

**THE HONOURABLE SRI JUSTICE A.SANTHOSH REDDY**

**C.R.P.No.3883 OF 2016**

**ORDER:**

This civil revision petition under Article 227 of the Constitution of India is directed against the order dated 05.01.2016 in I.A.No.1001 of 2014 in O.S.No.1014 of 2009, on the file of the I-Additional Senior Civil Judge, Ranga Reddy District, at L.B.Nagar, wherein the said application filed by the petitioner herein (plaintiff) under Order XXVI Rule 9 read with Section 151 CPC seeking appointment of Advocate Commissioner to divide the suit schedule property by metes and bounds in terms of preliminary decree, was dismissed.

2. Heard learned counsel for the petitioner. None appears and there is no representation on behalf of respondents either. Perused the record.

3. The petitioner is plaintiff and respondents are defendants. The petitioner filed the suit O.S.No.1014 of 2009 for partition and separate possession of their respective shares in the suit schedule property i.e., Plot No.6-176, admeasuring 462.00 square yards in Sy.No.582, situated at Ghatkesar Village and Mandal, Ranga Reddy

District, against the respondents. In the said suit, a preliminary decree was passed on 03.07.2014 allotting one such share to the plaintiff and one such share to defendants 1 to 3 each. Subsequently, the petitioner filed an application in I.A.No.1001 of 2014 under Order XXVI Rule 9 read with Section 151 CPC seeking appointment of Advocate Commissioner to divide the suit schedule property by metes and bounds in terms of preliminary decree, whereunder the petitioner claimed that her mother during her lifetime executed a registered Will dated 21.11.2013 bequeathing all her properties in petitioner favour of the petitioner and the share allotted to respondent No.2 herein also fell to her share. The respondents filed counter resisting the claim of the petitioner on two grounds viz., that the death of the mother of the petitioner, who was 2<sup>nd</sup> defendant in the main suit, was not informed and the Will deed dated 21.11.2013 was not probated by any Court of law. On a consideration of the material on record, the trial Court dismissed the said petition holding that the validity of the Will deed dated 21.11.2013 is not decided and the petitioner is not entitled to seek her share in the suit schedule

property against the preliminary decree. Challenging the said order, the revision is filed.

4. The claim of the petitioner is that her mother executed Will deed dated 21.11.2013 during her lifetime and she died on 23.05.2014 bequeathing all the properties in her favour. In fact, a preliminary decree was passed on 03.07.2014 and since the suit was reserved for judgment, the petitioner could not inform the same to the Court about the death of her mother and meanwhile the judgment was delivered. Subsequently, the present application for appointment of Advocate Commissioner and I.A.No.1000 of 2016 were filed for passing of final decree for allotment of shares. The trial Court dismissed the application filed for appointment of Advocate-Commissioner mainly on the ground that the validity of the Will deed was not decided in the main suit O.S.No.1014 of 2009 and unless and until that is decided in the final decree application, the petitioner is not entitled to seek half share in the suit schedule property. There is no irregularity in the impugned order. Learned counsel for the petitioner submits that he will take steps for filing a separate application claiming the share of mother of the

petitioner basing on the Will deed dated 21.11.2013 subsequent to setting aside the impugned order

5. Learned counsel for the petitioner further submits that the pleading of the respondents in the counter that the Will deed dated 21.11.2013 was not probated by any Court of law, is not correct and learned counsel placed reliance on the judgment of the Hon'ble Apex Court in **KANTA YADAV v. OM PRAKASH YADAV & ORS**<sup>1</sup> wherein it was held at paras 12 and 13 under:

“The statutory provisions are clear that the Act is applicable to Wills and codicils made by any Hindu, Buddhist, Sikh or Jain, who were subject to the jurisdiction of the Lieutenant-Governor of Bengal or within the local limits of the ordinary original civil jurisdiction of the High Courts of Madras or Bombay - {clause (a) of Section 57 of the Act}. Secondly, it is applicable to all Wills and codicils made outside those territories and limits so far as relates to immoveable property within the territories aforementioned - Clause (b) of Section 57. The clause (c) of Section 57 of the Act relates to the Wills and codicils made by any Hindu, Buddhist, Sikh or Jain on or after the first day of January, 1927, to which provisions are not applied by clauses (a) and (b). However, sub-section (2) of Section 213 of the Act applies only to Wills made by Hindu, Buddhist, Sikh or Jain where such Wills are of the classes specified in clauses (a) or (b) of Section 57.

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<sup>1</sup>(2020) 14 SCC 102

Thus, clause (c) is not applicable in view of Section 213(2) of the Act.

In view thereof, the Wills and codicils in respect of the persons who are subject to the Lieutenant-Governor of Bengal or who are within the local limits of ordinary original civil jurisdiction of High Court of Madras or Bombay and in respect of the immoveable properties situated in the above three areas. Such is the view taken in the number of judgments referred to above in the States of Punjab and Haryana as well as in Delhi as also by this Court in *Clarence Pais*".

6. After considering the facts and circumstances of the case, the petitioner is permitted to file a separate application claiming share of her mother by virtue of registered Will deed dated 21.11.2013. Upon filing such application, the trial Court shall entertain and decide the same on merits. After deciding the said application, the application for appointment of Advocate Commissioner to divide the suit schedule property by metes and bounds in terms of the preliminary decree may be taken up.

7. For the foregoing reasons, the civil revision is allowed. The impugned order dated 05.01.2016 in I.A.No.1001 of 2014 in O.S.No.1014 of 2009, on the file of the I-Additional Senior Civil

Judge, Ranga Reddy District, at L.B.Nagar, is hereby set aside.

There shall be no order as to costs.

8. Miscellaneous petitions, if any pending, stand closed.

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**A.SANTHOSH REDDY, J**

08.02.2023

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