
(2004) 03 KAR CK 0008

In the Karnataka High Court

Case No : Regular Second Appeal No. 763 of 2001 and OS No. 3800 of 1989

R. Venkatachalam

APPELLANT

Vs

Miss A.B. Madapa (deceased) by L.Rs.

RESPONDENT

Date of Decision : 23-03-2004

Acts Referred:

Succession Act, 1925 — Section 211 (1), 212, 213, 232, 238

Citation : (2005) 4 KCCR 2704

Hon'ble Judges : K. Sreedhar Rao, J

Bench : Single Bench

Advocate : Ashok B. Patil, for the Appellant; A. Lobo and Vidyashankar R., for the Respondent

Judgement

K. Sreedhar Rao, J.—Appellant is the Plaintiff, the deceased Respondent is the Defendant. The appeal is resisted by the second generation legal representative of the deceased Defendant. In the appeal, the Appellant would be referred to as the Plaintiff and the Respondent as the Defendant.

2. One Ms. Robinson jointly with one Ms. Donne started a higher primary school under name "Home School" in Basavanagudi in the year 1930 in a rented building. Ms. Donne died in the year 1960. Ms. Robinson continued to run the school. The school is recognised by the Government of Karnataka. The Plaintiff and the deceased Defendant Ms. A.B. Madappa sincerely and devotedly associated with Mrs. Robinson in the management of the school. Mrs. Robinson in recognition of their services during her life time expressed her wish as per Ex.P.5 declaring that after her demise the Plaintiff and the Defendant should become joint proprietors to manage the affairs of the school. Ms. Robinson also executed a Will at Ex.P. 6 bequeathing all her movable and immovable estate in favour of the Defendant. Ms. Robinson a foreign Christian died in the year 1961 at Bangalore.

3. The managing committee of the school passed a resolution at Ex.P. 4 condoling the death of Ms. Robinson and co-opted the Plaintiff and Defendant as

special members of the managing committee to run the school as per the wish expressed by Mrs. Robinson at Ex.P. 5. The Plaintiff and Defendant by joint correspondence at Ex. P11 and Ex. P12 addressed letters to the Education Department that Plaintiff and the Defendant have taken over the administration of the school jointly in terms of Ex.P5.

4. In or around the year 1965, disputes arose between the Plaintiff and the Defendant. The Defendant asserted that by virtue of the letter of administration relating to Will at Ex.P. 6, she is entitled to succeed to all the movable and immovable estate of Ms. Robinson including the exclusive proprietary right over the school. Therefore calls the Plaintiff a paid employee and not a joint proprietor.

5. Per contra the Plaintiff asserts that by virtue of Ex.P.5 he is the joint proprietor along with the Defendant. The terms of Ex.P.5 have been given effect to by a resolution of the management committee at Ex.P.4 and supported by the correspondence made to Education Department at Ex.P.11 and Ex.P.12. Therefore, the Plaintiff filed the suit seeking permanent injunction against the Defendant not to interfere with the right of joint management.

6. Ms. Madappa died during the pendency of O.S. 1247 of 1965 and she had executed a Will in favour of Ms. G.M. Mascarenahas. Therefore, the Plaintiff filed another suit in OS 3800 of 1989 on the file of Additional City Civil Judge, Bangalore against the legatees of Ms. Madappa for a permanent injunction not to interfere in the administration and management of the school. The evidence in OS 3800 of 1999 (sic 1989) is concluded and the case is at the stage of arguments. The material facts and the questions of law involved OS 1247 of 1995 (sic 1965) and OS 3800/1989 are the same. In fact the later suit is a duplicated exercise. At the request of both the Counsel and by exercise of power u/s 24 the suit OS 3800 of 1999 (sic 1989) is withdrawn from the file of the trial Court and clubbed with this proceedings for common disposal.

7. The trial Court upholds the claim of the Plaintiff that he is the joint proprietor along with the Defendant Ms. Madappa to manage the school. The first appellate Court reverses the finding and holds that the contents of Ex.P.5 does not convey any legal right of joint proprietorship to the Plaintiff. It is further held that Ex.P.5 does not constitute a gift of intangible right nor constitutes a Will to invest right in the Plaintiff after demise of Ms. Robinson. Therefore holds that Ms. Madappa exclusively succeeds to the proprietary rights to manage the school under the Will Ex.P.6. Accordingly the suit of the Plaintiff is dismissed.

8. The appeal is at the stage of admission. Both the Counsel assisted and argued the case on merits for final disposal. The following substantial questions of law are framed for consideration in this appeal.

(1) Whether the letters of administration granted at Ex.P.6 is only a limited grant for management of Bikasipura estate and does not enable Ms. Madappa to assert proprietary right over the school under the Will without specific grant of letters of administration in that behalf as required u/s 213 of the Indian Succession Act?

(2) Whether the scope and effect of bequest made under the Will Ex.P.6 would include the exclusive proprietary right to administer and manage the school by Ms. Madappa?

(3) Whether the terms of Ex.P.5 amounts to legally valid disposition of intangible proprietary rights to run and manage the school by Plaintiff and Defendant as joint proprietors ?

9. This Court in H.C. Ramaswamy Iyengar and Ors. v. H.C. Lakshminarasimhan and Ors. AIR 1965 Mys 87 has held that as a general rule, the probate or letters of administration should be granted in respect of the entire estate. The limited grants are an exception to the general rule and to be made in the circumstances indicated by the statute. In the cases where a part of the estate has already been administered in such a way that part has gone to some other heirs and legatees both in possession as well as in title, under such circumstances, as an exception to the general rule a limited grant could be made in respect of unadministered estate.

10. Sri Ashok B. Patil in support of his contention, cited the following three decisions:

(I) The observations made in AIR 1965 Mys 87 at paras 27 and 28 which reads thus:

(27) The Succession Act also makes separate and detailed provisions in Chapter II of Part IX in regard to limited grants. Sections 237 to 247 therein provide for grants limited in duration. Sections 248 to 260 deal with grants limited by reason of special purposes or any exception or in respect of the rest of an estate remaining after the exception or in respect of estates already partially administered.

(28) From the above scheme of the statute it is clear, in my opinion, that it contemplates grants of probate or letters of administration in respect of the entire estate as a general rule and that limited grants are an exception to the general rule, to be, made in circumstances indicated by the statute.

(II) In Bhai Khubchand v. Smt. Motilbai AIR 1936 Sind 150 the following observations are made.

We think that the last words in this section "or of so much thereof as may be unadministered" apply only to Clause (c) and not to the preceding Clauses (a) and (b), for it is only under the circumstances described in Clause (c) that the last words of this section are appropriate. In this case it is said, that so far as the house is concerned, nothing has to be administered because it is in possession of the Petitioner as universal or residuary legatee; but the administration of an estate within the meaning of Section 232 appears to us to mean administration under the authority of a grant of a Court. There is nothing in the petition to show that part of the estate has been already administered. In this case, in our opinion, none of the estate has been administered, and, therefore, it is necessary

for the Petitioner to apply for a grant in relation to the whole estate. Moreover, it appears to us that where in the Succession Act special provision is made in part 9, Chapter 2, for limited grants it is the intention of the Legislature that limited grants should be those only which fall within these special provisions. We cannot, therefore, accept the argument that because there is no express direction in the Indian Succession Act, that grants shall apply to all property, therefore, a Petitioner can, u/s 232, Succession Act, apply for the administration of just so much of the property as suits his purpose. u/s 232, Succession, though the grant is one of letters, it is a grant with the Will annexed. In the case of the grant of probate, court-fee must be paid on all the property. We see no reason why the same condition should not apply when the grant is of letters with the Will annexed. Schedule 3, Court Fees Act, contemplates a full declaration of all property.

(III) The decision of the Lahore High Court in *Sardar Singh and Anr. v. Teja Singh and Ors.* at page 277 in the last para the following observations are made:

It is obvious that except in a case where the estate has been partially administered before an application for grant of letters of administration is made the application must cover the entire estate of the deceased. It is only in cases covered by Clause (c) where the executor has died after having proved the Will but before having administered all the estate of the deceased that an application for administration of a part of the estate can be made, and even in that case the application must comprise the entire unadministered estate. On principle, apart from the provisions of Section 232, also it is quite clear that a person who is appointed to administer the estate of a deceased must administer the entire estate. A suit for administration where it omits to include the whole of the estate of the deceased is liable to be thrown out on that ground alone.

11. With reference to the ratio laid down in the above decisions, it is argued that the contingencies envisaged under Sections 237 to 260 in Chapter II Part IX of the Act are the only permissible situations warranting limited grant and for no other reasons the limited grant is permissible. It is further argued that in the instant case, the grant of letters of administration is not made in respect of the school under Ex.P.6, therefore, without letters of administration, the Defendant cannot assert right under the Will.

12. Per contra the Counsel for the Respondent relied on the ruling of the Madras High Court in *C.R. Ramachandra Gowder and Ors. v. C.P. Nanjappa* AIR 1973 Mad 179. In para 21, the following observations are made:

21. The learned Counsel for the Appellant further contended that the grant of the Letters of Administration in respect of the suit house is illegal. In this connection the learned Counsel cited the judgment in *In Re: T.K. Parthasarathi Naidu*, wherein their Lordships held that the Petitioner could not be granted Letters of Administration in respect of his share of property and that probate or letters of administration with or without the Will annexed must as a general rule, relate to

all the properties that is the entire estate of the deceased and only in exceptional cases falling under Sections 254 to 257 of the Indian Succession Act (XXXIX of 1925) could probate or letters of Administration, limited to specific items or a fraction of the estate be granted. In this case the estate of the deceased was administered without obtaining a probate or letters of administration and the only property in respect of which the administration is not completed is the suit house. In the above circumstances we consider that the learned Judge was right in granting Letters of Administration with the Will annexed in respect of the suit house.

13. The Counsel for the Respondent relying on the above decision of the Madras High Court in AIR 1973 and the decision of this Court in AIR 1965 Mysore argued that by virtue of provision in Section 232, a limited grant could be made in respect of unadministered estate. In the case where the property is already in effective possession and administration of the legatee/executor, the letters of administration is not necessary to vindicate the rights under the Will in respect of the administered estate.

14. The provisions of Section 211 declare that after the demise of the testator the right in the property will forthwith vest in the executor or administrator. But in the case of a deceased being a Hindu, Mohammadan, Buddhist, Sikh, Jain or Parsi, the property devolves on the heirs according to personal law of succession and the property unlike u/s 211(1) shall not vest in the executor or administrator.

15. The provisions of Sections 212, 213 and 232 of the Indian Succession Act reads thus:

212. Right to intestate's property.-

(1) No right to any part of the property of a person who has died intestate can be established in any Court of Justice, unless letters of administration have first been granted by a Court of competent jurisdiction.

(2) The section shall not apply in the case of the intestacy of a Hindu, Muhammadan, Buddhist, Sikh, Jaina, Indian Christian or Parsi.

213. Right as executor or legatee when established.-

(1) No right as executor or legatee can be established in any Court of Justice, unless a Court of competent jurisdiction in India has granted probate of the Will under which the right is claimed, or has granted letters of administration with the Will or with a copy of an authenticated copy of the Will annexed.

(2) This section shall not apply in the case of Wills made by Muhammadans and shall only apply.-

(i) in the case of Wills made by any Hindu, Buddhist, Sikh or Jaina where such Wills are of the classes specified in Clauses (a) and (b) of Section 57; and

(ii) in the case of Wills made by any Parsi dying, after the commencement of the

Indian Succession (Amendment) Act, 1962 (16 of 1962), where such Wills are made within the local limits of the ordinary original civil jurisdiction of the High Courts at Calcutta, Madras and Bombay, and where such Wills are made outside those limits, in so far as they relate to Immovable property situated within those limits.

232. Grant of administration of universal or residuary legatees.-When-

- (a) the deceased has made a Will, but has not appointed an executor, or
- (b) the deceased has appointed an executor who is legally incapable or refuses to act, or who has died before the testator or before he has proved the Will, or
- (c) the executor dies after having proved the Will, but before he has administered all the estate of the deceased.

a universal or a residuary legatee may be admitted to prove the Will, and letters of administration with the Will annexed may be granted to him of the whole estate, or of so much thereof as may be unadministered.

16. The provisions of Section 212 declares that when the propositus dies intestate, a heir at law or person interested in the property cannot establish right over the property of the deceased unless letters of administration is granted by the competent Court. The legal compulsion to take letters of administration is relaxed in respect of case of intestacy of a Hindu, Muhammadan, Buddhist, Sikh, Jain, Indian Christian or Parsi. The exemption from rigor of Section 212(1) to Indian Christian and Parsi is granted by amendment Act 16 of 1962.

17. The provisions of Section 213 deals with the cases of testamentary succession and positively declares that the executor or legatee cannot establish their right over the property unless a probate or letters of administration is granted by competent Court. The Sub-section (2) however exempts the application of Section 213 to Muhammadans. The section applies to Indian Christian, Foreign Christian, Parsi and applies only to Hindu, Buddhist, Sikh or Jain who are residents of the area mentioned in Section 57(a) or if the immovable property is situate in the area mentioned in Section 57(a). In other words, the rigor of Section 213 does not apply to Hindu, Buddhist, Sikh or Jain, who are not the resident of the area mentioned in Section 57(a) and if the property is not situate in the area mentioned in Section 57(a).

18. The need to have probate or letters of administration in the case of intestate succession is dispensed with, for all persons except the foreign Christians by amendment to Section 212. However, insisting probate or letters of administration for Indian Christians, Parsies and for the section of Hindu, Buddhist, Sikh or Jain based on residence or situation of property appears to be archaic and irrational. The distinction maintained during the British Rule between the Presidency towns and provincial areas no longer appears to be relevant in the changed political, social and economic context. The Indian Civil Justice System confers probate jurisdiction on some of the select Civil Courts. The ordinary Civil

Court unless empowered with probate jurisdiction cannot grant probate letters of administration, succession certificate etc. It is a settled proposition of law that the Civil Court, while exercising the probate jurisdiction cannot adjudicate the question of title. The findings of the probate Court is not finally binding on the party. The aggrieved party has scope to approach the Civil Court in the second round of litigation leading to multiplicity of proceedings. Therefore, academically it is desirable that in the case of testamentary succession also the insistence of probate or letters of administration should be dispensed with for Indian Christians, Parsees and to all Hindus, Buddhist, Sikh or Jain irrespective of their residential status or property situation. Otherwise, necessary amendment of law to be effected to make the ruling of the probate Court final and binding on the parties without scope for resorting to another round of civil litigation.

19. The academic opinion expressed in the preceding para is of course, is not germane to the present case, since Ms. Robinson is a foreign Christian and has executed a Will, therefore, the provisions of Section 213 apply. The letters of administration granted annexed with a Will at Ex.P.6 is only in respect of Bikasipur Estate. There is no express grant in respect of the school in question.

20. The jurisdiction to make limited grant of letters of administration is dealt in Sections 237 to 260 of the Act. The letters of administration limited in point of time could be granted in the case where the original Will is mis-placed, destroyed or not available. Indeed Section 238 permits grant of letters of administration based on the secondary evidence. The limited letters of administration can be granted to the persons interested in the property when there is no Will and the property of the deceased requires a diligent administration. The persons interested in the property, a creditor are also entitled to invoke the relevant provisions in Sections 237 to 260 for obtaining limited orders of administration. The limited grant contemplated under Sections 237 to 260 basically deal with limited grant from the stand point of time and does not deal with the case of extent of estate, whether to be for the whole of the estate or could be for part of the estate. The grant of probate or letters of administration in respect of whole of the estate or part of the estate is governed by Section 232. The provisions relating to limited grant under Sections 237 to 260 will have no application, if the question pertains to the extent of estate.

21. The provisions of Section 232 declares that the executor appointed under a Will suffers legal incapacity or refuses to act or where no executor is appointed under a Will the universal or residuary legatees can apply for grant of letters of administration. As a general rule they should take letters of administration "for whole of the estate or of so much thereof as may be unadministered." The said words inferentially declare that a letters of administration is not necessary if the part of the estate is already in effective possession and administration. The decision of this Court in AIR 1965 has in fact makes the following observations at para 30:

In cases where a part of the estate has already been administered in such a way

that, that part has gone to some of the heirs or legatees both in possession as well as in title, the legal position would be that only the rest of the estate is actually that of the deceased which remains to be administered by an administrator. That would constitute one of the special circumstances in which the Court may make a grant of letters of administration limited to the unadministered portion of the estate.

22. The Sindh High Court in Bhai Khubchand's case, AIR 1936, makes distinction between the administration of the estate under the orders of the Court and defacto administration. While interpreting the word "administration", my Lords" hold that the administration of an estate to mean "under the order of the Court" and not informal defacto administration.

23. The provisions of Sections 57(a), 57(b), 212 and 213, make sectional difference and discrimination insisting probate and letters of administration only to certain class of people. For example: a legatee inheriting modest immovable property by a Will and despite being in possession subjected to rigor of probate or letters of administration would be forced to face duplicated litigation one before the probate jurisdiction and another before the Civil Court in respect of title.

24. With great respect, I differ with the views of the Sindh High Court. The distinction between administration of estate with the formal orders of the Court and the informal defacto administration appears to be superfluous. The ideal proposition would be, as a general rule, the probate or letters of administration to be granted for the whole of the estate. As an exception to the general rule in case of estates in effective possession and defacto administration, the probate or letters of administration should be held as unnecessary u/s 213. The requirement becomes necessary only in case of un-administered portion of the estate. In the present case, the administration of the school is effectively with the Defendant after the demise of Ms. Robinson. Therefore, a specific grant of letters of administration is not necessary for the Respondent to assert her right under the Will.

II. Question:

25. The following is the material evidence adduced in respect of the contention whether under the residuary clause of the Will, all the properties including the proprietary right to manage the school is bequeathed:

Ex.P.4

The Home School Bangalore-4

Dated 12th Jan. 1961

Meeting of the Managing Committee of the Home School held on Thursday the 12th January 1961 at 7.30 p.m. in the premises of the Home School.

Present: 1. Mrs. Mary C. Rao

2. N. Bheema Charya

1. The Committee places on record its profound regret at the passing away of Muriel Edith Robinson, founder of the Home School and its Principal on the 7th January, 1961 and expresses its great admiration for the very valuable services she rendered to education in general and Home School in particular.

Sd/- N. Bheemacharya Mary C. Rao

2. Resolved that, as per the last wish of Miss. M.E. Robinson Miss. A.B. Madapa and Shri R. Venkatachalam may run the Home School.

3. Resolved that the following members may be co-opted as member of the Managing Committee in place of Shri Mir Eqbal Hussain, Judge, High Court of Mysore, Rev. Sam D"George and late Miss. M.E. Robinson.

NAME 1. Shri P. Kodanda Rao

2. Smt. Lalitha Krishnaswamy

3. Dr. Mahadevan

4. Mr. Roger C. Gordon

5. Miss. A.B. Madapa

6. R. Venkatachalam

Sd/- N. Bheemacharya Mary C. Rao.

Ex.P. 11 Dated 17.01.1961 The Home School Bangalore-4

A.H. Madappa and R. Venkatachalam, B.A., The Home School asavanagudi, Bangalore.

To,

The Inspector of Schools, Civil Area, Bangalore.

Dear Sir,

We regret very much to inform you of the passing away of Miss M.E. Robinson, founder and Principal of the above school on 7th inst. As per her wish, expressed through the letter she left behind-a copy of which is herewith enclosed, and with the approval of the committee, we have assumed charges from 12th inst. Miss A.B. Madappa will be the corRespondent henceforth. Our specimen signatures are given below.

Sd/- (A.B. Madappa)

Sd/- (R. Venkatachalam).

Ex.

P.12 The Home School, Bangalore-4

A.H. Madappa And R. Venkatachalam, B.A. The Home School Basavanagudi, Bangalore.

To

The District Educational Officer, Bangalore District, Bangalore.

Dear Madam,

We regret very much to inform you of the passing away of Miss M.E. Robinson, founder and Principal of the above school on 7th inst. As per her wish, expressed through the letter she left behind-a copy of which is herewith enclosed-, and with the approval of the committee, we have assumed charges from 12th inst. Miss. A.B. Madappa will be the corRespondent henceforth. Our specimen signatures are given below.

Sd/- (A.B. Madappa)

Sd/- (R. Venkatachalam).

26. In Ex.P14 the affidavit sworn to by Miss Madappa in CRP 1096/60 at paras 3 and 4 the following facts are stated:

3. I have been working in this Home School for over 25 years as a teacher, and after the death of Mr. Dawn, Miss M.E. Robinson became the Superintendent and I became the principal and the second Petitioner who was a Teacher became the Head Master i.e., he succeeded to my place. These arrangements were made in accordance with the desire of Miss M.E. Robinson as mentioned in her last letter dated 19.8.1960 the true copy of the same is produced herewith. Accordingly both myself and the cond Petitioner R. Venkatachalam are now continuing and running this institution. As this institution is getting a grant from the Education Department for the past 10 years we have produced the original of the above said last letter of Miss. M.E. Robinson before the Assistant Inspector of Schools to send the cheque of the grant amount in our joint names. Further there is a committee of Management for his Home School and the Managing Committee in their meeting held on 12th instant have also passed a resolution authorising both myself and R. Venkatachalam to continue the arrangement as desired by Miss M.E. Robinson and accordingly both of us are now in possession of the suit premises and running the institution.

4. As both myself and R. Venkatachalam as Superintendent and Headmaster are responsible to run this institution and are actually in possession of this institution, I state on oath that we are the only persons to be brought on record in the above case and continue the proceedings, since the premises in question were taken on lease for the institution by the then Superintendent Mrs. Dawn and after her death her Successor in interest Miss. M.E. Robinson continued the proceedings originally instituted.

27. And further relied on the admission made by Miss Madappa in Cross-examination dated 29.3.1977 the following statements is made:

The Will alleged Ms. Robinson does not mention about the school (Home School) since Ms. Robinson asked him in the hospital to take over, has took it over after her death.

The question reads....

28. The Counsel for the Appellant in the light of the ratio laid down by the Supreme Court in *Gnanambal Ammal Vs. T. Raju Ayyar and Others*, , and with reference to the above evidence argued that Ms. Robinson was highly educated lady, was conscious of her intangible proprietary right over the school. Since under Ex.P.5, she had appointed the Plaintiff and the Defendant to be the future joint proprietors, therefore, consciously omitted disposition of the proprietary right over the school from the subject matter in the Will by not making specific bequest in that behalf. On the other hand, the movable and immovable properties are specifically referred to in the Will though not by detailed reference but by cryptic reference as movable and immovable properties. The school being an intangible property assumes a distinct legal characteristic property. The contents of Exs.P.11 and P.12 and the averments in the affidavit at Ex.P.14 in CRP 1096 of 1960, disclose that the Defendant did not assume that the proprietary right over the school is also a subject matter of bequest under the Will. The Defendant further makes it clear that herself and the Plaintiff have assumed joint proprietary rights under Exs.P.11 and P.12. The fact that Exs.P.11 and P.12 are not communicated to the department is inconsequential.

29. Per contra the Counsel for the Respondent referred to the deposition of the Plaintiff in OS No. 1327 of 1961 at Ex.D.35. In the said deposition the Plaintiff has admitted that "Ms. Robinson executed a Will to carry on the institution. The Plaintiff has paid the rent. It is further argued that under Ex.D.25 during the lifetime of Ms. Robinson on 4.10.1960 a joint Bank account of the Home School was opened in the name of Ms. Madappa and Ms. Robinson. The financial affairs of the school was exclusively managed by Ms. Madappa. The Plaintiff was only working as Head Master and for some time, he was made Treasurer of the high school section without any control over the financial management of the school at any point of time. Therefore, Sri A. Lobo, strenuously argued that without participation in the financial management it cannot be said that the Plaintiff was in the joint management of the school.

30. A paradoxical situation is evident in the evidence adduced by the parties. The Plaintiff under Ex.D.35 relating to HRC proceedings admits that Ms. Madappa is the exclusive proprietor. On the other hand, the Exs.P.11 and P.12 are the letters jointly executed by Plaintiff and the Defendant to the department that they have become joint proprietors. The Defendant admits Exs.P.11 and P.12, but states that they have not been communicated to the department. The fact of non-communication is irrelevant to know the mental intention of the Defendant as per the tenor of the said documents. The argument that the contents of affidavit in Ex.P.14 are made only with a bonafide intention of succeeding in the HRC case and at the advise of the Counsel without a serious intention of conceding the

proprietary right in favour of the Plaintiff appear to be an artificial explanation. The Defendant further in the cross-examination dated 29.3.1977 clearly admits that the school is not the subject matter of the Will and she took over the administration of the school after the death of Ms. Robinson, since she asked her to take over the administration after her death.

31. Ms. Robinson is an educated lady, was conscious of her specific intangible right over the school, had made some provisions under Ex.P.5 for management of the school. The Defendant did not assume or took stance of claiming right over the school as per the Will immediately after the demise of Robinson. But after the lapse of years, when the Will came into effect and in the suit for the first time, the Defendant contends otherwise. The fact that the Plaintiff did not participate in the financial affairs is not a ground to hold that the Plaintiff was kept out of the management, since he was very much involved in the administration and management of the school otherwise. Therefore, the contention that under the Will the right of management of school was bequeathed by Ms. Robinson is an untenable argument. 6:11 PM 11/27/2010III. Question: The contents of Ex.P.5 read thus: The Home School Bangalore-4

In the event of my death I appoint Miss. A.B. Madappa, Superintendent of the Home School and Mr. R. Venkatachallam, B.A., Head Master of the Home School, both of them to be joint proprietor so long as they wish the arrangement to continue. 19.8.60 Mr. Robinson PRINCIPAL

32. Ex-facie the document does not constitute a Will, since there is no attestation by the witnesses as required under law. The document also cannot be considered as a gift, since the right over the property is not conveyed immediately and only after the death of Robinson it is said that Plaintiff and Defendant should become joint proprietors.

33. The Counsel for the Appellant refer to the commentaries of Salmond on jurisprudence 12th Addition (Edition) at page 228 to contend that Ms. Robinson has necessary power of appointment. The decision of the Supreme Court in Sri Mahalinga Thambiran Swamigal Vs. His Holiness Sri La Sri Kasivasi Arulnandi Thambiran Swamigal, at para 18, paras 28 to 32 of the judgment, the following observations are made:

18. The definition of "Will" in Section 2(h) of the Indian Succession Act, 1925, would show that it is the legal declaration of the intention of a testator with respect to his property which he desires to be carried into effect after his death. By exercising the power of nomination, the head of a Mutt is not disposing of any property belonging to him which is to take effect after his death. He is simply exercising a power to which he is entitled to under the usage of the institution. A nomination makes the nominee stand in a peculiar relationship with the head of the Mutt and the Hindu community and that relationship invests him with the capacity to succeed to the Headship of the Mutt. A nomination takes effect in present. It is the declaration of the intention of the head of the Mutt for the time

being as to who is successor would be; therefore, although it is said that the usage in the Mutt is that the power of nomination is exercisable by Will, it is really a misnomer, because, a Will in the genuine sense of the term can have no effect in presenti. There can be no dispute that a nomination can be made by deed or word of mouth. In such a case, the nomination invests the nominee with a present status. That status gives him the capacity to succeed to the headship of the Mutt on the death of the incumbent for the time being. If that is the effect of nomination when made by deed or word of mouth; we find it difficult to say that when a nomination is made by Will, it does not take effect in presenti, and that it can be cancelled by a executing another Will revoking the former Will. Such at any rate, does not seem to be the concept of nomination in the law relating to Hindu Religious Endowments. A nomination need not partake of the character of a Will in the matter of its revocability, merely because the power of nomination is exercised by a Will. In other words, the nature or character of nomination does not depend upon the type of document under which the power is exercised. If a nomination is otherwise irrevocable except for good cause, it does not become revocable without good cause, merely because the power is exercised by a Will. If the power of nomination is exercised by a Will, it is pro tanto a non-testamentary instrument. A document can be partly testamentary and partly non-testamentary. In *Ram Nath Das Vs. Ram Nagina Choubey and Others*, the head of the Mutt for the time being exercised his power of nomination, more or less in terms of Exhibit B-1 here, namely, by making the nomination of a successor and providing that he will be the owner of the properties and charities of the Mutt and also of the other properties standing in the name of the head of the Mutt. The Court held that so far as the nomination and devolution of the properties of the Mutt were concerned, the Will operated as a non-testamentary instrument. The Court said that the condition which must be satisfied before a document can be called a Will is that there must be some disposition of property and that the document must contain a declaration of the intention of the testator not with respect to any thing but with respect to his property. According to the Court, if there is a declaration of intention with respect to his successor, it cannot constitute a Will even if the document were to state that the nominee will become the owner of the properties of the Mutt after the death of the executant of the Will as that is only a statement of the legal consequence of the nomination.

34. The argument that Ex.P.5 constitutes valid appointment by nomination is an untenable argument. The power of nomination applicable to mutts and public trusts and public charities cannot be invoked in respect of the school in question. The current and the past law in grant-in-aid Code and the Education Act governing the Primary and Higher Secondary Schools does permit establishing and running of schools as proprietary concern and not necessarily as public trust. The power of appointment by nomination can be made only in respect of religious and charitable trusts but not in cases of institution, which is in the nature of a proprietary concern. In that view of the matter, Ex.P.5 cannot

constitute an appointment by nomination.

35. The facts of the case present very peculiar situation. Admittedly, the proprietary right over the school is not the subject matter of bequest under the Will. There is no valid disposition of rights under Ex.P.5. But as per the wish of Ms. Robinson, both the Plaintiff and the Defendant took over the administration as joint proprietors and acknowledge the fact in Exs.P.11 and P.12. Both of them managed the school. The Plaintiff was appointed, as treasurer of the High School section and the Plaintiff was actively involved in managing and running the school. The contention that Plaintiff is only a paid employee is heavily contradicted by Exs.P.11 and P.12. In that view the contention that the Plaintiff did not deal with the financial affairs, becomes immaterial. The Plaintiff and Defendant jointly took over the administration as joint proprietors and both of them were managing of the affairs of the school in one or other manner. The Defendant Ms. Madappa by her conduct and written declaration at Exs.P.11 and P.12 is estopped from denying the legal status of the Plaintiff as a joint proprietor. Therefore the contention of the Plaintiff that he is a joint proprietor is to be up held.

36. The Defendant Ms. Madappa died during the pendency of the suit and she executed a Will in favour of G.M. Mascarenhas bequeathing her rights over the school. It appears that around the time of filing of the suit, the Plaintiff was being obstructed by the Defendant from joint management. After demise of the Defendant, the Plaintiff filed another suit in O.S. No. 3800 of 1989 against Mr. Mascarenhas claiming absolute right over the school and prevented Mr. Mascarenhas and his legal heirs from participating in the management of the affairs of the school. The Plaintiff almost for a period of 24 years after demise of Ms. Madappa is in exclusive control of the affairs of the school by virtue of interim order of the Court. The stand of the Plaintiff in O.S. No. 3800 of 1989 is untenable. As per the conduct of the Plaintiff and the Defendant both have become joint proprietors and acquired joint right of management. Therefore, after the demise of Ms. Madappa the legatee of Ms. Madappa will have joint right of joint management. Accordingly, the Plaintiff and the legal representatives of the Defendant on record are entitled to joint management of the school as joint proprietors. The parties are entitled to reconstitute fresh managing committee in accordance with law. Accordingly, the appeal and the suit O.S. No. 3800 of 1989 are disposed of as indicated above. The parties shall bear their own cost.