

ORDER

1. The petitioner is the second defendant. The suit was laid for partition of the matruka property i.e. house bearing No. 3-5-855, situated at Hyderguda, Hyderabad. A preliminary decree was passed and a Commissioner was appointed to effect partition by metes and bounds and the enquiry is in progress. At that stage, the petitioner filed an application to include in the schedule the house bearing No.3-5-855 situated at Hyderguda and also the appurtenant land of 12,000 Sq. Yards. According to the petitioner, the property belongs to his mother Sogra Begum, and she died intestate. Therefore, it formed part of the matruka property. Though he raised the same contention in the written statement, it was not decided. Since it is matruka property it is liable to be included as one of the items in the schedule and is liable to be partitioned. In the first instance, he made an application for amendment of the schedule under Order IV, Rule 17, CPC. That application was dismissed and when revision was filed this Court while dismissing the revision, held that the procedure followed is not as per law. It was indicated that it is open to the petitioner to follow appropriate procedure. Thereafter, the petitioner filed an application being IA.No. 322 of 1981 in the lower Court to include this item as one of the items in the schedule and to effect partition. To this application, a counter was filed by the respondent-plaintiff contending that the old number of the property in question is 953/A/1; that the property was gifted over by Sogra Begum in favour of Lutfunnisa Begum alias Laiqunnisa, wife of the respondent, by a settlement deed, dt. May, 21, 1946; that the entire property comprising of the house and the land was gifted over and that she was in possession and enjoyment in her own right. He, therefore, contended that it is not a matruka property and is not liable to be included in the schedule. The lower court dismissed the application on the ground that it does not lie and also on the ground that it does not lie and also on the ground of laches. In the inquiry, the lower Court gave a finding that Sogra-Begum gifted over the house bearing No. 3-5-805 (Old No.953/A/1) in favour of her daughter-in-law Lutfunnisa Begum alias Liqunnisa, wife of the respondent.

2. In this revision, Sri Seetharamaiah, learned counsel for the petitioner did not assail the correctness of the finding that Sogra Begum gifted over the house to Lutfunnisa Begum alias Laiqunnisa, wife of the respondent but his contention is now focussed on the fact that what was gifted was only a house and the appurtenant land admeasuring 6,170 Sq. Yards whereas in fact the total extent of the open land is 12,000 Sq.yards. therefore, excluding the property gifted over, namely, the house and the appurtenant land of Rs.6,170 Sq. Yards, the balance of the land continues to be the property of Sogra Begum. She having died intestate, it becomes the matruka property and is liable to be partitioned between all her heirs. If that fact is accepted, then there will not be any dispute to include that property by way of an amendment as part of the schedule. In support thereof, he relied upon the decision of a Division Bench of this Court in S. Burrayya v. S. Achayamma, , as also the decision in Ramaswamy Chetty v. Palaniappa Chetty, AIR 1924 Mad 354. He contended that there is no impediment to pass any number of preliminary decree. A preliminary decree granted earlier, can continue to be the preliminary decree, but in the case on hand, the dispute is whether this item can be separately adjudicated and a further preliminary decree granted.

3. Sri Narayana Charyuly, learned counsel for the respondent, on the other hand, contended that the application is a belated one. It is an afterthought. The petitioner raised expressly the plea that there is no gift as such. The entire property is the matruka property of Sogra Begum. There is no issue cast by the trial Court. After the preliminary decree was granted, the petitioner allowed the decree to become final while the other respondents too failed to file an appeal. Before the appellate Court, he did not assail the correctness of the preliminary decree. When the Commissioner was appointed and the enquiry

proceeded with, he did not take this plea. He did not participate in the enquiry before the Commissioner. At the last moment he woke up and raised this plea only to protract the proceedings. In support of this plea; he relied upon the decisions in Devarajulu v. Kondammal, AIR 1925 Mad 427 , Thimmappa v. B. Subba Rao, AIR 1960 Mys 249 , State v. Bamadeb, AIR 1971 Orissa 227. He further contended that what was conveyed to Lutfunnissa Begum alias Laiqunnisa Begum is not only the house and a land of 6,170 sq. Yards, but the entire property comprising within the boundaries mentioned in the gift deed. It is not the case of the petitioner in the Court below the balance extent of the land excluding 6,170 sq. Yards should form part of the matruka. That is the reason why the respondent did not focuss his attention with regard to the balance of the property. He confined himself to the validity of the execution of the gift deed in favour of his wife. It is also contended that Lutfunnisa Begum alias Laiqunnisa is a not a party to the suit. She has got an indefeasible right by virtue of the gift deed. Therefore, she cannot be driven to have a fight in this case. He also supported the reasoning of the lower Court with regard to laches and also the maintainability of the petition. He stated that the application under O.XX, Rule 18,CPC does not lie. The preliminary decree cannot be enlarged in the application. The preliminary decree contains only one item. More than one item, now, cannot be included in the preliminary decree.

4. Upon these respective contentions, the first question that arises for consideration is whether an application would lie?

5. I have held in Pentaiah v. Siva Lingam, (1984) 2 APLJ (SN) 35, (S.A.No. 587 of 1960, dt. Sept.1, 1984) that in partition action when there is no dispute with regard to the existence of the property, though claims in respect of one of the items of the properties were not adjudicated and a preliminary decree was passed in respect of the other items, there is no impediment to pass more than one preliminary decree. With a view to shorten the litigation instead of driving the parties to a separate action. The dispute can be decided in the same action. Accordingly I confirmed the preliminary decree in respect of the items decreed in the suit and remanded the matter for enquiry with respect to another item which was claimed to be the joint family property. I have also held that the same principle applies inter se to the co-owners as well. Under those circumstances, following the above decision, I have no difficulty to hold that an application would lie under O.XX,R.18 or even under S.151,CPC invoking the inherent power of the Court to include one of the items, provided the property belongs to the joint family or the matruka or the co-ownership. In this case, it is claimed by the petitioner that it is the matruka property and that therefore, the matter can be adjudicated. As regards the legal principle, I have no manner of doubt to hold that an application would lie.

6. With regard to the claim to the property as such, now the record establishes that the petitioner averred in the written statement that the entire house and the land is the matruka property, no issue was raised. The preliminary decree was allowed to become final and the Commissioner is proceeding to divide the property comprising the preliminary decree by metes and bounds. At this stage, the petitioner filed this application to include this house and the land of 12,000 sq.yards as well as part of the schedule. The trial Court has accepted that there is a gift made by Sogra Begum in favour of Lutfunnisa Begum alias Laiqunnisa Begum the wife of the respondent. That finding is not assailed, and fairly, before me.

7. The only point in issue now centers round the question; what is the total extent of the open land? Sri Seetharamaiah learned Counsel for the petitioner contends that what was conveyed under the gift deed to the donee is only the house and 6,170 sq . yards and nothing more, and that 6,170 sq. Yards is an appurtenant land for the convenient enjoyment thereof. In support thereof, he relied upon the decision in Row v. Siddons, (1888) 22 QB 224, at p. 236, which was approved and followed in the Full Bench judgment of the Allahabad High Court in Babulal v. Ram Prasad, AIR 1939 All 37.

8. Sri Narayana Charyulu, learned counsel for the respondent on the other hand, as extracted earlier, contended that the entire gift is of the house and the entire land situated within the boundaries specified in the schedule. The boundaries specified in the schedule. The boundaries specified in the schedule are : South : House of Mohd. Ahmed Ansari, North : House of Kulsumbai Mr. Torian and house of Baiganapally Nawab : east : the residential house belonging to the petitioner and West King Koti road. He contends that what was conveyed under the gift to Lutfunnisa Begum is the entire property, though it may have been specified as 6,170 sq. Yards. It may be more or, it may be less. The entire extent belongs to her and her alone. Therefore, there is no matruka left over. In support of this plea, he relied upon a Division Bench judgment in Subbayya Chakkiliyan v. M. Muthia Goundan, AIR 1924 Mad 493. Therein also, the question of construction of the deed arose. It was held that ordinarily when a piece of land is sold with definite boundaries, unless it is very clear from the circumstances surrounding the sale that a smaller extent than what is covered by the boundaries was intended to be sold, the rule of interpretation is that boundaries must prevail as against the measurements.

9. It is now well settled that when a conveyance is made of the property with definite boundaries, the boundaries shall prevail over the extent, and whatever may be the extent specified within the boundaries, the entire extent of the land must be deemed to belong to the purchaser or the donee or the settlee. But here the question is whether the land is 6,170 sq. Yards or 12,000 sq. Yards. As I have stated earlier, the controversy that centred round before the trial court is with regard to the execution of the gift deed, but not with regard to the extent of the land. Therefore, rightly the respondent did not concentrate his attention with regard to the extent of the land mentioned in the petition, and also in the evidences at the enquiry. It is a disputed fact and when that question was not raised at the enquiry before the trial Court, if I give a finding in this regard, there will be any amount of miscarriage of justice to either party. Added to that the donee is not before the court who has got an indefeasible right, title to and interest in the property conveyed, whether it is 6,170 sq. Yards or 12,000 sq. Yards. It is a matter to be gone into at an appropriate stage in her presence. Though Sri Seetharamaiah, learned counsel for the petitioner sought to contend that if it is decided that there is excess land and it is sought to be included in the schedule, she may participate in the enquiry, I am not inclined to agree with the learned counsel in this regard. The petitioner had slept over the matter for a long time; he raised the plea in the trial court that there is no gift; he raised this affirmative plea only having found that the gift was accepted and sought to say something more and even carried the matter in revision in this regard. Under these circumstances, I am not inclined to give a finding in this regard in this revision. Therefore, I leave open that question and it is open to the parties to adjudicate forum according to law, if they are so advised.

10. Accordingly, the revision is dismissed on the above ground but in the circumstances, without costs.

11. Revision dismissed.