

THE HON'BLE SRI JUSTICE M.LAXMAN
CITY CIVIL COURT APPEAL SUIT No.261 of 2001

JUDGMENT:

1. The present City Civil Court Appeal has been directed against the judgment and decree dated 07.08.2001 in O.S.No.176 of 1990 on the file of the Court of learned IIIrd Senior Civil Judge, City Civil Courts, at Secunderabad wherein and whereby, the claim of the respondent Nos.1 to 3/plaintiffs for partition of the plaint schedule property into two shares and allotment of one such share to them with costs was decreed with costs. Aggrieved by the same, the present Appeal has been filed at the instance of the appellants/defendant Nos.2, 4, 6, 9 to 12.

2. For the sake of convenience, the parties hereinafter are referred to as they are arrayed in the suit.

3. The sum and substance of the case of the plaintiffs is that one Mandala Ramaswamy was the owner of Ac 3-25 gts of land in Survey No.22, Rasoolpura Village, Secunderabad. He executed a Will Deed bequeathing his properties equally in favour of Mandala Narasamma and Mandala Narasimha including the land in Survey No.22 of Rasoolpura Village. After his death, a suit O.S.No.52 of 1970 was filed on the file of learned Additional Chief

Judge, Secunderabad by Mandala Narasamma against Mandala Narasimha for partition of the properties left behind by Ramaswamy. Since, both the parties have not disputed the execution of Will Deed, a preliminary decree dated 24.12.1979 was passed in terms of Will Deed, allotting half share in the properties to Mandala Narasamma and the remaining half share to Mandala Narasimha. In the final decree proceedings, Commissioner was appointed to divide the property in Survey No.22 of Rasoolpura. Meanwhile, Mandala Narasamma and Mandala Narasimha died and the defendants were brought on record as legal representatives of Narasamma, while the plaintiffs were brought on record as legal representatives of Narasimha. The learned Commissioner found that the total extent of the land was less than Ac 3.25 gts and that the plaintiffs were delivered possession of land admeasuring 6075.50 square yards towards their half share and the other half share of same extent was delivered to the defendants. Subsequently, final decree was passed. When the survey was taken up basing on the extent allotted to Mandala Narasamma and Mandala Narasimha, they found that possession of 400 square yards of excess land was delivered to defendants. The said 400 square yards of land was

liable for partition equally between the legal representatives of Mandala Narasamma and Mandala Narasimha in terms of clause 6 of Will Deed. Therefore, when the partition is taken up and refused, the plaintiffs filed the said Suit.

4. The case of the defendants is that, the suit O.S.No.52 of 1970 was decreed and the partition of the suit property has taken place after appointment of Commissioner. The Commissioner delivered the available half share in the property in the total extent of Ac 3.15 gts in Survey No.22 to the plaintiffs as per the Will Deed. The plaintiffs never claimed an extent of Ac 3.25 gts in the said survey number. It is the contention of the defendants that, the plaintiffs who were parties to the previous Suit cannot re-agitate for the allocation of shares by filing the present Suit and such a claim is hit by Order II Rule 2 and Section 11 of Civil Procedure Code, 1908 (for short, "C.P.C."). Hence, they prayed to dismiss the Suit.

5. On the basis of the above pleadings, the following Issues have been framed by the trial Court:

1. Whether 400 sq. yds in Sy.No.22 belongs to the plaintiffs and defendants jointly and if so, whether both of them are in possession of the suit land ?

2. Whether the plaintiffs have got half share in the plaint schedule property, and if so, whether they are entitled for the half share ?

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

4. Whether the defendants are the exclusive owners of the plaint schedule property ?

5. Whether the Suit is barred by limitation ?

6. Whether the plaintiffs are entitled for mesne profits as prayed for ?

7. To what relief ?

6. On behalf of the plaintiffs, PW1 is examined and Exs.A1 to A9 are marked. On behalf of the defendants, DW1 is examined and Exs.B1 and B2 are marked.

7. The trial Court has rejected the claim set up by the defendants and preliminarily decreed the suit stating that the plaintiff Nos.1 to 3 together are entitled to half share in the schedule property. Defendant Nos.1 to 12 together are entitled to the remaining half share in the said property. The plaintiffs are not entitled to any mesne profits in the circumstances of the case. Aggrieved by the same, the present first Appeal is filed by some of the defendants.

8. Heard learned counsel appearing on either side.

9. Points for consideration are as follows:-

(i) Whether the Suit Schedule Property is available for Partition ?

(ii) Whether the present Suit filed by the plaintiffs is barred by virtue of provisions of Order II Rule 2 and Section 11 of C.P.C. ?

Point Nos.1 and 2:

10. It is admitted by both the parties that one Late Ramaswamy is the owner of properties admeasuring Ac 3-25 gts of land in Survey No.22, Rasoolpura Village, Secunderabad. It is also admitted that he executed Will Deed under Ex A9 in favour of Mandala Narasimha, who was son of his own brother and Mandala Narasamma, who was his concubine. It is also not in dispute that as per clause 6 of Will Deed there is residuary clause whereunder, it was clearly detailed that all the properties shall be equally owned by both of them. It is also not in dispute that Narasamma filed the previous suit for partition on the strength of Will Deed. The said suit consists of properties in Survey No.22. The final decree proceedings were passed allocating each branch 6075.50 square yards of land in Survey No.22. As such the said extent comes to Ac 3.15 gts. The possession was also delivered to

the parties on the strength of final decree proceedings for the above extent by the Commissioner. The entire dispute was on account of measurement of land allocated to plaintiffs and defendants by the Surveyor of the Government. On re-survey, it was found that an excess land of 400 square yards was found in possession of the defendants which is over and above the property allocated to plaintiffs. In the final decree proceedings, there was no serious dispute that the suit schedule property is part of Survey No.22 and the defendants are also claiming title to such properties from late Ramaswamy only. The only contention of the defendants was that the suit is barred by Order II Rule 2 and Section 11 of C.P.C.

11. The trial Court while advertng to the said issues found that both the parties are not aware of the availability of the present suit schedule property for partition while passing the final decree proceedings. This fact came to their knowledge only when re-survey was conducted by the Surveyor to the Government. Therefore, fresh cause of action has arisen for filing the present Suit in respect of 400 square yards of land in Survey No.22 basing on the Will Deed executed by late Ramaswamy. Therefore, the question of *res judicata* does not apply in the present facts

and circumstances of the case. Similarly, both the parties were not having knowledge about the availability of present suit property detailed in the previous Suit for partition. Therefore, it cannot be said that the present Suit comes under the bar stipulated under Order II Rule 2 and Section 11 of C.P.C. This was rightly considered by the trial Court as the terms of Will Deed clearly demonstrate that all the properties available as on the date of death of Late Ramaswamy shall be equally partitioned between Mandala Narasimha and Mandala Narasamma. The plaintiffs herein are the legal representatives of Narasimha. The defendants are the legal representatives of Narasamma. In view of the residuary clause contained under the Will Deed, the trial Court has rightly decreed the suit by allotting half share of the suit schedule property in favour of plaintiffs and other half share in favour of the defendants. Therefore, the present Appeal is devoid of merits and liable to be dismissed.

12. Accordingly, the City Civil Court Appeal Suit is dismissed confirming the judgment and decree dated 07.08.2001 in O.S.No.176 of 1990 on the file of the Court of learned IIIrd Senior Civil Judge, City Civil Courts, at Secunderabad. No costs.

Miscellaneous Petitions, pending if any, shall stand closed.

08.12.2022
ESP

JUSTICE M.LAXMAN

THE HON'BLE SRI JUSTICE M.LAXMAN

272

C.C.C.A.No.261 of 2001

Dated: 08.12.2022

ESP