

IN THE HIGH COURT OF KARNATAKA AT BENGALURUDATED THIS THE 11TH DAY OF MARCH, 2022

BEFORE

THE HON'BLE MR.JUSTICE R. NATARAJ

R.S.A. NO.2100 OF 2015 (PAR)**BETWEEN:**

CHAMUNDI
S/O SHIVEGOWDA
AGED ABOUT 47 YEARS
R/AT BELAVADI VILLAGE
YELWALA HOBLI,
MYSORE-567201.

...APPELLANT

(BY SRI. K.N.PUTTEGOWDA, ADVOCATE)

AND:

1. SMT. PUTTAMMA
W/O MANJUGOWDA
AGED ABOUT 69 YEARS
R/AT HOSAKOTE VILLAGE
YELAWALA HOBLI,
MYSORE TALUK-567201.
2. PAPANNA
S/O SANNAHANUMANTHEGOWDA
AGED ABOUT 72 YEARS
3. SMT. SUNANDAMMA
W/O PAPANNA
AGED ABOUT 60 YEARS

BOTH ARE RESIDENTS OF
HOSAKOTE VILLAGE
YELAWALA HOBLI
MYSORE TALUK-567201.

4. PUTTARAJU
S/O ANDANEGOWDA
AGED ABOUT 46 YEARS
5. SMT. BHAGYA
W/O KRISHNEGOWDA
AGED ABOUT 40 YEARS
6. SMT. ANASUYA
D/O ANDANEGOWDA
AGED ABOUT 38 YEARS

R-4 TO R-6 R/AT
HOOTAGALLI VILLAGE
NEAR HALANJI KATTE
KASABA HOBLI
MYSORE TALUK-567201.
7. GANGADHAR
S/O PAPANNA
AGED ABOUT 35 YEARS
8. RAGHU
S/O PAPANNA
AGED ABOUT 30 YEARS
9. SUNIL
S/O PAPANNA
AGED ABOUT 28 YEARS
10. JAYANTHI
D/O PAPANNA
AGED ABOUT 26 YEARS
RESPONDENTS 7 TO 10 ARE
R/AT HOSAKOTE VILLAGE
YELAWALA HOBLI
MYSORE TALUK-567201.
11. GOWDAIAH
S/O LATE SHIVEGOWDA
AGED ABOUT 46 YEARS
R/AT BELAWADI VILLAGE
YELAWALA HOBLI

MYSORE TALUK-567201.

...RESPONDENTS

(BY SRI. P. NATARAJU, ADVOCATE FOR RESPONDENT NO.1;
SRI. T.S.MAHANTESH, ADVOCATE FOR RESPONDENT NO.3;
NOTICE SERVED ON RESPONDENT NO.2 AND UNREPRESENTED;
VIDE ORDER DATED 22.12.2015, SERVICE OF NOTICE TO
RESPONDENT NOS.4 TO 11 ARE DISPENSED WITH)

THIS R.S.A. IS FILED UNDER SECTION 100 OF CODE OF
CIVIL PROCEDURE, 1908 AGAINST THE JUDGMENT AND
DECREE DATED 02.07.2014 PASSED IN RA.NO.224/2012 ON
THE FILE OF THE III ADDL.SENIOR CIVIL JUDGE & CJM,
MYSORE, ALLOWING THE APPEAL AND SETTING ASIDE THE
JUDGMENT AND DECREE DATED 16.08.2012 PASSED IN
OS.NO.66/2000 ON THE FILE OF THE II CIVIL JUDGE AND
J.M.F.C AT MYSORE.

THIS R.S.A. COMING ON FOR ADMISSION THIS DAY, THE
COURT DELIVERED THE FOLLOWING:

JUDGMENT

This appeal is filed by the defendant No.12 in O.S.
No.66/2000 challenging the divergent finding recorded in
R.A. No.224/2012 on the file of the III Addl. Senior Civil
Judge & CJM, Mysore, (henceforth referred to as 'First
Appellate Court') by which it reversed the judgment and
decree passed in O.S. No.66/2000 on the file of II Civil
Judge and J.M.F.C., Mysore (henceforth referred to as
'Trial Court') and decreed the suit for partition and

separate possession of the plaintiff's 1/3rd share in the suit schedule properties.

2. The parties shall henceforth be referred as they were arrayed before the Trial Court. The appellant was the defendant No.12, while the respondent No.1 was the plaintiff and respondents No.2 to 11 were the defendants No.2 to 11 before the Trial Court.

3. The suit in O.S. No.66/2000 was filed for partition and separate possession of the suit properties which were the land in Sy.No.186 of Rachegowdanahalli, Sy.No.22 of Mallahalli, Sy.No.63/3 of Hemmanahalli, Sy.No.194/1 of Yechegowdanahalli, Sy.No.194/2 of Yechegowdanahalli and two house properties at Hosakote village, all situate in Mysore taluk. It was claimed in the suit that the plaintiff, defendant No.2 and mother of defendants No.4 to 6 (Kamamma) were the children of defendant No.1. Defendant No.3 is the wife of defendant No.2. It was claimed that all the suit properties were joint family ancestral properties which were administered by

defendant No.1. The plaintiff alleged that defendant No.1 in collusion with defendant No.3 was attempting to create documents in respect of the suit properties. The plaintiff found that defendant No.1 in collusion with defendants No.2 and 3 had purchased suit Items No.4 and 5 out of the income of the joint family but in the name of defendant No.3. The plaintiff suspecting the *bonafides* of the defendants, issued a notice demanding partition and separate possession of her share in the suit properties, which was evasively replied by the defendants No.3 to 5. The plaintiff, therefore, filed a suit for partition.

4. The suit was contested by defendant No.3, who admitted the relationship with the plaintiff. She claimed that some of the suit properties were ancestral, while some were the self-acquisition of defendant No.3. She claimed that the plaintiff is not entitled to any share as she was married long back prior to the Hindu Succession (Karnataka Amendment) Act, 1994. She claimed that the

suit against the defendant No.1 had abated, and therefore, it abated against the other defendants also.

5. Defendants No.7 to 10 contested the suit, where they claimed that Sy.No.186 was the self-acquisition of their grandfather and that he had bequeathed them to the defendants No.7 to 10 in terms of a Will dated 08.02.2000. They also claimed that land bearing Sy.No.22 was also bequeathed under the said Will.

6. Based on these rival contentions, the Trial Court framed the following issues :

- i. Whether the plaintiff proves that the suit schedule properties are the ancestral and joint family properties?*
- ii. Whether the plaintiff proves that the 1st defendant was the Kartha of the family?*
- iii. Whether the suit is bad for non-joinder of necessary and proper parties?*
- iv. Whether the plaintiff is entitled for partition and separate possession as prayed?*
- v. What order or decree?*

Additional Issues :

- i. *Whether the defendants No.7 to 10 prove that the 1st defendant has executed a Will dated 08.02.2000 in their favour bequeathing the suit Items No.1 and 2 properties?*
- ii. *Whether the defendants No.7 to 10 prove that the plaintiff has sold her share to Nanjamma?*

7. The plaintiff was examined as PW1, who marked documents as Exs.P-1 to P-13, while the defendant No.7 was examined as D.W.1 and defendant No.4 as D.W.2 and marked documents as Exs.D-1 to D-10.

8. The Trial Court held that the properties mentioned in Exs.P-1 to P-4 which stood in the joint names of defendants No.1 and 2 were presumably joint family properties. It held that though the defendant No.4 claimed that the defendant No.1 had executed a Will in his favour on 15.12.1997 in respect of Sy.No.186 and though defendants No.7 to 10 claimed that Items No.1 and 2 were bequeathed to them by the defendant No.1 in terms of a Will dated 08.02.2000, they failed to offer themselves for

cross-examination and they had failed to discharge the burden of proving the Will as required under Section 68 of the Indian Evidence Act, 1872. Therefore, the Trial Court held that the suit Items No.1, 2, 4 and 5 were also the joint family ancestral properties.

9. However, in so far as suit Items No.3, 6 and 7, it held that the plaintiff had failed to prove that they were acquired out of the joint family nucleus. After holding so, the Trial Court applied the law declared by this Court in the case of **PUSHPALATHA vs. PADMA, ILR 2010 KAR 1108** and held that the plaintiff was born prior to 1956 and therefore was not entitled to any share in respect of ancestral property. Hence, it dismissed the suit.

10. Being aggrieved by the aforesaid judgment and decree, the plaintiff filed R.A. No. 224/2012 before the First Appellate Court.

11. The First Appellate Court secured the records of the Trial Court, heard the learned counsel for the parties

and framed points for consideration and in terms of the judgment and decree dated 02.07.2014 allowed the appeal and decreed the suit on the ground that the age of the plaintiff mentioned in the suit was not conclusive as in her deposition, she claimed that she was then aged 45 years. It held that even if she was born prior to 1956, her right to claim as a co-parcener cannot be defeated. It also held that the defendant No.7 and the defendant No.4 did not prove the due execution of the Will under which they claimed title to Items No.1 and 2. Therefore, it held that the plaintiff is entitled to 1/3rd share in the suit properties as the defendant No.1 had died intestate.

12. Being aggrieved by the aforesaid judgment and decree, the defendant No.12 who purportedly purchased 1 acre 26 guntas out of 2 acres in Sy.No.194/1 and 34 guntas in Sy.No.194/2 under a sale deed dated 17.08.2009 from the defendant No.3, has filed the present appeal.

13. The learned counsel for the defendant No.12 submitted that the defendant No.12 who had purchased the above referred properties from the defendant No.3, was assured by the defendant No.3, that the suit would be effectively defended. The defendant No.12 trusted the defendant No.3, who, however, did not participate in the proceedings. He, further contended that even in the appeal filed before the First Appellate Court the defendant No.3 assured to defend the appeal and did not intimate him about the outcome. When the plaintiff initiated final decree proceedings in FDP No. 1/2015, against the defendants, the defendant No.3 continued the assurance. The learned counsel accused the defendant No.3 of colluding with the plaintiff by not effectively representing the case of defendant No.12. He, therefore, submitted that an opportunity be granted to the defendant No.12 to contest the suit on merits only in so far as suit Items No. 4 and 5 are concerned.

14. This was opposed by the learned counsel for respondents, who submitted that the plaintiff had initiated final decree proceedings and had already received her share in the suit properties, and therefore, any disturbance of the final decree would cause untold hardship to the plaintiff.

15. It is seen from the records that the suit was filed in the year 2000 and the defendant No.12 was represented by an Advocate. The defendant No.12 did not contest the suit and did not even enter the witness box. In the appeal filed before the First Appellate Court, the defendant No.12 was placed *ex parte*. This Regular Second Appeal itself was belatedly filed on 21.12.2015 i.e., after delay of nearly 447 days. The defendant No.12 though filed an application for stay of final decree proceedings, did not take any steps to move the appeal for consideration of the application for stay. The defendant No.12 remained a mute spectator to the proceedings in the case and after the final decree Court had partitioned the

properties has approached this Court pleading for sympathetic consideration.

16. Normally, this Court would not entertain a lazy and negligent litigant who had slept over his rights. In the case on hand, the defendant No.3 who had disposed off the suit Items No.4 and 5 to defendant No.12 was bound to take all necessary steps to safeguard the interest of defendant No.12 as all documents and information relating to said properties would be lying with her. The defendant No.12 cannot on his own establish that the suit Items No.4 and 5 were the self-acquisition of the defendant No.3. Nonetheless the fact that the defendant No.3 had not participated in the proceedings before the Trial Court and First Appellate Court gives an impression that she had colluded with the plaintiff to deprive the rights of defendant No.12. Thus, the contention urged by the learned counsel for defendant No.12 that he was misled by defendant No.3 seems probable. As the civil rights of defendant No.12 would be affected by the decree of the

First Appellate Court, this Court in order to do justice between the parties, considers it appropriate to grant an opportunity to the defendant No.12 to contest the suit on merits in so far as it relates to suit Items No.4 and 5. However, the same cannot be without compensating the plaintiff for the time, money and energy lost in the process. This Court considers it appropriate to fix timeline for the Trial Court to conclude the proceedings so that defendant No.12 does not misuse the indulgence shown by this Court. This Court is also conscious of the fact that the final decree is already drawn in F.D.P. No.1/2015 and the parties are already placed in possession of their respective shares. Thus, the final decree drawn deserves to be kept in abeyance until adjudication of the claim of the defendant No.12. If the Trial Court concludes that the plaintiff is entitled to her share in suit Items No.4 and 5, then the final decree drawn in F.D.P. No.1/2015 shall not be disturbed. However, if the Trial Court comes to the conclusion that the plaintiff is not entitled to any share in suit Items No.4 and 5, then the final decree drawn in

F.D.P. No.1/2015 would be revisited and reconsidered by the final decree Court based on the preliminary decree that may be passed in respect of suit Items No.4 and 5.

17. Hence, the following :

ORDER

- i. The appeal is allowed.
- ii. The impugned judgment and decree passed by the First Appellate Court in R.A. No.224/2012 in so far as suit Items No.4 and 5 are concerned is set aside and the case is remitted to the Trial Court only in so far as suit Items No.4 and 5 are concerned.
- iii. In order to enable the Trial Court to consider the same expeditiously, the defendant No.12 as well as the plaintiff are directed to appear before the Trial Court on 04.04.2022.
- iv. The defendant No.12 shall file his written statement within 30 days from 04.04.2022 and the Trial Court may frame issues insofar

as suit Items No.4 and 5 is concerned and record the evidence of the parties on a day-to-day basis and dispose off the suit in respect of suit Items No.4 and 5 by the end of November 2022. This shall, however, be subject to payment of a cost of Rs.50,000/- payable by defendant No.12 to the plaintiff on the next date of hearing before the Trial Court.

- v. As stated above, if the Trial Court holds that the plaintiff is entitled to 1/3rd share in the suit Items No.4 and 5, then the final decree drawn in F.D.P. No.1/2015 and the consequent execution proceedings shall remain unaffected. However, if the Trial Court disallows the claim of the plaintiff in respect of suit Items No.4 and 5, then the final decree drawn in F.D.P. No.1/2015 shall be suitably modified.

- vi. It is open for the parties to settle the dispute amicably before the Trial Court in respect of suit Items No.4 and 5. The decree in respect of other suit items is confirmed.

Pending I.A., if any, does not survive for consideration.

**Sd/-
JUDGE**

hnm