(2015) 07 KAR CK 0246

In the Karnataka High Court

Case No : Regular First Appeal Nos. 169 and 342 of 2009

S. Sundaramurthy and Others — APPELLANT

Vs

Saraswathi Lakshmanan and Others — RESPONDENT

Date of Decision : 21-07-2015

Acts Referred:
Civil Procedure Code, 1908 (CPC) — Order 14 Rule 2
Karnataka Court Fees and Suits Valuation Act, 1958 — Section 11, 11(4)(a), 35(2)
Succession Act, 1925 — Section 122, 124

Citation : (2015) 6 KarLJ 24

Hon'ble Judges : Anand Byrareddy, J

Bench : Single Bench

Advocate : B.V. Acharya, Senior Advocate for Ajesh Kumar S. and Shanmukappa, for the Appellant; Uday Holla, Senior Advocate for Vivek Holla, Advocates for the Respondent

Final Decision : Dismissed

Judgement

Anand Byrareddy, J—These appeals are heard and disposed of by this common judgment. The appeal in RFA. 169/2009 is filed by defendants 1 and 2. The appeal in RFA. 342/2009 is filed by the plaintiff.

2. The plaintiff was the eldest daughter of S.V. Subramaniam. Defendants 1 and 2 are the sons and defendants 3 and 4 were the other daughters. Defendant No. 5 was the widow of Subramaniam.

Subramaniam was said to be an industrialist of repute. He was the Chairman and Managing Director of M/s. Metal Lamp Caps (India) Ltd., a well known entity. Subramaniam owned vast movable and immovable assets. He is said to have died on 29.1.1975. He had left behind a will dated 11.12.1972. In terms of the will the properties described in Schedule ''A'' to the plaint was bequeathed in favour of Defendants 1 and 2, jointly. They were also named as the executors under the will. The testator had cast an obligation on defendants 1 and 2 to purchase an immovable property in favour of the plaintiff worth not less than Rs.

1 lakh, in Bangalore, provided the plaintiff relinquished her interest in favour of her sisters, in respect of properties at Nos. 12 and 13, Brunton Road, Bangalore.

It was the plaintiffs case that the intention of the testator was that the property to be purchased was to be as valuable as the property which she was relinquishing at Brunton Road. The plaintiff is said to have released and relinquished her interest in the said properties at Nos. 12 and 13, Brunton Road, as per a deed dated 1.9.1982. But, it was alleged, that the defendants 1 and 2 did not purchase any immovable property at Bangalore, as was required of them, in terms of the will. It was claimed that the properties at 12 and 13, Brunton Road, were worth about Rs. 2 crore as on the date of suit. In the year 1973 when the father of the plaintiff had indicated the value of the property to be purchased in favour of the plaintiff as at Rs. 1 lakh, when the Brunton Road properties were worth about Rs. 5 lakh, each.

It was the plaintiffs case that in spite of repeated demands, defendants 1 and 2 had failed to comply with the condition of purchasing a property at Bangalore for her, though she had dutifully relinquished her right in the Brunton Road properties in the expectation that the said defendants would abide by their obligation. Hence there was a total failure on their part to fulfill the condition precedent for them to inherit Schedule ''A'' properties. The bequests under the will were no longer valid. It was contended that as the plaintiff and the defendants were the only Class I heirs of late Subramaniam, they were all entitled to equal shares in Schedule ''A'' properties, of 1/6th, each. Hence the suit for partition.

3. Defendants 1 and 2 had entered appearance and filed their written statement to contend that the subject matter of the suit was not properly valued and that the same ought to be decided at the outset before proceeding with the adjudication on merits.

It was stated that the suit properties were the self acquired properties of late Subramaniam, their father. During the life time of Subramaniam, the plaintiff was married to one A.S. Lakshmanan and had moved to her matrimonial home since the year 1957, whereas the house at No. 23, MG Road, Bangalore was said to have been constructed in the year 1964. Hence the question of joint possession of the plaintiff with defendants 1 and 2 was not true.

Under the will of Subramaniam, dated 11.12.1972, the entire properties shown in Schedule ''A'' to the plaint were bequeathed to defendants 1 and 2. Even defendant No. 5, the widow of Subramaniam was only given a right of residence during her life time. None of the daughters, including the plaintiff were given any right in the properties. The only direction to the defendants Nos. 1 and 2, under the will was that they should purchase a house property worth not less than Rs. 1 lakh, in Bangalore, provided she relinquished her right to property bearing Nos. 12 and 13, Brunton Road, Bangalore, which stood in the names of the plaintiff and defendants No. 3 and 4, jointly. This obligation was claimed to have been discharged by the defendants, in the following circumstances. It was not in dispute that there was a bungalow at Ootacamund, Tamil Nadu, which was in the name of defendant No. 5. In respect of the said property, Subramaniam in his will had indicated that the said property as well as the shares standing in the name of defendant No. 5 were to be enjoyed by her during her life time and after her demise it would devolve on all her children. They were also directed not to sell the shares to any person outside the family. In view of this, it was said to have been mutually agreed that instead of purchasing a property worth Rs. 1 lakh at Bangalore for the benefit of the plaintiff, it was agreed that defendant No. 5 would relinquish her right in the property at Ootacamund, on defendants Nos. 1 and 2, discharging a loan of Rs. 3 lakh that had been borrowed on the security of the said property. It was pursuant to this agreement that a settlement deed dated 26.6.1982 was executed by defendant No. 5 in favour of the plaintiff conferring title on her in respect of the said property. The plaintiff had been in occupation of the property ever since. In spite of having received the benefit, albeit in variance with the will, which required that she be provided a property at Bangalore, on her releasing her rights to the properties at Nos. 12 and 13, Brunton Road, Bangalore, the plaintiff had raised a false and untenable claim, almost 12 years after she had been conferred with the benefit.

It was stated that even during the pendency of the suit a company petition was said to have been filed before the Company Law Board, in case No. 44/1995, in which a settlement had been arrived at and the plaintiff and defendants 3 and 4 are said to have received Rs. 38,25,000/- each and defendant No. 5 is said to have received Rs. 1,20,75,500/-. The said defendants had thereafter withdrawn their prayers seeking partition of 1320 shares of M/s. Metal Lamp Caps Industries Limited, in the present suit. The plaintiff had deceptively failed to file a memo in that regard. Defendants Nos. 1 and 2 had however, withdrawn a civil suit in O.S. No. 433/1993, which was filed in respect of the same dispute pertaining to the shares of the said company. Therefore, the plaintiff was seeking to lay claim to untenable reliefs and suit was fraught with falsity.

The plaintiff had filed a rejoinder to the written statement of defendants 1 and 2 to refute their contentions, while asserting that the Ootacamund property was the absolute property of defendant No. 5 and the settlement made by defendant No. 5 in favour of the plaintiff did not have the effect of defendants 1 and 2 having satisfied the obligation cast on them to purchase a property for her at Bangalore, on her relinquishing her share in the Brunton Road properties.

4. Defendant Nos. 3 and 4 had filed their written statement to fully support the case of the plaintiff They had asserted that the Brunton Road properties belonged to their mother and she had settled the same in favour of the plaintiff and defendants 3 and 4. They had alleged that the defendants 1 and 2 had even neglected to care for their mother and even failed to pay her the nominal maintenance amount of Rs. 1,000/- per month as directed under the will of their father. The said defendants have seriously questioned the bona fides of

defendants 1 and 2 in having failed to act in terms of the will of their late father and hence had contended that the bequest in favour of defendants 1 and 2 had failed and that the suit properties ought to be divided as prayed for by the plaintiff.

Defendant No. 5 had also filed her written statement, to also allege that defendants 1 and 2 had failed to act in terms of the will of their father. And fully supported the case of the plaintiff and defendants 3 and 4. Her written statement is almost a verbatim repetition of the written statement of defendants 3 and 4. However, defendant No. 5 had died during the pendency of the suit.

5. On the basis of the above pleadings, the court below had framed the following issues.

"1. Does plaintiff proves the conditional bequeath of ''A'' schedule properties under the will dated 11.12.1972 executed by late Sri. S.V. Subramaniam?

2. Do the defendants 1 and 2 prove that fulfillment of condition of Will as contended in para 7 of their written statement?

3. Do the defendants 1 and 2 prove that claim of plaintiff is barred by limitation?

4. Do the defendants 1 and 2 prove that suit is not properly valued and the Court fee paid is insufficient?

5. Do the defendants 3 and 4 prove that Will has not been acted upon?

6. Do the defendants 3 and 4 prove that the property at Ooty was the absolute owner ship of defendant No. 5?

7. Do the defendants 3 and 4 prove that defendant No. 5 settled the property at Ooty in favour of plaintiff?

8. Does defendant No J prove that the property bearing Nos. 12 and 13, Brunton Road, Bangalore were her absolute properties?

9. Does defendant No. 5 prove that she had settled Brunton Road properties in favour of plaintiff and defendants 3 and 4?

10. Does defendant 5prove that defendants 1 and 2 failed to pay the maintenance as alleged?

11. Is plaintiff entitled to 1/6th share in schedule A property?"

ADDITIONAL ISSUES:

"1. Whether the defendants 1 and 2 prove that his father had left the liability of Rs. 4,66,167/- towards income-Tax Wealth Tax as his personal liability?

2. Whether the defendants 1 and 2 prove that they were required to discharge another loan of Rs. 3 lakhs which was taken on the collateral security of the Ooty property by deposit of title deed?

3. Whether the defendants 1 and 2 prove that they as the executors of the Will dated 11.12.1972 have carried out the desire of their of their father and given full effect to it as contended in para 18(b) of the amended written statement?

4. Whether the defendants 1 and 2 prove that the settlement was reached before the company Law Board No. 44/95 as contended in para 18(6) of the additional written statement?"

Issue Nos. 1, 5 to 9 and 11 and Additional Issue Nos. 1 and 2, were answered in the affirmative and the remaining issues in the negative. The suit was decreed in part holding that the plaintiff was entitled for partition and separate possession of 1/6th share in item Nos. 1 and 3 to 9 of suit schedule A'' properties. Hence the appeal by defendants No. 1 and 2. The denial of the plaintiffs claim to a share in item No. 2 of Schedule A'' properties, namely, 1320 shares of M/s. MLC Industries Limited, is sought to be questioned in the connected appeal, by the plaintiff.

6. The learned Senior Advocate, Shri B.V. Acharya, appearing for the counsel for the appellants - defendants 1 and 2, would contend that the trial court was in error in holding that the court fee paid was sufficient, when it was apparent from the admitted circumstance that the plaintiff had moved to her matrimonial home upon her marriage in the year 1957 and could not claim to be in joint possession of the property in seeking to value the suit in terms of Section 35(2) of the Karnataka Court Fees and Suits Valuation Act, 1958 (hereinafter referred to as ''the KCFSV Act'', for brevity).

It is further contended that the suit was barred by limitation. In that, the father of the appellants had executed a will dated 11.12.1972 and he had died on 29.1.1975. If it was the claim of the plaintiff that defendants were required to purchase a property for her at Bangalore worth Rs. 1 lakh, provided she relinquished her right in respect of property Nos. 12 and 13, Brunton Road, and if she had in fact relinquished her rights in respect of the same under a deed dated 1.9.1982, a cause of action arose, if the defendant Nos. 1 and 2 had failed to act in terms of the will in purchasing a property for her as was reciprocally required of them under the will, and hence the suit filed on that basis, in the year 1993 was hopelessly barred by time. It is pointed out that as per the letter dated 7.3.1984, Exhibit D-26, defendants 1 and 2 had categorically stated that the property at Ootacamund had been settled in favour of the plaintiff, in discharge of the obligation cast on the defendants 1 and 2, in terms of the will. If the said letter is treated as the date of refusal of the plaintiffs claim for a partition, the suit ought to have been filed within three years from the date of Exhibit D-26. The plaintiff had made a bare assertion that the will in question was null and void without seeking the necessary declaration in that behalf And such a suit would obviously be barred by limitation in view of Article 58 or Article 113 of the Schedule to the Limitation Act, 1963. Hence the suit was barred by limitation.

It is contended that the suit is actually in the nature of a suit for declaration to annul the effects of the registered will. She was a beneficiary under the will, and as it was her grievance that the appellant defendants had failed to comply with a direction issued to them by the testator- she could at best seek enforcement of the direction and if the defendants failed to comply it was for the plaintiff to enforce her claim against properties bequeathed in favour of defendants 1 and 2. The question of a partition of the suit properties did not arise.

It is contended that the trial court had failed to discern and arrive at an inescapable finding of a family arrangement, on a perusal of the will, the settlement of the Ooty property in favour of the plaintiff and the subsequent conduct of the parties. When the Ooty property was settled in favour of the plaintiff and the consequential relinquishment of rights over the Ooty property by the other members of the family, and the plaintiff having received the same in lieu of a property that was to be purchased at Bangalore for her by the defendants No. 1 and 2, were all part of a family arrangement, which is logically evident from the aforesaid documents. The trial court has thus committed a palpable error in not assessing the evidence in the proper perspective. It is hence contended that the appeal by the defendants 1 and 2 be allowed and the suit be dismissed.

7. On the other hand the learned Senior Advocate, Shri Udaya Holla, appearing for the counsel for the plaintiff and the appellant in the appeal in RFA.342/2009, would seek to justify the judgment of the trial court in so far as the same having been made in favour of the plaintiff and would point out that it was not in dispute that the will of late Subramaniam did cast an obligation on defendants No. 1 and 2 to purchase a property worth Rs. 1 lakh at Bangalore, provided the plaintiff relinquished her right in respect of the properties on Brunton Road, Bangalore. It is also not in dispute that the plaintiff had indeed relinquished her right in respect of those properties in favour of defendants 3 and 4 - there is no assertion by defendants No. 1 and 2 that they have reciprocally purchased a property at Bangalore in satisfaction of the condition imposed under the will. It is hence contended that by operation of law the bequest in favour of defendants 1 and 2 is void. Attention is drawn to Section 122 of the Indian Succession Act, 1925, which reads as follows:

"122. Onerous bequests..-Where a bequest imposes an obligation on the legatee, he can take nothing by it unless he accepts it fully.

Illustration:

A, having shares in (X), a prosperous joint stock company, and also shares in (Y), a joint stock company in difficulties, in respect of which shares heavy calls are expected to be made, bequeaths to B all his shares in joint stock companies; B refuses to accept the shares in (Y). He forfeits the shares in (X)."

Reliance is placed on the commentary on the Indian Succession Act by B.B. Mitra, Fifteenth Edition, page 307, to contend that the principle underlying Section 122 is that, where onerous and beneficial properties are included in the same gift, the legatee cannot disclaim the onerous and accept the beneficial, unless the will manifests a sufficient intention of the testator to the contrary. This section lays down a rule of election that where a gift consists of several things some of which are burdened with an obligation, he is put to his election either to accept the whole gift or not to accept anything at all.

The claim of defendants 1 and 2 of the due discharge of the obligation cast under the will, by reference to the settlement deed made by defendant No. 5 in favour of the plaintiff pertaining to the Ooty property, was not tenable in the face of the tenor of the very document and the undisputed position that the Ooty property stood in the name of defendant No. 5 and there was no reference in the settlement deed to the same being executed pursuant to any family arrangement and of the defendant Nos. 1 and 2 having discharged the loan created on the Ooty property and that in lieu of their obligation to purchase a property for the plaintiff at Bangalore, the settlement deed was being executed.

In so far as the contention as regards the trial court not having found that the court fee paid was insufficient, it is urged by Shri Holla, that the general principle of law is that in the case of a co-owner, the possession of one is in lawful possession of all, unless ouster or exclusion is proved. To constitute to be in joint possession in law, it was not necessary that the plaintiff should be in actual possession of the whole or part of the property. Equally it was not necessary that one should be getting a share or some income from the property. Reliance is placed on Neelavathi and Others Vs. N. Natarajan and Others, AIR 1980 SC 691 : (1980) 2 SCC 247 : (1980) 2 SCR 307 : (1980) 12 UJ 246 for the above propositions.

It is further contended that the contention as to the suit being barred by limitation on the ground that the nature of the suit was really one for a declaration attracting Article 58 or atleast one falling under the residuary Article 113 of the Schedule to the Limitation Act and therefore was barred by limitation- as not being tenable. It is emphasized that the bequest in favour of defendants 1 and 2 having been rendered void, which has been established, would entitle the plaintiff to seek a partition of the suit properties by intestate succession as it were, as a Class I heir and hence the suit being classified as a suit for partition was in order.

It is further contended by Shri Holla that in so far as the trial court having denied a share to the plaintiff in item No. 2 of Schedule A'' to the suit properties is concerned, it is pointed out that, even after holding that the plaintiff has proved the conditional bequest of Schedule A properties under the Will dated 11.12.1972 executed by late Sri. S.V. Subramaniam, the trial court erred in holding that the plaintiff is not entitled to her 1/6th share in item No. 2 of the suit Schedule A properties (1320 equity shares in the company, Metal Lamps Caps Industries Limited).

Further, even though defendants 1 and 2 and the said company Metal Lamps

Caps Limited have not paid the sale consideration to the plaintiff and the defendants 3 to 5 in respect of the 1320 Shares, the trial court has erroneously relied upon a stray sentence in the cross-examination of the plaintiff that as per the decision of the Company Law Board, there are no shares to be divided amongst the family members. It is also contended that the trial court erred in holding that PW1 - the plaintiff and DW2 Defendant No. 4 have admitted that in the company petition No. 44/1995, the appellant and the respondents have entered into a compromise and accordingly the Company Law Board has disposed off the said petition. As no consideration was paid in respect of the said 1320 equity shears, the trial court ought to have held that the plaintiff was entitled to the partition of the said equity shares.

Further, it is contended that the trial court failed to notice that the sale consideration was paid in respect of the equity shares which the plaintiff and Defendants 3 to 5 held in their individual names in the said company - Metal Lamps Caps Industries Limited, and that the said 1320 equity shares belonged to the estate of late Sri. S.V. Subramaniam. As the said 1320 equity shares belonged to the estate of the deceased, the trial court ought to have directed the partition of the said 1320 equity shares also. Even after the admission of Defendant No. 3 in her cross-examination that 55420 shares of MLC Industries Limited, were standing in the name of the plaintiff and Defendants 3 to 5 and that the 1320 shares of MLC Industries Limited, shown in item No. 2 of Schedule A of the plaint were standing in the name of their deceased father and that MLC Industries Limited has paid the sale consideration only in respect of the 55420 shares mentioned in Exhibit D-7 and that neither Defendant No. 1, Defendant No. 2, nor MLC Industries Limited, had paid the sale consideration for 1320 equity shares shown in Schedule A'' of the plaint to the appellant and the respondents 3 to 5 herein, the trial court erred in holding that the plaintiff is not entitled to a share in the 1320 equity shares.

8. By way of reply, Shri Acharya would contend that the bequest made in favour of defendants 1 and 2 were strictly not subject to the condition imposed on them to purchase a property for the plaintiff in Bangalore. They were personally obliged to do so only if the plaintiff chose to relinquish her right in the properties on Brunton Road, standing in the joint names of the plaintiff and defendants Nos. 3 and 4. Reliance is placed on the decision in Re. Lester v. Lester, All ER 1 1942 646. In the said case, the testator had bequeathed certain shares to his son "subject to the payment by him" of an annuity to another son of the testator for his life and after the son''s death, annuities to his wife and daughter respectively, on terms specified therein. It was admitted that this condition imposed a personal obligation on the legatee who accepted the gift, but it was contended for the annuitants that it also created a charge on the shares. It was held that there was only a personal obligation created on the legatee by the condition, but the words used in the will were not apt to create a charge on the shares. It is contended by Shri Acharya, that similar is the case on hand. It did at best enable the plaintiff to enforce the obligation on defendants 1 and 2 to purchase a

property for her at Bangalore, in view of her having relinquished her share in respect of the Brunton Road properties Even if it could be held that defendants had not met the condition, they had taken steps and settled the Ooty property exclusively in favour of the plaintiff.

It is further contended by Shri Acharya that the condition imposed on defendants 1 and 2 could not be construed as a defeasance clause and that on a failure on the part of the defendants to abide by the same, the will did not indicate that they would stand divested of the properties bequeathed on them. Such an intention should be found spelt out in the will.

Reliance is placed on Smt. Talkeshwari Devi Vs. Ram Ran Bikat Prasad Singh and Another, AIR 1972 SC 639 : (1972) 1 SCC 549 : (1972) 3 SCR 71 : (1972) 4 UJ 551 . In the said case, one Raghunath Prasad Singh executed a will on August 31, 1938, and died leaving behind his widow Jageshwar Kuer, his daughter Satrupa Kuer and two grand-daughters, Talkeshwari Devi and Sheorani. Talkeshwari Devi and Sheorani were the daughters of the testator''s son, Sukhdeo Prasad Singh who had predeceased him. Jageshwar Kuer died in November 1948, and Sheoram in November 1949, without leaving any issue. The will provided that one-third share would pass to his daughter - Satrupa Kuer and the remaining two-thirds would pass to his grandchildren - Talkeshwan Devi and Sheoram, in equal shares (clause 4 of the will). There was a further clause in the will which provided that if one of the grand-daughters died issueless, then the other living grand-daughter would get the entire two-third share and become the absolute owner (clause 5 of the will). After the death of Jageshwar Kuer, the Talkeshwan Devi and Sheoram divided the properties in equal shares and took possession of their respective shares. After the death of Sheoram issueless, the Talkeshwan Devi filed a suit for possession of the share of the properties that fell to her Sheoram''s share. The Trial Court dismissed the suit holding that Clause 5 of the will ceased to be operative on the death of Jageshwar Kuer and Clause 4 of the will was the only operative clause. On appeal to the Supreme Court, it was held that it was undisputed that the duty of the Court is to find out the intention of the testator, but that intention has to be gathered from the language of the will read as a whole. That it was clear from Clause 4 of the will that the testator wanted to give to his grand-daughters an absolute right in the properties that were to devolve on them after the death of his wife, Jageshwar Kuer. The estate bequeathed under Clause 4 of the will is not a conditional estate. Clause 5 of the will related to devolution and it did not provide for any divestment of an estate which had vested. The estate that vested on Sheorani was an absolute one. The will does not provide for the divestment of that estate and it was plain from the language of Clause 5 of the will that it refers to the devolution, which means when the properties devolved on the two sisters on the death of Jageshwar Kuer.

Further, that Clause 5 cannot be considered as a defeasance clause. If the testator wanted that the bequest made to any of his grand-daughters should stand divested on the happening of any contingency, then he would have said so in the will, assuming that he could have made such a provision. But the will nowhere says that the properties bequeathed to the appellant and her sister should cease to be their properties on their dying issueless. Obviously what the testator intended was that if any of his grand-daughters dies issueless before the devolution took place then the entire property should go to the other grand-daughter.

Further, that if Section 124 of the Indian Succession Act, 1925 applies to the facts of the case, then it is clear that the legacy claimed by the Talkeshwan Devi is unavailable, as the contemplated contingency did not occur before the fund bequeathed was payable or distributable and hence, dismissed the appeal.

9. It is further contended by Shri Acharya that in so far as the appeal in RFA 342/2009 is concerned, it is pointed out that the findings of the trial court are categorical and the clear admission of the plaintiff and defendants 3 to 5 of a final settlement in so far as the shares pertaining to M/s. MLC Industries Limited, whether held by them in their own names or in respect of the 1320 shares said to be in the name of the testator, stood closed and it was mischievous on the part of the plaintiff to pursue the claim.

10. On the above rival contentions and on a perusal of the record, the points that arise for consideration in these appeals are as follows:

"(a) Whether the finding of the trial court, that the court fee paid was sufficient, was in order ?

(b) What was the nature of the suit? To wit, was it a suit for partition or was it to be construed as one falling under Article 113 or any other provision of the Schedule to the Limitation Act, 1963? Was the suit barred by limitation?

(c) What was the effect of the obligation cast on the defendants 1 and 2 to purchase a property for the plaintiff, contingent on her relinquishing her right to the property Nos. 12 and 13, Brunton Road, Bangalore, standing in the joint names of the plaintiff and defendants 3 and 4 and the failure on the part of defendants 1 and 2 to comply ?

(d) To what relief was the plaintiff entitled ?"

11. On the issue as to the sufficiency of the court fee paid, the trial court has proceeded to rely upon the decision in In Re: K. Ramalingam and B.S. Malleshappa Vs. Koratagere B. Shivalingappa and others, AIR 2001 Kar 384 : (2001) ILR (Kar) 3988 : (2001) 4 KarLJ 431 : (2001) 4 KCCR 2665 , to conclude that the court fee payable on the plaint is to be determined on the basis of averments in the plaint and not on the basis of the averments in the written statement, or any evidence and has opined that the valuation of the suit under Section 35(2) of the Karnataka Court Fees and Suits Valuation Act, 1958 was proper and sufficient. In this regard on an overview of the case law, as laid down in the following authorities, would indicate the above said view to be consistent thereto. (See: S.Rm.Ar.S.Sp. Sathappa Chettiar Vs. S.Rm.Ar.Rm. Ramanathan

Chettiar, AIR 1958 SC 245 : (1958) 1 SCR 1021 , Jagannath Amin Vs. Seetharama (dead) by LRs. and Others, (2006) 10 JT 397 : (2006) 11 SCALE 599 , Suhrid Singh @ Sardool Singh Vs. Randhir Singh and Others, AIR 2010 SC 2807 : (2010) 3 JT 472 : (2010) 158 PLR 707 : (2010) 3 SCALE 389 : (2010) 4 SCR 1121 : (2010) AIRSCW 3308 : (2010) 2 Supreme 670 and in Budh Ram and Others Vs. Bansi and Others, (2010) 8 JT 115 : (2010) 7 SCALE 750 : (2010) 11 SCC 476 : (2010) 9 SCR 674)

However, it is to be noticed that the above decisions were without reference to Section 11 of the KCFSV Act or any provision in pari materia thereto. In that regard, a division bench of this court has held that, it was mandatory on the part of the Trial Court to try all questions as to value for the purpose of determining the jurisdiction of Courts arising on the written statement of a defendant to be heard and decided before evidence is recorded affecting such defendant, on the merits of the claim. Therefore, the view of the trial court that it is only averments in the plaint that would be relevant to determine the court fee payable, is without reference to Section 11 of the Act and hence reliance placed only on the decisions referred to has led to an erroneous conclusion. The view of the Division Bench in Veeragouda and Others Vs. Shantakumar @ Shantappagowda, (2009) ILR (Kar) 887 , clearly indicates how the decisions of the apex court stand distinguished. The reasoning with reference to the scope and effect of Section of 11 of the KCFSV Act is stated thus:

"13. A perusal of the said provision makes it clear that an obligation is cast on the Court even before ordering the plaint to be registered, to decide on the materials and allegations contained in the plaint, what is the correct fee payable on the plaint. The said decision however is subject to review, further review, corrections in the manner specified in the succeeding sub-sections. Sub-section (2) of Section 11 provides, a defendant may, by his written statement filed before the first hearing of the suit or before evidence is recorded on the merits of the claim, plead that the subject matter of the suit has not been properly valued or that the fee paid is not sufficient. If such a plea is taken, naturally the Court has to frame an issue. Sub-section (2) further provides all questions arising on such pleas shall be heard and decided before evidence is recorded affecting such defendant, on the merits of the claim. In other words, it mandates, if an issue regarding court fee is raised, the said issue shall be decided before recording evidence on other issues. Therefore, the mandate of law is very clear. No discretion is left to the Court for postponing the decision regarding issue of court fee once such a plea is taken in the written statement or before the evidence is recorded.

14. The issue regarding court fee normally would be a mixed question of law and fact. Evidence is to be recorded. Merely because evidence is to be recorded on the said issue that is not a ground to direct trial on that issue along with other issues on which also evidence is necessary. If the issue regarding court fee is held against the plaintiff and the plaintiff does not pay the court fee prescribed

by the Court in the order, the law mandates that the Court shall reject the plaint, so that the precious time of recording evidence on other issues is saved and the defendant is not harassed in the form of trial. Therefore, this Section is based on good public policy and it has nothing to do with the Bangalore City Civil Court Act or its jurisdiction to try the suits before it. Incidentally, the issue regarding court fee may also involve question of pecuniary jurisdiction. In answering the said issue, if the Court holds that the subject matter of the suit is more than the value over which the said Court has jurisdiction, it has to return the plaint for presentation to the proper Court.

15. Order XIV Rule 2 of the CPC is the general provision of civil law relating to trial of suits and issues including any issues as preliminary issue. The Karnataka Court Fees and Suits Valuation Act, is a special law. It has received the assent of the President of India. It prevails over the general law. It is well settled when a special mode has been prescribed by a special law to do a particular job or to exercise the power in relation to subject thereunder, then special law has to prevail over the general law and the mode so prescribed by special law would have to be followed in respect of matters covered therein. Section 11 of the Act, specifically deals with decision as to proper fee in Courts. It gives a special direction to the Court to decide the issue relating to valuation and Court fee, before recording of evidence on merits of the case. Therefore, in so far as the issues relating to valuation and Court fee are concerned, Order XIV Rule 2 of the CPC has to yield to Section 11 of the Act. Therefore, all questions arising with reference to valuation and Court fee payable shall be heard and decided before evidence is recorded affecting such defendant, on the merits of the claim. This aspect has been affirmed and reaffirmed in Sub-sections (2), (3) and (5) of Section 11. Therefore, the intention of the legislature is manifest. The words "shall be heard" repeatedly used in the aforesaid provisions, makes it clear that this provision is mandatory. In order to decide the said issue whether any evidence is to be recorded or not is immaterial. It is also immaterial to find out whether the issue regarding valuation and Court fee is a pure question of law or a mixed question of law and fact or a pure question of fact. When once a plea is taken that the suit has not been properly valued or that the fee paid is not sufficient, issue arising on such pleas shall be heard and decided before evidence is recorded on merits of the claim.

16. This view of ours is supported by a plethora of cases decided by the Apex Court as well as this Court. The Supreme Court in the case of Sri Ratnavaramaraja Vs. Smt. Vimla, AIR 1961 SC 1299 : (1961) 3 SCR 1015 , dealing with the Court Fees Act held that, the Court Fees Act was enacted to collect revenue for the benefit of the State and not to arm a contesting party with a weapon of defence to obstruct the trial of an action. Whether the proper court fee is paid on a plaint is primarily question between the plaintiff and the State. The Section only enables the defendant to raise a contention as to the proper court fee payable on a plaint and to assist the Court in arriving at a just decision on that question. That Act provides that for the purpose of deciding

whether the subject matter of the suit or other proceeding has been properly valued or whether the fee paid is sufficient, the Court may hold such enquiry as it considers proper and issue a commission to any other person directing him to make such local or other investigation as may be necessary and report thereon. The anxiety of the Legislature to collect court fee due from the litigant is manifest from the detailed provisions made in Chapter III of the Act."

The decisions referred to above, some of which were incidentally with reference to the provisions of the KCFSV Act are rendered without reference to Section 11 of the said Act. And in the other decisions there was also no reference to any corresponding provision, in pari materia, thereto.

However, as there was also a controversy as to whether the suit for partition was competent, which was again dependant on the finding as to the effect and consequence of the failure on the part of the beneficiaries, under the will pertaining to the very suit properties, to comply with the obligation imposed on them and whether it would have the effect of divesting dispositions made in their favour, which proposition was required to be found in favour of the plaintiff, as a first step. It could only then be said (if at all) that the bequests having become void, all the properties which were subject matter of the will and bequeathed in favour of defendants 1 and 2 were available for partition amongst the Class I heirs of the testator, as if by intestate succession. It is to be also kept in view that the above controversy could not have been resolved without a full fledged trial. Therefore the conclusion of the court below that the suit was to be treated as a suit for partition and separate possession and the court fee paid on the valuation of the suit under Section 35(2) of the KCFSV Act cannot be said to be conclusive.

As regards the nature of the suit, from a plain reading of the plaint it is evident that the properties which were sought to be partitioned were the self-acquired properties of the plaintiffs father and were subject matter of a will dated 11.12.1972. The father had died in the year 1975. According to the plaintiff, she had relinquished her right in the Brunton Road properties, upon execution of a registered deed dated 1.9.1982. And hence the obligation on the part of defendants 1 and 2 to purchase a property for her at Bangalore, was operational from the said date and it is the case of the plaintiff that they had continually defaulted in that regard till she filed the suit in the year 1993. Hence, a cumulative reading of the plaint would indicate that the plaintiff was in effect seeking that the dispositions under the will were no longer valid and defendants 1 and 2 stood divested of the properties bequeathed to them under the will and that she became entitled to her share of the properties of the testator as if by intestate succession. The plaintiff was not therefore seeking a partition of the properties de hors the will, but in spite of it and it would be incongruous for the court to proceed on the basis that the will was no longer operative, without first determining the actual intention of the testator under the will and the manner in which the defendants could be held bound by the condition under the will and to determine the just relief to which the plaintiff was actually entitled. In other words, if the terms of the will could be duly complied with by defendants 1 and 2 at the instance of the plaintiff, it would be out of place to hold that the defendants 1 and 2 stood divested of the bequests in their favour. It may be possible for the said defendants to be compelled to comply with the obligation referred to above, failing which they would stand the risk of being divested of the bequests in their favour. This again, only on accepting the extreme argument that the bequest was of a nature contemplated under Section 122 of the Indian Succession Act, 1925. This was also in the face of the defence set up by the said defendants that it was alternatively agreed, in variance with the terms of the will, that they would discharge the loan in respect of the Ooty property that stood in the name of defendant No. 5,who would in turn convey the said property in favour of the plaintiff in consideration of the plaintiff having relinquished her right in the Brunton Road properties in favour of her sisters.

When the trial court had negated the defence set up by defendants No. 1 and 2 it was necessary for the trial court to then consider the real intention of the testator and the justification in the plaintiff claiming a share of the entire estate bequeathed by the testator in favour of the defendants 1 and 2, without in the first instance examining the viability of compelling defendant Nos. 1 and 2 to comply with the obligation envisaged under the will and in terms thereof. It was not justified on the part of the trial court in having conceded the plaintiffs claim for partition of the suit properties, as if it was axiomatic that the will stood effaced on the plaintiff demonstrating that the defendants No. 1 and 2 had failed to comply with an obligation or a legacy made in her favour.

A suit of the nature contemplated under Article 106 the Schedule to the Limitation Act, 1963, may be noticed:

The suit of the plaintiff is certainly in respect of a legacy, in the plaintiff seeking to base the suit on the failure of a legacy made by the testator, and on defendants 1 and 2 having failed in their obligation to purchase a property for the plaintiff contingent on her relinquishing her right in the Brunton Road properties. A cause of action for such a suit arose on her executing a deed giving up her rights in favour of her sisters, as per deed dated 1.9.1982. Hence, the suit filed in the year 1993 was well within a period of 12 years from that date. The suit was inappropriately labeled as one for partition and separate possession of the suit properties. The plaintiff may even be entitled to enforce any such claim against properties that were bequeathed in favour of defendants 1 and 2 if they were found to have failed to discharge the obligation, consequent on their defence being negated and the court decreeing the relief which the plaintiff was entitled to in terms of the will.

In so far as the third point for consideration as to the nature of the obligation imposed under the will and how far it could be equitable to interpret the failure of the obligation on the part of defendants 1 and 2 could be interpreted strictly in terms of the tenor of Section 122 of the Indian Succession Act, 1925, to immediately proceed on the footing that the bequest in favour of the defendants 1 and 2 was void, is also relevant. It was the case of the plaintiff as well as defendants 3 to 5, which has been upheld by the trial court, that the Ooty property was the exclusive property of defendant No. 5. So also the properties at No. 12 and 13 Brunton Road, Bangalore, were the exclusive properties of Defendant No. 5 and that the testator had no authority to make any testamentary disposition in respect of the same. Therefore, if the properties at No. 12 and 13 were the exclusive properties of defendant No. 5, which in turn had been conferred by her on the plaintiff and defendant Nos. 3 and 4, it is inexplicable that an obligation being imposed on defendants 1 and 2, with reference to a contingent relinquishment of rights by the plaintiff in respect of the Brunton Road properties, when there was no indication of defendants 1 and 2 having received any benefit by virtue of the plaintiff having relinquished her rights over the Brunton Road properties, would only render the obligation cast on the defendants as being a personal one cast on them by the testator and it could not be construed as resulting in divesting them of the bequests made in their favour, in the absence of any reciprocity as to any benefit derived by them. And this is especially so, in the absence of a specific declaration by the testator that the entire bequest in favour of defendants 1 and 2 would fail in the event that they did not comply with the obligation as aforesaid, it could not be said that they were, ipso facto, divested of the bequests.

The next question that would arise for consideration is, if the plaintiff was not entitled to seek partition and separate possession of the suit properties, then what was the appropriate relief that she was entitled to. Assuming that there was a failure on the part of defendants 1 and 2 to comply with the obligation cast on them, though a pragmatic view of the sequence of events would indicate that there was indeed a possible settlement, albeit in variance with the terms of the will whereby the plaintiff has agreed to receive the Ooty property held by defendant No. 5, in lieu of defendants purchasing a property for her at Bangalore and the proximity in time, of her having released her rights in the Brunton Road properties in favour of her sisters thereafter, would fortify that view. However, the language and tenor of the documents evidencing the above transactions being silent as to the involvement of the defendants 1 and 2 in having discharged a loan in respect of the Ooty property to facilitate an unencumbered transfer in favour of the plaintiff, is indeed unfortunate. It could even be attributed to callous and incompetent drafting of the documentation, not really reflecting the true nature and intention of the transactions, to the serious detriment and misfortune of defendants No. 1 and 2. Especially the absence of any reference to the involvement of defendants 1 and 2 in bringing about the same. Or it may have even been at the instance of defendants No. 1 and 2 themselves, for reasons best known to them, that there was no mention of their involvement. Be that as it may, proceeding on the footing that there was indeed no compliance with their obligation under the will, it is necessary to consider as to the appropriate relief to which the plaintiff was indeed entitled to.

In the above circumstances, the appropriate relief to which the plaintiff was entitled was the enforcement of the obligation cast on defendants 1 and 2 to purchase a property at Bangalore, worth not less than Rs. 1 lakh, contingent on the plaintiff relinquishing her right to the Brunton Road properties. This was an intention declared in the year 1972, obviously the testator envisaged that the interest or the share that the plaintiff held in those properties was worth about Rs. 1 lakh as on the date of the will. It would stand to reason that the value so attributed should be construed with reference to the actual date on which the plaintiff became entitled to enforce the obligation, on the part of defendants 1 and 2, to provide such benefit. As already noticed above, the plaintiff was within her right to bring a suit within 12 years from the date of cause of action, in terms of Article 106 of the Schedule to the Limitation Act, 1963. She had done so in the year 1993. Even according to the plaintiff, as stated in the plaint itself, the properties at Nos. 12 and 13, Brunton Road, Bangalore were valued at Rs. 2 Crore, as on the date of suit. This has not been denied by Defendants 1 and 2 in their written statement. In effect, the plaintiff was claiming that defendants were obliged to purchase a property which would be effectively worth one-third of Rs. 2 crore as on the date of suit. Given the varying valuation of property depending on its location and nature, at the relevant point of time, it may safely be said that the plaintiff was entitled to a property worth about Rs. 70 lakh, more or less, as on the date of suit. It would be just and reasonable therefore to direct the defendants 1 and 2 to pay a sum of Rs. 70 lakh to the plaintiff to purchase a property of her choice or to utilize the money in any other way. Defendant No. 5 having died during the pendency of the suit and having given up her claim to maintenance, she and defendants 3 and 4 were not entitled to any reliefs.

The above determination would also indicate the actual court fee that was payable by the plaintiff on the suit as brought by the plaintiff, notwithstanding that it was termed as a suit for partition. It was indeed a suit for enforcement of a legacy as contemplated under Article 106 of the Schedule to the Limitation Act, 1963. Plaintiff is hence liable to pay court fee on Rs. 70 lakh, being the value of the property that she was entitled to. This court accordingly determines the court fee payable in terms of Section 11(4)(a) of the K.C.F.S.V. Act.

In so far as the claim of the plaintiff in respect of 1320 shares held by late Subramaniam, pertaining to M/s. MLC Industries Limited and even if it could be demonstrated that the said shares were not the subject matter of the compromise entered into before the Company Law Board, as between defendants No. 1 and 2 on the one hand and the plaintiff and defendants 3 to 5 on the other, the said shares have been bequeathed in favour of Defendants 1 and 2 and their children, under the will of Subramaniam. Hence in the light of the view taken by this court, the plaintiff is not entitled to claim any part of those shares.

In the result, the appeal in RFA. 169/2009 is allowed in part. The judgment and decree of the court below is modified to hold that the appellants shall pay a sum of Rs. 70 lakh to the plaintiff -Respondent No. 1 within a period of four weeks, failing which the amount shall carry interest at the rate of 10% per annum from date of default till date of payment and shall be enforceable as against the properties bequeathed to defendants 1 and 2 by their father. They shall also be liable to pay the costs of the suit to the plaintiff, which would include the court fees payable by the plaintiff, as determined above. The appellants are obliged to pay court fee, at the same rate as determined against the plaintiff, on their appeal. The same shall be paid within a period of four weeks.

The plaintiff is liable to pay the court fee as determined above within a period of six weeks, from the date of receipt of a copy of this judgment.

The appeal in RFA 324/2009 stands dismissed.

