

ORDERS ON ADDL.ISSUE NO.1 AND ISSUE NO.6

Additional Issue No.1 :

Whether plaintiff proves his locustandi to file this suit.

Issue No.6 :

Whether the suit is properly valued for the purpose of court fee and jurisdiction.

It is a suit for partition. However, the crux of the case is plaintiff is not the family members of the defendant family. But he seeks partition in respect of property of deceased A. Prabhakar Acharya on the basis of the will dated 25.07.2000. It is alleged that the deceased bequeathed his half right in the immovable property to the plaintiff in respect of the repayment of

the loan received by the defendant during the construction of his house. Admittedly it is a matter of evidence. It is the burden of the plaintiff to prove the due execution of the will and his right in the suit schedule property. It is argued by the defendant that the suit filed on the basis of created Will and Will not proved before any Court and there is no prayer for declaration on proof of Will. It is strongly contended that plaintiff has no locustandi to file the suit. Unless the plaintiff seeks relief in respect of declaration, he is not entitled for any relief declaration of the Will is must. Whereas, on perusal of the file shows issue No.2 is in respect of the proof of the Will and plaintiff claims his right on the basis of the will. So the proof of the Will is sufficient. There is no necessity to seek separate relief in respect of declaration of the Will. It is not the stage to adjudicate upon Will and give conclusion.

2. Further, the plaintiff counsel even argued that maintainability of the suit was in respect of Court fee in Issue No.6. On perusal of the plaint shows the suit valued u/s 35(2) of *Court Fees and Suits Valuation Act*. The plaintiff claims his joint and constructive possession of the suit schedule property. Whereas, it is pertinent to note that admittedly plaintiff is the stranger. He needs to prove the possession of joint

and constructive possession of suit property. Moreover it is the suit filed on the basis of the Will. So his claim of right arises on proof of the Will.

3. The learned counsel for the plaintiff referred the citation **2002 (4) K.L.J. 400**. I perused the contents. It says that when it is a mixed question of fact and law the Court fee cannot be considered as preliminary issues. However, as above referred the plaintiff is not the family member of the defendant family. His claim is on proof of Will. So certainly at this stage Court cannot presume on joint and constructive possession of suit property. Plaintiff "B" schedule property is the commercial building and plaintiff "A" schedule properties are the property situated at Moodanidambur village. However, plaintiff pleading mentions that the plaintiff is paying the Municipality Tax in respect of the plaintiff schedule properties and also care taking the plaintiff schedule properties. The plaintiff "B" schedule property building have been leased out to various tenants. Whereas, the 1st defendant is the reluctant to share the profits of the building. So here it shows the constructive possession of the suit schedule property at Prima facie. The proof of the same is the matter of evidence, cannot be adjudicated at this stage. So I appreciate the citation. **1989 (1) Kar.L.J. 170**, between Gopinath A. Vs. K. Ramalingam and Others, where it is held that,

Possession of one in law is possession of all, unless ouster or exclusion is proved. To continue to be in joint possession in law, it is not necessary that plaintiff should be in actual possession of the whole or part thereof. Unless it is shown that he is excluded from such possession, it cannot be said that the plaintiff has to pay advalorem Court fee under section 35(1) of the Act.

ORDERS

Hence at this stage I consider issue No.6 and additional issue No.1 in the affirmative. However in respect of Court fee issue No.6, the defendant is at liberty to contest during the merit of the case.

Prl.Sr.Civil Judge,Udupi