

**THE HONOURABLE SRI JUSTICE SAMBASIVARAO NAIDU**

**C.C.C.A.NO.385 OF 2018**

**JUDGMENT:**

Defendant No.1 in O.S.No.401 of 2013 on the file of the XIX Senior Civil Judge, City Civil Court, Secunderabad, has filed this first appeal under Section 96 of the Code of Civil Procedure, 1908 (for short, 'C.P.C.') assailing the Judgment and Decree dated 01.03.2017 passed by the trial Court in the subject suit whereunder the trial Court had passed a decree in favour of the respondents/plaintiffs for partition of the schedule mentioned property.

2. For the sake of convenience and also for better understanding, the parties will be referred in the same ranking in which they are arrayed before the trial Court.

3. As could be seen from the material available on record, the plaintiffs have filed the subject suit against defendant Nos.1 to 3 seeking partition of the schedule mentioned property i.e., House bearing door Nos.6-5-453 to 455, admeasuring 96.44 square yards. As per the averments made in the plaint, the plaintiffs have claimed that the plaintiffs, defendant No.1 and one Sri Devraj are the sons of Mr.G.Krishna Murthy and Smt.Santhamma.

Defendant No.3 is the wife of the said Sri Devaraj, who was no more by the time of filing of the suit.

4. The plaintiffs have claimed that Smt.Janakamma, who is their maternal grandmother i.e., mother of the said Smt.Santhamma was the original owner of the schedule mentioned property and during her life time, she has executed a registered Will deed bequeathing the schedule mentioned property in favour of her daughter i.e., Smt.Santhamma and her grandchildren i.e., the plaintiffs and defendants shall be entitled to enjoy the joint and individual rights in the property. Therefore, after the death of their grandmother, the plaintiffs and the defendants and said Smt.Santhamma were residing in the said house.

5. The plaintiffs have further claimed that since the extent of the property is small, they could not have divided the property into five shares, thereby, they gave consent for sale of the property so that they can divide the sale proceeds into five shares. However, due to difference of opinion such sale could not have been affected as such they wanted the property to be partitioned among all the sons of Smt.Santhamma and as one of the sons, the said Sri Devaraj is no more, his share shall be given to Defendant No.3-Smt.Sumithra Devi.

6. The plaintiffs have claimed that defendant No.1 did not cooperate for the partition and for the sale of the property, as he wanted to grab the entire property, they filed the subject suit seeking partition of the property into five equal shares.

7. Out of three defendants shown in the plaint, defendant Nos.2 and 3 were remained *ex parte* whereas defendant No.1 has filed the written statement admitting the original ownership of Smt.Janakamma over the schedule mentioned property, he has claimed that Smt.Janakamma while executing the registered Will bequeathed the property in favour of her daughter Smt.Santhamma and grandchildren of Smt.Santhamma, thereby, the sons of Smt.Santhamma have no right over the schedule mentioned property. Thereby, the suit filed by the plaintiffs for partition of the property into five shares is not maintainable. He has also claimed before the trial Court that in view of the Will deed executed by original owner Smt.Janakamma bequeathing the property to Smt.Santhamma and her grandchildren, since Smt.Janakamma and Smt.Santhamma are no more, the grandchildren of Smt.Santhamma only have got right, therefore, sought for dismissal of the suit. The trial Court has framed the following issues:

- 1) Whether the plaintiff is entitled for 1/5<sup>th</sup> share in the suit schedule property?
- 2) To what relief?

During the course of trial, plaintiff No.1 was examined as PW.1 and Exs.A.1 to A.15 documents were marked. Defendant No.1 has been examined as DW.1 and Exs.B.1 to B.10 are marked. The trial Court having appreciated the pleadings and evidence of both the parties, came to the conclusion that since there was no dispute about the original ownership of Smt.Janakamma and the Will deed executed by her bequeathing the property in favour of her daughter and grandchildren of her daughter and, in view of the said Will, the said Smt.Santhamma will have half share and remaining share shall go to the grandchildren of Smt.Santhamma and in view of said fact, the sons of Smt.Santhamma would get 1/5<sup>th</sup> share in the said half share to which Smt.Santhamma is entitled and accordingly, passed a preliminary decree for allotment of half share in favour of Smt.Santhamma and division of the said half share among the five sons.

8. Being aggrieved by the said Decree and Judgment, defendant No.1 has filed this appeal on the following grounds:

- a) The Judgment and Decree of the trial Court suffers from serious infirmities and against the settled principles of

law. The trial Court did not consider the recitals of Ex.A.1 in proper perspective but the Will clearly shows that none of the parties to the suit are entitled to any share in the schedule mentioned property, thereby, it could not have passed preliminary decree for partition among the plaintiffs and defendants of the suit. The trial Court committed an error by holding that Smt.Santhamma, who is the mother of the plaintiffs and defendant Nos.1 and 2, has got half share in the schedule mentioned property.

b) Defendant No.1 has further claimed that the trial Court made a wrong observation as if defendant No.1 admitted that he paid the amount towards his share to his mother and sisters in Ex.A.2 and the same is voluntarily executed by them, in fact, there was no such averment by the plaintiffs in plaint nor there was any such evidence in support of the claim. Defendant No.1 has also contended that the trial Court committed an error by not considering the recitals of Will deed, which clearly shows that Smt.Santhamma and her grandchildren alone have got joint and undivided rights over the schedule mentioned property, thereby, none of the other family members including the plaintiffs and defendants have got any right over the

schedule mentioned property. The trial Court was wrong in holding that the plaintiffs and defendants are entitled to half share that will fall to the share of Smt.Santhamma in spite of the clear recitals in the Will deed.

c) Defendant No.1 has claimed that the findings recorded by the trial Court about the entitlement of Smt.Santhamma about half share and after her death the parties to the suit has got 1/5<sup>th</sup> share is incorrect and liable to be set aside. Therefore, Defendant No.1 has prayed for dismissal of the suit by setting aside the impugned Judgment.

9. Now, the points that would emerge for determination in this appeal are:

- 1) Whether the trial Court was wrong in considering that by virtue of Ex.A.1 Will deed, the mother of the plaintiffs, defendant Nos.1 and 2 and Sri Devaraj has got half share and the remaining share will go to her grandchildren?
- 2) Whether the trial Court was wrong in holding that the sons of Smt.Santhamma have got 1/5<sup>th</sup> share, each in the half share that may fall to their mother and the said finding is liable to be set aside?
- 3) Whether the finding recorded by the trial Court by virtue of the Will deed and in view of Section 14(1) of the Hindu Succession Act, 1956, Smt.Santhamma is entitled to half share and that can be divided among her five sons, is liable to be set aside?

10. As could be seen from the evidence produced by the parties both oral and documentary, it transpires that there is no dispute about the original ownership of schedule mentioned property that is shown in the schedule by Smt.Janakamma, who is maternal grandmother of defendant No.1 and other sons of Smt.Santhamma. The parties did not dispute the execution of the registered Will by the said Smt.Janakamma under the original of Ex.A.1. There is no serious dispute about the recitals of Will which clearly shows that the executant of the Will bequeathed the schedule mentioned property in favour of her daughter Smt.Santhamma and also in favour of the grandchildren of Smt.Santhamma. For the sake of convenience and clarity the particulars/recitals of the Will has been extracted hereunder:

*“I hereby give devise and bequeath all my above said property unto and to the use of my daughter Smt.G.K.Shantamma, W/o late G.Krishna Murthy, aged about 55 years, R/o H.No.6-5-453, 454 and 455, New Bhoiguda, Secunderabad, and her grandchildren shall be entitled to enjoy joint and undivided rights in the said property and none of my other family members shall be entitled to have any manner of right, title or interest over my above said property.”*

11. The parties to the suit did not dispute the recitals of the Will deed. However, the plaintiffs have claimed that the original owner Smt.Janakamma bequeathed the property to her daughter-Smt.Santhamma and her grandchildren. Both the parties while proceeding with the oral evidence in support of their respective contentions, they have categorically stated that the schedule mentioned property is originally purchased with the own funds of the said Smt.Janakamma and in view of the Ex.A.1 Will deed she has bequeathed the property for enjoyment of the same by her daughter. However, the recitals of Ex.A.1 clearly indicates that the executant of Ex.A.1 wanted to bequeath the property not only in favour of her daughter but also in favour of the grandchildren of her daughter-Smt.Santhamma. The daughter-Smt.Santhamma and grandchildren of Smt.Santhamma were given joint and undivided rights over the property and it is also stated in the Will that except Smt.Santhamma and her grandchildren, no other family members have got any right over the property.

12. On careful examination of Ex.A.1 Will deed, it unfolds that there is no averment by which neither defendants nor the plaintiffs can claim any share over the property. The plaintiffs while placing reliance on Ex.A.1 have claimed that in view of the



death of the original owner as well as their mother Smt.Santhamma, they being sons of Smt.Santhamma would get 1/5<sup>th</sup> share each over the property. However, there is no explanation from the plaintiffs as to how they can claim 1/5<sup>th</sup> share each, when there is a clear recital in Ex.A.1 to the fact that the property shall be enjoyed by their mother as well as by her grandchildren i.e., children of the parties to the suit.

13. As could be seen from the recitals of Ex.A.1 Will deed, the testator of the Will has bequeathed the entire property in favour of her daughter, who is no other than the mother of the plaintiffs and also in favour of the grandchildren of her daughter i.e., great grandchildren of Smt.Janakamma. The trial Court though relied on a Judgment of the Hon'ble Apex Court, came to an incorrect conclusion as if the property bequeathed in favour of Smt.Santhamma can be treated as her exclusive property to an extent of 50% share. In fact, according to Section 14(1) of Hindu Succession Act, 1956

*“Any property possessed by a female Hindu, whether acquired before or after the commencement of this Act, shall be held by her as full owner and not as a limited owner. Further, as per the explanation to Section 14 sub-clause (1), property includes moveable and immoveable properties*

*acquired by a Hindu female by inheritance division at a partition or any lieu of maintenance or arrears of maintenance or by gift from any person.”*

14. The property involved in the present suit cannot be said to be acquired by Smt.Santhamma as per Section 14(1) of the Hindu Succession Act, 1956. Section 14(2) of the Hindu Succession Act, 1956, reads as follows:

*“Nothing contained in sub-section (1) shall apply to any property acquired by way of gift or under a will or any other instrument or under a decree or order of a Civil Court or under an award where the terms of the gift, will or other instrument or the decree, order or award prescribe a restricted estate in such property.”*

Therefore, the property which was bequeathed in favour of Smt.Santhamma and her grandchildren will be dealt with under Section 14(2) of the Hindu Succession Act, 1956 but not under Section 14(1) of the Act. The parties to the suit i.e., the plaintiffs and defendants did not dispute the original ownership of Smt.Janakamma over the schedule mentioned property. Similarly, there is no dispute about the execution of Will under Ex.A.1.

15. In such a case, in the light of the averments in Ex.A.1 Will deed, the intention of the testator of Ex.A.1 was to give the

property not only to her daughter but also to the grandchildren of her daughter, thereby, the said Smt.Santhamma and all her grandchildren will have equal right over the property. Therefore, the said Smt.Santhamma alone may not get any right over the property but she will have equal share along with her grandchildren. The plaintiffs who are no other than the children of Smt.Santhamma have filed the subject suit against the other two brothers and widow of their deceased-brother but did not add the grandchildren of Smt.Santhamma, who have got equal share with their grandmother, as parties. Be it viewed from any angle, it is a lacunae in the plaint. Moreover, in view of the contentions raised by both the parties and as could be seen from the cross-examination of DW.1, it demonstrates that already defendant No.1 has constructed a new house after dismantling the old house and one of his brothers has locked one room of the house and was in possession thereof.

16. After meticulously analyzing peculiar facts and circumstances of the instant case on hand, this Court is of the considered view that the preliminary decree granted by the trial Court by dividing and allotting half share of Smt.Santhamma among her five sons will not sustain, but, the trial Court could have directed the parties to implead the grandchildren of

Smt.Santhamma as parties for arriving to a just and correct conclusion. Further, the subject suit filed by the plaintiffs without impleading the grandchildren, who would get half share over the schedule property is not maintainable. As per the available material on record, it is quite clear that Smt.Janakamma died on 05.05.1999 and Smt.Santhamma died on 22.04.2001. Therefore, it is quite clear that there is no clear finding as to the rights of parties. There is no finality to the litigation in spite of lapse of 20 years since the death of original owner. Therefore, in view of the above sated circumstances, it is just and necessary to remand the suit to the trial Court for deciding the rights of the parties.

17. Under the circumstances narrated hereinbefore, the preliminary decree passed by the trial Court is set aside, the subject suit is hereby remanded to the trial Court for fresh disposal with a direction to allow the plaintiffs to implead the grandchildren of Smt.Santhamma as parties and decide the shares of the sons of Smt.Santhamma, out of the share devolved upon the said Smt.Santhamma and also allot share among the grandchildren of Smt.Santhamma, which they got under Ex.A.1 Will deed. The trial Court shall allow the parties to adduce additional evidence, if they want. The trial Court shall dispose of the subject suit as expeditiously as possible preferably within a

period of six months from the date of receipt of copy of this Judgment, in accordance with law, and report compliance to the Registry.

18. With the above observations, this appeal is disposed of. There shall be no order as to costs.

Pending miscellaneous application, if any, shall stand closed.

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**JUSTICE SAMBASIVARAO NAIDU**

**DATED 12.03.2024**

**Note:** LR copy to be marked.

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**THE HONOURABLE SRI JUSTICE SAMBASIVARAO NAIDU**

**C.C.C.A.NO.385 OF 2018**

**DATED 12.03.2024**

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% 12.03.2024

# Between:

**G.Krishna Murthy.**

**Appellant**

**Vs.**

**G.K.Prabhakar and others.**

**Respondents**

! Counsel for Appellant : Mr. G.Ravi Chandran

^ Counsel for Respondent Nos.1 & 2 : Mr. B.Simhachalam, Mr.B.Prasad &  
Mr.G.Venugopala Chary.

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? Cases referred