 1955) came into force which Act declared a bigamous marriage as void besides being a punishable offence. Hence their marriage is perfectly legal. He further submitted that even prior provincial legislation prohibiting bigamous marriages such as Madras Hindu (Bigamy Prevention and Divorce) Act, 1949 (Act 6/1949) which was in vogue by the date of marriage of the first plaintiff with Vasudev Rao had no application since the parties belonged to Hyderabad in Hyderabad State which was a Part B State by then. Hence, the marriage between Sushila Bai first plaintiff and Vasudev Rao was a legally valid marriage and the children born to them i.e. plaintiffs 3 to 6 are their legitimate children. On this aspect he relied upon the decision reported in Dr. M. Satyanarayana Reddy v. Rukma Bai , 2004 (1) ALD 17. He argued that the trial Court misconstrued the provisions of HM Act, 1955 and held as if the marriage between first plaintiff and Vasudev Rao as a void marriage though of course, it held their children were legitimate and entitled to share by virtue of Section 16 of HM Act, 1955. He submitted that in deciding the legality of their marriage, the subsequent legislation i.e. HM Act, 1955 had no application and their children being legitimate had no need to take shelter under Section 16 of HM Act, 1955.

b. Secondly, he would argue that trial Court committed a severe blunder in treating the suit schedule properties as the self-acquisitions of late Anandi Bai though she being only a house wife had had no independent source of income. On other hand, her husband Khande Rao who was an Engineer and Kartha of joint family advanced the sale consideration from the joint family funds accumulated with his earnings and his son s. Thus, the trial Court ought to have treated the suit schedule properties as joint family properties and held late Anandi Bai had no right to bequeath them by way of Ex. B1 Will. Since the suit schedule properties are the joint family properties the trial Court ought to have accepted the plea of plaintiffs that D1 and Vasudev Rao being two son''s of late Khande Rao are entitled to equal moieties and decreed the suit.

c. Thirdly and alternatively, he argued that even assuming that the suit properties are held to be the self-acquisitions of late Anandi Bai, still plaintiffs being the LRs. of Vasudev Rao who was the second son of Anandi Bai are entitled to half share therein, as the alleged Will Ex. B1 was got fabricated by D1, D14 and D15. He vehemently argued the trial Court faltered in believing the Will. Projecting the suspicious circumstances surrounding the Will, he submitted that there was no good reason for Anandi Bai to exclude her second son Vasudev Rao from inheriting her property along with her elder son Govind Rao. The mentioning in Ex. B1 to the effect that since Vasudev Rao had a second marriage with first plaintiff against the Will of his parents he was excluded is only a lame pretext which was engineered by D1, D14 and D15. Vasudev Rao had to have the second marriage not out of lust towards first plaintiff but because his first wife Ambu Bai was crippled due to paralysis and he had a minor son and both of them to be looked after and so, with the consent of his first wife and also his parents, Vasudev Rao married the younger sister of Ambu Bai and his act in those circumstances cannot be said to invite wrath of his parents. So, the exclusion of Vasudev Rao from the Will is a strong suspicious circumstance to discard its genuinity. Except that no other plausible reason was assigned or established by the defendants being the propounders of the Will for excluding Vasudev Rao and also his son i.e. second plaintiff.

d. Pointing out another suspicious circumstance, he would submit that DWs.2 and 3 the alleged attesters of the Will are none other than the close friends of D15 (DW1) and in the ordinary course, Anandi Bai who did not know the attesters could not have requested them to act as witnesses. Further, the defendants have not legally proved the Will, inasmuch as, the attesters did not specifically state that the testatrix signed in their presence and they in turn attested the Will in her presence. As such, the execution of Will was not legally established though it was a registered document. Regarding the proof of Will, he relied upon the decision of the Apex Court reported in Kashibai v. Parwatibai , (1995) 6 SCC 213.

e. He further argued D14 and D15 are the main beneficiaries of the Will and strangely D15 was appointed as sole executor of the Will which shows that he took a

prominent role in execution of the Will. This is another suspicious circumstance. He submitted that when the Will is discarded, the plaintiffs suit has to be decreed. He thus prayed to allow the appeal and set aside the judgment and decree of the trial Court.

6. Per contra, learned counsel for R15 Ch. Ravindranath supported the trial Court judgment and filed brief written arguments. The others did not adduce any arguments.

7. In the light of above rival arguments, the points for determination in this appeal are:

"1. Whether plaintiff No. 1 is a legally wedded wife of late Vasudev Rao and plaintiffs 3 to 6 are their legitimate children?

2. Whether the plaint schedule properties are joint family properties or self-acquisitions of late Anandi Bai?

3. If the suit properties are held to be the self-acquisitions of late Anandi Bai, whether Ex. B1 Will dated 09.04.1990 said to be executed by her is true, valid and binding on the plaintiffs?

4. To what relief?"

8a. Point No. 1: The relationship between the parties and existence of suit schedule properties are not in dispute. One of the grounds on which the defendants denied first plaintiff and plaintiffs 3 to 6 a share in the suit schedule properties is that first plaintiff was not legally wedded wife of Vasudeva Rao and her children are not legitimate children. As stated supra, the trial Court held first plaintiff is not the legally wedded wife of Vasudeva Rao but her children are deemed to be legitimate by virtue of Section 16 of HM Act, 1955 and hence entitled to a share.

b. As per the plaint averments and evidence of PW1, Vasudeva Rao married Ambu Bai in the year 1945 and later she suffered a paralytic stroke and became completely disabled and they got a minor son i.e. second plaintiff and in those circumstances he married the first plaintiff on 09.03.1953 i.e. long before the HM Act, 1955 came into force with the consent of his first wife and also his family members and begotten plaintiffs 3 to 6 through the first plaintiff and hence, the first plaintiff is also legally wedded wife of Vasudeva Rao. In their respective written statements, D1, D14 and D15 contended that first plaintiff was not the legally wedded wife of Vasudeva Rao, as the second marriage was solemnized during the subsistence of prior marriage and hence the same was void as per HM Act, 1955.

c. Coming to the evidence, PW1 in her cross-examination stated that her marriage was held on 09.03.1953 with Vasudeva Rao in Jambagh, Hyderabad in her parents house, but she admitted that she did not file any documentary proof to that effect. While so, DW1 in his cross-examination stated that marriage between the first

plaintiff and Vasudeva Rao was held in the year 1950. Be that it may, PW2 who is the son of Vasudeva Rao through his first wife admitted in his evidence that the marriage between his father and first plaintiff took place on 09.03.1953. It may be noted that PW2 who is the son of Vasudeva Rao through his wife could have disputed the marriage of first plaintiff with his father, but he admitted the marriage. So, when the pleadings and evidence of respective parties are taken into consideration, PW2 and defendants are not disputing the factum of second marriage of first plaintiff with Vasudeva Rao, but according to the defendants since the said marriage was during the subsistence of the first marriage and against the wish of the parents of Vasudeva Rao, it is a void marriage as per HM Act, 1955. In this case, though marriage is an admitted fact, there is no correct proof for the date of marriage. As per the evidence of PWs.1 and 2 the marriage was held on 09.03.1953, whereas as per the admission of first defendant the marriage took place in the year 1950. It is considered that it Will be difficult for the first plaintiff to produce documentary proof of date of her marriage long after the said marriage. Since the marriage is an admitted fact, though there is no proof for correct date of marriage, basing on the evidence it can be safely concluded that marriage of first plaintiff and Vasudeva Rao was held prior to HM Act, 1955 came into force.

9. It may be noted that HM Act, 1955 came into force on 18.05.1955. As per Sections 5(1) and 11 of the said Act, the second marriage during the lifetime of the spouse of valid first marriage was held void. However, the provisions of HM Act, 1955 are prospective in operation and thereby the second marriage could be held void only when it was solemnized after the HM Act, 1955 came into force and not before.

a. In the instant case, the second marriage between the first plaintiff and Vasudeva Rao was solemnized long prior to HM Act, 1955 and hence, the said Act had no application to the parties. Learned counsel for appellants/plaintiffs submitted that even the provisions of the provincial enactment i.e. Madras Hindu (Bigamy Prevention and Divorce) Act, 1949 (Act 6/1949) which introduced strict monogamy among Hindus even prior to HM Act, 1955, have no application to the parties because though the marriage took place during the existence of Madras Act 6/1949 but the parties belong to Telangana area in Hyderabad State which is a Part-B State and their marriage took place at Hyderabad and hence the provisions of Madras Hindu (Bigamy Prevention and Divorce) Act, 1949 have no application to them.

10. In M. Satyanarayana Reddys case , 2004 (1) ALD 17 (supra) cited by the appellants, the facts are similar to the present case. In that case one Rajeshwar Reddy who belonged to Adilabad district in erstwhile Hyderabad State had three marriages prior to HM Act, 1955. About the validity of those marriages, it was argued that the parties belong to Adilabad district and the provisions of Bombay Prevention and Divorce Act, 1946 (Act 25/1946) and Madras Hindu (Bigamy Prevention and Divorce Act, 1949 (Act 6/1949) had no application to the parties and till the bar or prohibition of second marriage imposed by HM Act, 1955 came into

force, there was no such prohibition at all. This argument was approved by the learned single Judge of this High Court. The said judgment applies to the instant case. Therefore, the marriage of first plaintiff and Vasudev Rao was legally valid and consequently the children born to them are legitimate. Unfortunately, the trial Court has not considered the facts and law on this issue on proper perspective.

This point is answered accordingly.

11a. POINT No. 2: The plaintiffs are claiming share in the properties firstly on the plea that the suit schedule properties were purchased by Khande Rao, Kartha of joint family with the joint family funds and also with the earnings of himself and two son''s and obtained Ex. B2 sale deed in the name of his wife Anandi Bai and hence, the suit schedule properties are joint family properties and plaintiffs deserve half share therein and alternatively on the plea that even assuming that the suit schedule properties are self-acquisitions of Anandi Bair, still the plaintiffs being the LRs. of her younger son Vasudev Rao are entitled to half share. They contended that Will said to be executed by her was fabricated and manipulated by D1, D14 and D15 to deprive the plaintiffs of their legitimate share. The trial Court held that suit schedule properties are self- acquisitions of Anandi Bai and Will was a genuine one which findings are assailed in this appeal. Hence the nature of suit properties in the hands of Anandi Bai has to be scrutinized once again in this appeal.

b. As per Exs.B2 and B3, admittedly the suit properties were purchased by Anandi Bai. In this regard, we have to consider the law relating to properties standing in the name of female member of a joint Hindu family. It must be noted that there is no presumption that the property stands in the name of a female member belongs to joint family. The cardinal principle of Hindu law is that there is a marked distinction as to the presumption in the case of acquisitions in the names of male members and female members of the joint family. Acquisitions in the name of male member of a joint family is concerned, there is a presumption that if the joint family had sufficient ancestral nucleus, the properties standing or acquired in the name of male members are the joint family properties unless the presumption is rebutted by showing the properties are the separate properties of a particular member or members in whose names the properties stand or were acquired. However, there is no presumption in the case of properties standing in the name of female members. In such case, it is for the party who claims properties as joint family properties to specifically plead the particulars and details in the pleadings and establish the same by adducing necessary evidence. In the absence of which, there is no need for detailed scrutiny as to how the female members acquired the property in question. If the plaintiffs adduced no evidence, no further question arises and the female member in whose name the property stands must be held to be beneficial owner of the property in question.

c. The above principle was well delineated in a number of decisions. In Santanu Kumar Das v. Bairagi Charan Das , AIR 1995 Orissa 300 it was held thus: Para 8: It

would be apposite to point at this stage that both the Courts were under the misconception of law that when a property is purchased in the name of a female member of the joint family and there is sufficient nucleus, the said property should be presumed to be joint family property. Such a presumption would be available only in the case of a male member of the family, but not a female member as has been held in the case of Manahari Devi v. Choudhury Sibanava Das reported in , AIR 1983 Orissa 135 where this Court after referring to various decisions held that the presumptive doctrine available in respect of the property in the name of a male is not available as in the case of a female member. The party pleading a contrary case should establish the same adducing necessary evidence that the property so purchased was from the joint fund.

In Nagayasami Naidu v. Kochadai Naidu , AIR 1969 Mad 329 also similar view was expressed.

12. In the instant case, the plea of plaintiffs was that Khande Rao being the Kartha of joint family advanced joint family funds, his earnings and also the earnings of his to son''s and acquired suit properties covered by Exs.B2 but in the name of his wife Ambu Bai. However, except taking such a plea the plaintiffs have not adduced any proof positive showing that the joint family of Khande Rao and his son''s had sufficient nucleus and the details of the income fetching properties and the method and manner of advancing the amounts from joint family nucleus by Khande Rao to acquire the suit properties in the name of Anandi Bai. What all established was that during the relevant period Khande Rao was an Engineer and Anandi Bai was only house wife, but it could not be shown that two son''s were employees by the date of purchase of suit properties. So, there is no strong evidence from the plaintiffs side to establish that the joint family nucleus comprising sufficient properties to advance funds to purchase the suit properties. On the other hand, the contention of defendants is that the father of Anandi Bai was a businessman and with the gold, silver and cash presented by her parents as Stridhana, Anandi Bai purchased the suit properties. As laid down in the above principle, when the plaintiffs failed to prove the factum of flow of funds from the joint nucleus to acquire the suit properties by cogent evidence, there is no need to go deep into whether Anandi Bai had obtained Stridhana property and with the same she purchased suit schedule properties. The trial Court was right in holding that suit schedule properties were the self- acquisitions of late Anandi Bai.
This point is answered accordingly.

13a. POINT NO.3: Since the properties are held to be self-acquisitions of late Anandi bai, it has to be seen whether Ex. B1 Will is a genuine one or not. The contention of plaintiffs was that the Will is not a genuine one and it was set up by defendants 1, 14 and 15 and Anandi Bai was more than 80 years old by the date of alleged Will and she was not mentally fit to execute any Will and further, the first defendant being doctor might have managed to get a false certificate of her mental condition and in

that back drop, the Will was a factitious one brought into existence for laying false claim in respect of suit properties.

b. Per contra, defendants claimed the Will is a genuine one. The trial Court held that the plaintiffs could not establish the ill-health of Anandi Bai so as to prove that she was not mentally fit to execute the Will and on the other hand, through the evidence of DWs.2 and 3 the attesters the defendants could establish that Anandi Bai executed the Will. So, the genuinity of the Will is again an issue in this appeal.

14. Exs.B1 Will reads that Anandi Bai purportedly executed the same on 09.04.1990 and it is a registered Will. She mentioned in the Will that she was 70 years old and she was executing the Will to avoid any disputes that may arise after her death in between his elder son i.e. D1 and first plaintiff and her children in respect of her properties. She then mentioned immovable and movable properties owned by her. She stated that her younger son Vasudev Rao who died on 01.08.1977, married his first wife''s sister i.e. PW1 contrary to the wishes of herself and her husband and since the time of his second marriage the relations between them were strained due to constant bickerings and so her second son and his family settled and residing in their house at Aurangabad.

She further stated that D15 (DW1) the son of D1, who is her grand son, has been residing with her and her husband since he was 4 years old and her husband died on 02.12.1976 and thereafter, no one took interest in the property acquired by her and it became dilapidated and collapsed and in those circumstances she executed GPA in favour D15 and permitted him to develop the property by taking hand loans from suitable parties and accordingly, he demolished the old building, reconstructed and developed the property. She further stated that D15 and his wife D14 were looking after her and rendering all kinds of services with love and affection and therefore, she was bequeathing the building bearing No. 15-8-342 to D14 and building bearing No. 15-8-343 to D15. She stated that she was not conferring any immovable properties on the legal heirs of her second son Vasudev Rao, but giving a share in movable property. She appointed D15 as sole executor of the Will to allot the shares as mentioned in the Will.

The above are purportedly the contents of Ex. B1 Will. Thus, the above contents would show that Anandi Bai bequeathed her valuable immovable properties to D14 and D15, but conferred paltry gold ornaments of 4 tulas and steel and brass utensils worth Rs. 2,000/- to first plaintiff and her children.

"a) Admittedly, Anandi Bai was 70 years old lady and she was in the care and custody of D1, D14 and D15 at the time of execution of Will. All her immovable properties were bequeathed to D14 and D15 and only a pittance to PW1 and her children. Since the grand old lady was with D14 and D15 and as they were taking a major share out of bequest, being propounders of the Will, heavy duty is cast on them to ward off the suspicious circumstances surround the Will.

b) Admittedly, Govind Rao and Vasudev Rao are the two son''s of Anandi Bai. In that view, generally there could be no reason for the mother to exclude the LRs. of second son from obtaining her legacy, but she gave only few gold, silver and brass articles to them which are far lesser in value when compared to immovable properties which are conferred to D14 and D15. The only apparent reason for disparity was because Vasudev Rao had second marriage with PW1 (plaintiff) against the wish of his parents. The point is whether this could be a real and logical cause to exclude the LRs. of Vasudev Rao. It is not in dispute that Vasudev Raos first wife Ambu Bai afflicted with paralysis and by then, second plaintiff was a minor boy and Vasudev Rao was working at Aurangabad as an Engineer. In those circumstances, he married PW1 who is none other than the younger sister of Ambu Bai. It goes without saying that marriage would not have been solemnized without the consent of Ambu Bai and her parents. PW3 who is the younger brother of PW1 did not say about the unwillingness of parents of Vasudev Rao. In fact, the marriage was performed in Jambagh, Hyderabad in the house of parents of PW1. So, it can be said the marriage of Vasudev Rao was not out of his vices or lust but because of necessity. In that back drop, being the parents of Vasudev Rao, Anandi Bai and Khande Rao would generally support the marriage but do not get angry upon their son so as to sever relationship with him. If at all Vasudev Rao and PW1 left his parents and resided at Aurangabad that was due to his employment. For that matter, the first son Govind Rao was also residing in Aurangabad due to his employment. So, the alleged cause shown in Ex. B1 for exclusion of plaintiffs appears to be only a pretext engineered by D1, D14 and D15. On the contrary, as admitted by DW1 in his cross-examination, on the occasion of marriage of daughter of first plaintiff, all the family members including Anandi Bai and Khande Rao assembled and got photographed under Ex. A8. If really they angered upon Vasudev Rao for his second marriage and severed relationship with him thereafter, the question of their attending the marriage of the daughter of Vasudev Rao and first plaintiff would not have arisen. Further, Ex. A7 letter dated 07.04.1978 shows that Shanta Bai the mother of D15 wrote the said letter to first plaintiff in very cordial terms. This also shows that Vasudev Rao and PW1 did not sever their relations with other family members on account of their marriage. From all the above, it is clear that the mentioning in Ex. B1 Will is only a ruse to exclude the LRs. of Vasudev Rao from bequest. It appears to give a colour that first plaintiff and her children were also given property, some negligible gold and silver articles were conferred on them.

c) Above all, as rightly pointed out by the learned counsel for appellants, surprisingly, D15 who took major share under Ex. B1 Will was appointed as sole executor of the Will. Further, DWs.2 and 3 appeared to be the friends of D15 (DW1).

d) DW2 stated that he is Unani Doctor and family friend of D15 and treating his family members and in that context, on the request of Anandi Bai he went to the Registrar office and acted as attesting witness to the Will. But in the

cross-examination he stated that he did not treat the family members of D15. If he did not treat them, the question of getting acquaintance with Anandi Bai so as to be called by her to act as attester does not arise. DW3 also claims to be the family friend of late Anandi Bai and on her request he attended Sub-Registrar office and acted as witness to the Will. In the cross-examination he clearly admitted that except D14 and D15 he does not know any of their family members. Thus, it is clear that he does not know Anandi Bai. So, the question of her asking him to act as an attester to the Will does not arise. Thus, it appears DWs.2 and 3 acted as attesters as per the wish of D14 and D15. All the aforesaid circumstances would show that D1, D14 and D15 prevailed over Anandi Bai taking advantage of her old age and her dependency on them and stood behind and engineered the Will. Therefore, there can be no doubt to hold that Ex. B1 Will was not executed out of free Will and consent of Anandi Bai."

15. On another ground also learned counsel for appellants challenged the validity of the Will. He argued that DWs.2 and 3 have not specifically stated that the executant has signed on the Will in their presence and in turn they attested the Will in her presence and therefore, the defendants failed to prove the due execution of the Will and its attestation as required under law and hence, the validity of the Will cannot be accepted.

16. In Kashibais case (2 supra) the Apex Court happened to discuss due method of execution of Will and its attestation. In that context it observed thus:

"Para 10: This brings us to the question of the Will alleged to have been executed by deceased Lachiram in favour of his grandson Purshottam, the defendant No. 3, Section 68 of Evidence Act relates to the proof of execution of document required by law to be attested. Admittedly, a Deed of Will is one of such documents which necessarily require by law to be attested. Section 68 of the Evidence Act contemplates that if a document is required by law to be attested, it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive, and subject to the process of the Court and capable of giving evidence. A reading of Section 68 Will show that "attestation" and "execution" are two different acts one following the other. There can be no valid execution of a document which under the law is required to be attested without the proof of its due attestation and if due attestation is also not proved, the fact of execution is of no avail. Section 63 of the Indian Succession Act, 1925 also lays down certain rules with regard to the execution of unprivileged Wills. Clause (C) of Section 63 provides that the Will shall be attested by two or more witnesses, each one of whom has seen the testator sign or affix his mark to the Will or has seen some other person sign the Will, in the presence and by the direction of the testator, or has received from the testator a personal acknowledgment of his signature or mark on the signature of such other person; and each of the witnesses should sign the Will in the presence of the testator, but it

shall not be necessary that more than one witness be present at the same time and no particular form of attestation shall be necessary.

Para 11: Here we may also take note of the definition of the expression "attested" as contained in Section 3 of the Transfer of Property Act which reads as under:

Section 3 "attested", in relation to an instrument, means and shall be deemed always to have meant attested by two or more witnesses each of whom has seen the executant sign or affix his mark to the instrument, or has seen some other person sign the instrument in the presence and by the direction of the executant, or has received from the executant a personal acknowledgement of his signature or mark, or of the signature of such other person, and each of whom has signed the instrument in the presence of the executant but it shall not be necessary that more than one of such/Witnesses shall have been present at the same time, and no particular form of attestation shall be necessary.

Having regard to the afore-mentioned definition an attesting witness is a person who in the presence of an executant of a document puts his signature or mark after he has either seen the executant himself or someone on direction of the executant has put his signature or affixed his mark on the document so required to be attested or after he has received from the executant a personal acknowledgement of his signature or mark or the signature or mark of such other person.

xx xx xx

In the absence of such evidence it is difficult to accept that the execution of the alleged Will was proved in accordance with law as required by Section 68 of the Evidence Act read with Section 63 of the Indian Succession Act and Section 3 of the Transfer of Property Act.

So, having regard to Section 68 of Evidence Act and Section 3 of Transfer of Property Act and the above observation of Honourable Apex Court, it is clear that in proof of due execution of Will and its attestation, the attesting witnesses shall clearly spell out that the executant had either signed or put the thumb impression in their presence and they in turn have attested in the presence of executant. If they failed to state these crucial facts, it cannot be held that execution of the Will was duly proved."

17. In the instant case, DW2 only deposed that on the request of Anandi Bai he went along with her to Registrar Office to sign on the Will executed by her and after reading its contents he signed the Will before the Registration Officer and that he can recognize and identify her signature. He further stated that original of Ex. B1 Will was executed by Anandi Bai and the same contains her signature and she was hale and healthy at the time of execution of Will and she signed before the Sub-Registrar of Manghalghat. D3 almost deposed in similar fashion. Thus, as rightly contended by learned counsel for appellants/plaintiffs, these two witnesses have

not deposed about the crucial facts relating to attestation i.e. the executant signing in their presence and thereafter their attesting the Will in her presence. No such connotation can be given to their evidence and going by the law of execution and the observation of Honourable Apex Court it can be said in the instant case, the defendants failed to prove due execution of the Will and its attestation.

18. So, for all the above reasons, it can be held that the defendants on one hand failed to prove due execution of Will and on the other, failed to dispel suspicious circumstances. Therefore, it is held Exs.B1 Will is not a genuine document and it Will not bind the plaintiffs.

This point is answered accordingly.

19. In the result, in view of the findings in Points 1 to 3, this appeal is allowed and judgment and decree dt: 16.06.2004 in O.S. No. 345 of 1995 on the file of V Senior Civil Judge, City Civil Court, Hyderabad is set aside and a preliminary decree is passed in favour of plaintiffs, directing partition of Plaint-A schedule property into two equal shares and allot one such divided share to them with costs throughout.

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