IN THE COURT OF CIVIL JUDGE AND JMFC AT HOLENARASIPURA

Present:- Sri.R.Mahesha, B.A.L, LL.B,
Civil Judge and J.M.F.C,
Holenarasipura.

Dated this the 19th day of October, 2017

O.S.No.134/2008

Between

Rani and others : Plaintiff

(By Sri.B.N.R., Adv.,)

V/s

Chikkamallamma and others : Defendants

(D1 & 2 -By Sri.P.D.D., Adv.,
D3, 6 to 11 - By Sri.H.S.A. Adv.,
D12- By Sri.R.S. Adv.,
D4 & 5 -Exparte)

ORDER ON IA-XXIII

The defendant No.5 has filed IA.No.XXIII U/Order 8 Rule 1(a)(3) seeking permission to production of document by condoning the delay.

2. In the annexed affidavit, the defendant No.5 submitted that, due to lost of document could not able to produce the document well in time. The proposed documents are very much necessary to prove his case.

Hence, condone the delay in production of document and permit to produce the same before the court and marked the same as exhibits. If application is dismissed she will be put great hardship and injury. Hence prays for allowing the application.

3. Per contra the plaintiff filed detailed objection by contending that the present application is not maintainable either in law or facts. Further the suit filed for the relief of partition and other consequential relief against the defendants. For the purpose of deprive the legal right of the plaintiff, the defendant No.5 created document No.2 and 3 as per list. They have no legal sanctity. Therefore document No.2 and 3 are not exhibited. The document dated 01.08.2008 styled as "Vibhaga patra (ವಿಭಾಗ ಪತ್ರ)" was not registered and Janaki is not signatory to such document, witness details not mentioned. Deed writer name was empty. Hence the said Vibhagapatra (ವಿಭಾಗ ಪತ್ರ) was created one. The document No.3 also created for the purposes deprive the legal right of the plaintiff on the suit property. Hence prays for dismissal of the above application.

4. Heard the argument of both sides. Perused the records.

5. The points that arise for my consideration are as follows.

1. Whether the application filed by the defendant No.5 made out sufficient ground to allow IA No.XXIII?

2. What order?

6. My answer the above points are as follows.

Point No.1:- Partly in the Affirmative

Point No.2:- As per the final orders for the following reasons.

R E A S O N S

7. **Point No.1:-** Perused the entire record, order sheet, and rival pleadings of both parties, the specific case of the plaintiff is that the plaintiffs are the legal heirs of late Umesh. The properties are originally belongs to one Mylaraiah, proposits of family. The suit properties are still in the name of Mylaraiah, some of A schedule properties are in the name Mahadevaiah, some of properties out of A schedule in the name of defendant No.3 and 4. B schedule property stands in the name of defendant No.12. The plaintiff seeks partition of suit property and income of defendants denied and postponed to effect partition and etc., relief, hence, this suit filed. In other hand the defendant No.5 denied all plaint

averment. He stated in his written statement that the husband of Umesh had given adopted son as Late Somashekar and 1st wife by name Vasantha. In the presence of villagers late Umehsa continued as Adoption son and he died in the year 1998-99. The partition effected between Mahadevaiah and late Somashekara during the year 1958. The said Umesha had no right over the properties of Late Mahadevaiah and Somashekara. Late Umesha had given to Somashekar and Vasantha, he was separated from the family. He had no right over the Shivaraju property. Therefore pray for dismissal of the suit.

8. Now the present case posted for defendant's evidence, the plaintiff side evidence concluded. Now the defendant No.5 filed present application for condoning the delay. Upon careful perusal of document, the Vibhaga patra (ವಿಭಾಗ ಪತ್ರ) dated 01/08/2008 and oppige patra (ಒಪ್ಪಿಗೆ ಪತ್ರ) dated 17/07/2008 are the unregistered documents. Such documents are not bear the details of witness and scribe moreover it is unregistered. Learned HSA for defendant no.5 canvassed his arguments that such documents are even though unregistered. He has produced for collateral purpose, it can be received in evidence.

9. He has relied decision of our Hon'ble High court of Karnataka **ILR 2002 KAR 3613 between K.Anjaneya Setty Vs. K.H.Rangiah setty**. The Hon'ble High Court held that there is no total prohibition for receiving unregistered document in evidence, unregistered partition deed could be received in evidence to prove any collateral transaction.

10. In other hand Learned BNR advocate canvassed his arguments by referring Section 17(1)(b) of Registration Act and Section 49 of Registration Act. The documents produced by the defendant No.5 are not admissible document, unregistered document evidence Act. Therefore that document cannot be received in evidence.

11. From the rival arguments of both advocates it is worth to looked into the above state and Section before come to any conclusion-

Section 17(1)(B) Registration Act 1908:

> (B) Other non-testamentary instruments which purport or operate to create, declare, assign, limit or extinguish, whether in present or in failure, any right, title or interest, whether vested or contingent, of the value of one hundred rupees, and upwards, to or in immovable property:

Section 49 in The Registration Act, 1908:

Effect of non-registration of documents required to be registered - No document required by section 171 [or any provision of the Transfer of Property Act, 1882] to be registered shall-

(a) affect any immovable property comprised therein or

(b) confer any power to adopt or

(c) be received as evidence of any transaction affecting such property or conferring such power, unless it has been registered: [provided that an unregistered document affecting immovable property and required by this Act or the Transfer of Property Act, 1882 (4 of 1882) to be registered any be received as evidence of a contract in a suit for specific performance under Chapter II of the Specific Relief Act, 1877 (3 of 1877) or as evidence of any collateral transaction not required to be effected by registered instrument] state Amendment Uttar Pradesh: In section 49-

(i) in the first paragraph, after the words "or by any provision of the Transfer of property Act, 1882" insert the words " or of any other law for the time being in force"

(ii) Substitute clause (b) as under "(b) confer any power or create any right or relationship or "

(iii) in clause(c) after the words "such power" insert the words " or creating such right or relationship"

(iv) in the proviso, omit the words "as evidence of a contract in a suit for specific performance under Chapter II of the Specific Relief Act, 1877.

Section 91 of Indian Evidence Act, 1872,

Evidence of terms of contracts, grants and other dispositions of property reduced to form of document- When the terms of a contract, or a grant, or of any other

disposition of property, have been reduced to the form of a document, and in all cases in which any matter is required by law to be reduced to the form of document, no evidence shall be given in proof of the terms of such contract, grant or other disposition of property or of such matter, except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions herein before contained -

Exception 1.- When a public officer is required by law to be appointed in writing and when it is shown that any particular person has acted as such officer, the writing by which he is appointed need not be proved.

Exception 2.- Wills 2 [admitted to probate in 3 [India]] may be proved by the probate.

Explanation 1.- This section applies equally to cases in which the contracts in which they are contained in more documents than one.

Explanation 2. - Where there are more originals than one, one original only need be proved.

Explanation 3. - The statement if any document whatever, of a fact other than the facts referred to in this section, shall not preclude the admission of oral evidence as to the same fact

(a) If a contract be contained in several all the letters in which it is contained must be proved.

(b) if a contract is contained in a bill of exchange, the bill of exchange must be proved.

(c) If a bill of exchange is drawn in a set of three, one only need be proved.

(d) A contracts in writing with B for the delivery of indigo upon certain terms. The contract mentions the fact that B hand paid A the price of other indigo contracted for verbally on another occasion. Oral evidence is offered that no payment was made for the other indigo. The evidence is admissible.

(e) A gives b receipt for money paid by B. Oral evidence is offered of the payment. The evidence is admissible.

12.Upon rival submission of both counsel and careful perusal of documents on record it is well settled principle of law the larger bench of Andra Pradesh High Court in Chinappa Reddy Garimurthy Alias Reddy Vs. Chinnapp Readdy and Hon'ble Supreme court of India referred same principles in the case Yellappa Uma Maheshwari and others Vs. Buddha Jagadheeswara Rao and others SPL 12788/2014 and Civil Appeal No.844/15 held that the whole process of partition contemplates three phases i.e. severancy of status, division of Joint property by metes and bounds and nature of possession of various shares. In a suit for partition an unregistered document can be relied upon for collateral purpose i.e. severancy of title, nature of possession of various shares but not for the primary purpose i.e. division of joint properties by metes and bounds, an unstamped instrument is not in admissible in evidence, even for collateral purpose, until the same is impounded. If defendants wants to mark these documents for collateral purpose it is open for them to pay the stamp duty together with penalty and get the document impounded trial court has liberty to mark those documents for collateral purpose subject to proof and relevance".

13.It is worth to mention present facts on hand is that the main objection of plaintiff is that the defendant No.5

created document No.2 and 3 as per the list those have no legal sanctity. The Vibhagapatra dated 1/8/2008 is unregistered one Janaki is not signatory. Moreover witness and scribe witness details not completed. Therefore it is incomplete document. The defendant No.3 also created document just for deprives the right of plaintiff on suit property.

14. By looking into the above facts in the background of Hon'ble Supreme Court view on the above point, it is not permissible to the court to entertain such document in the evidence. Even it is stamped because there is no pleadings in his written statement nothing will be forth come by producing before the court. Unless they take such a plea in his written statement if really three things taken place. He could definitely taken specific contention in defendant No.5 pleadings. Therefore this court opines and document apparently disclose that the document No.2 and 3 may created for the purpose of suit later stage after instituting the present suit. The reasons stated in the annexed affidavit also not satisfactory. Hence this court opinion to answer the Point No.1 partly in the Affirmative.

15. **Point No.2**: For the aforesaid discussion, I proceed to pass the following.

::O R D E R::

IA. No. 23 filed by the defendant No.5 Under Order 8 Rule 1(a)(3) of C.P.C is hereby partly allowed.

Consequently document No.1 registered partition deed dated 21/02/2009 and original pahani are taken on record, subject to proof and relevance.

Further document partition deed dated 1/08/2008, consent affidavit dated 17/07/2008 are not taken on record for any purpose.

No order as to costs.

(Dictated to stenographer and transcribed by her revised and corrected by me then pronounced in the open court dated this 19th day of October, 2017)

(R.Mahesha)
Civil Judge and J.M.F.C,
Holenarasipura.

In Kailash Vs. Nanhku and Ors. 2005) 4 SCC 480, Supreme Court inter alia observed as under:

> **"Three things are clear. Firstly a careful reading of the laungague in which order VIII, Rule 1 has been drafter, shows that it casts an obligation on the defendant to file the written statement within 30 days from the date of service of summons on him and within the extended time failing within 90 days. The provision does not deal with the power of the court and also does not specifically take away the power of the court to take the written statement on record though filed beyond the time as provided for.**
>
> **Secondly, the nature of the provision contained in Order VIII, Rule 1 is procedural. It is not a part of the substantive law.**
>
> **Thirdly, the object behind substituting Order VIII, Rule 1 in the present shape is to curb the mischief of unscrupulous defendants adopting dilatory tactis, delaying the disposal of the cases much to the chagrin of the plaintiffs and petitioners approaching the court for quick relief and**

also to the serious inconvenience of the court faced with frequent prayer for adjournment. The object is to expedite the hearing and not to scuttle the same. The process of justice may be speeded up and hurried but the fairness which is a basic element of justice cannot be permitted to be buried.

It is also to be noted that though the power of the court under the proviso appended to Rule 1 of Order VIII is circumscribed by the words- "shall not be later than ninety days" but the consequences flowing from non-extension of time are not specifically provided though they may be read by necessary implication. Merely, because a provision of law is couched in a negative language implying mandatory character, the same is not without exceptions. The courts, when called upon to interpret the nature of the provision, may keeping in view the entire context in which the provision came to be enacted, hold the same to be directory though worded in the negative form.

Considering the object and purpose behind enacting Rule 1 of Order VIII in the present form and the context in which the provision is placed, we are of the opinion that the provision has to be construed as directory and not mandatory. In exceptional situations, the court may extend the time for filing the written statement though the period of 30 days and 90 days, referred to in the provision, has expired. However, we may not be

misunderstood as nullifying the entire force and impact - the entire life and vigour- of the provision. The delaying tactics adopted by the defendants in law courts are now proverbial as they do stand to gain by delay. This is more so in election disputes because by delaying the trial of election petition, the successful candidates may succeed in enjoying the substantial part, if not in its entirety, the term for which he was elected even though he may loose the battle at the end. Therefore, the judge trying the case must handle the prayer for adjournment with firmness. The defendant seeking extension of time beyond the limits laid down by the provision may not ordinarily be shown indulgence.

Ordinarily, the time schedule prescribed by Order VIII, Rule 1 has to be honoured. The defendant should be vigilant. No sooner the writ of summons is served on him he should take steps for drafting his defence and filing the written statement on the appointed date of hearing without waiting for the arrival of the date appointed in the court. The extension of time sought for by the defendant from the court whether within 30 days or 90 days, as the case may be should not be granted just as a matter of routine and merely for asking more so, when the period of 90 days has expired. The extension can be only by way of an exception and for reason assigned by the defendant and also recorded in writing by the court to its satisfaction. It must be spelled out that a departure from the time schedule prescribed by Order VIII, Rule 1 of

the Code was being allowed to be made because the circumstances were exceptional, occasioned by reasons beyond the control of the defendant and such extension was required in the interest would be occasioned if the time was not extended".

In Salem Advocate Bar Association, Tamil Nadu Vs. Union of India 2005 (6) SCC, Supreme Court, inter alia observed as under:

" It has been common practice for the parties to take long adjournments for filing written statements. The legislature with a view to curb this practice and to avoid unnecessary delay and adjournment, had provided for the maximum period within which the written statement is required to be filed. The mandatory or directory nature of Order VIII Rule 1 shall have to be determined by having regarding to the object sought to be achieved by the amendment. It is thus, necessary to find out the intention of the legislature. The consequences which may follow and whether the same were intended by the legislature have to be kept in view"

The following view was taken by the court with respect to extension of time beyond the prescribed period of 90 days.

" In constructing the provision of Order VIII Rule 1 and Rule 10, the doctrine of harmonious construction is required to be applied. The effect would be that under Rule 10 of Order VIII, the court in its discretion would have power to allow the defendant to file written statement even

after expiry of period of 90 days provided in Order VIII Rule 1. There is no restriction in Order VIII Rule 10 that after expiry of ninety days, further time cannot be granted. The court has wife power to 'make such order in relation to the suit as it thinks fit'. Clearly, therefore, the provision of Order VIII Rule 1 providing for upper limit of 90 days to file written statement is directory. Having said so, we wish to make it clear that the order extending time to file written statement cannot be made in routine. The time can be extended only in exceptionally hard cases. While extending time, it has to be borne in mind that the legislature has fixed the upper time limit of 90 days. The discretion of the court to extend the time shall not be so frequently and routinely exercised so as to nullify the period fixed by Order VIII Rule 1".