IN THE HIGH COURT OF KARNATAKA
DHARWAD BENCH

DATED THIS THE 27TH DAY OF JULY 2017

BEFORE

THE HON'BLE MR. JUSTICE K.N. PHANEENDRA

W.P. NO. 113059/2014 (GM-CPC)

BETWEEN:

DALAWAI NAGAPPA SINCE DEAD BY LRS.

1. DALAWAI RAVI S/O LATE DALAWAI NAGAPPA,
R/O DOOR NO. 192, WARD NO. 13,
VALMIKI STREET, BELLARY.

2. DALAWAI LAKSHMAMMA,
W/O LATE DALAWAI NAGAPPA,
R/O DOOR NO. 192, WARD NO. 13,
VALMIKI STREET, BELLARY.

DALAWAI NARAYANAPPA
SINCE DEAD BY HIS LRS.

3. D. ANASUYA W/O LATE D. NARAYANAPPA,
R/O PLOT NO. 58, SIDDARAMESHWAR
NAGAR, JEWARGI ROAD, GULBARGA.

4. D. VIJAYALAKSHMI,
D/O LATE D. NARAYANAPPA,
R/O PLOT NO. 58, SIDDARAMESHWAR
NAGAR, JEWARGI ROAD, GULBARGA.

5. D.N. HARISH S/O LATE D. NARAYANAPPA,
R/O PLOT NO. 58, SIDDARAMESHWAR
NAGAR, JEWARGI ROAD, GULBARGA.

6. D.N. CHANDAN S/O LATE D. NARAYANAPPA,
R/O PLOT NO. 58, SIDDARAMESHWAR
NAGAR, JEWARGI ROAD, GULBARGA.

7. D.N. VEENA D/O LATE D. NARAYANAPPA,
R/O PLOT NO. 58, SIDDARAMESHWAR
NAGAR, JEWARGI ROAD, GULBARGA.

- PETITIONERS

(BY SRI A.P. MURARI, ADVOCATE FOR
L.M. KURAHATTI, ADVOCATE)

AND:

1. P. ABDUL BARI S/O LATE P. PEERAN SAB,
AGE: 62 YEARS, R/O PLOT NO. 48/25,
B.C. MALLAIAH COMPOUND,
INFANTRY ROAD, SOUTH
CANTONMENT, BELLARY.

2. P. KHADARSAB S/O LATE P. RAJASAB,
AGE: 63 YEARS, R/O WARD NO. XI,
DOOR N. 61, FLOWER STREET, BELLARY.

3. SHAIK AHMED S/O MOHAMMED SAHEB,
AGE 72 YEARS, R/O PLOT NO. 13,
ANANTHPUR ROAD, BEHIND CHEVEROLET
CAR SHOW ROOM, VASAVI NAGAR, BELLARI.

4. SMT. MABUNNI W/O LATE MONVAR,
AGE 60 YEARS.

5. CHAND BASHA S/O MOHAMMED SAHEB,
AGE 65 YEARS.

6. RASOOL S/O MOHAMMED SAHEB,
AGE 52 YEARS.

7. NAZEER S/O MOHAMMED SAHEB,
AGE 48 YEARS.

8. ABDUL RAWOOF S/O MOHAMMED SAHEB,
AGE: 46 YEARS, R/O DOOR NO. 61,
WARD NO. 11, FLOWER STREET, BELLARI.

9. MUMTAZ D/O MOHAMMED SAHEB,
AGE 54 YEARS.

10. ZULAIKA D/O MOHAMMED SAHEB,

AGED 62 YEARS.

RESPONDENT NO. 4 TO 7 AND 9 AND 10,
R/O DOOR NO. 22, RUPANAGUDI,
NARASAPPA STREET, BELLARI.

- RESPONDENTS

(BY SMT. V. VIDYA, ADVOCATE FOR C/R1,
SRI D.L. LADKHAN, ADVOCATE FOR R2,
SRI R. KOTWAL, ADVOCATE FOR R3-R10)

THIS WRIT PETITION IS FILED UNDER ARTICLES 226 & 227 OF CONSTITUTION OF INDIA PRAYING TO SET ASIDE THE ORDER AT ANNEXURE-A DATED 11.12.2014 PASSED BY THE LEARNED PRL. CIVIL JUDGE & JMFC, BELLARY, ALLOWING IA NOS.18 AND 19 FILED U/S 151 OF CPC & ETC.

THIS WRIT PETITION WAS HEARD AND RESERVED FOR ORDERS ON 24.07.2017 COMING ON FOR PRONOUNCEMENT OF ORDER, THIS DAY, THE COURT MADE THE FOLLOWING:

ORDER

W.P. No. 113059/2014 is filed challenging the orders passed by the Prl. Civil Judge & JMFC, Ballari in F.D.P. NO. 63/1995 on I.A. Nos. 18 and 19 dated 11.12.2014 in dismissing the final decree proceedings on various grounds by allowing I.A. Nos.18 and 19.

2. W.P. No. 109840/2014 is filed against the order dated 27.09.2014 passed in F.D.P. No. 63/1995 calling in question the order in rejecting the counter affidavit filed by the petitioners as respondents 32(A TO H). The above said order

has been passed during the pendency of the final decree proceedings.

3. The respondents counsel has raised a preliminary objection to entertain the writ petitions on the ground that the final decree proceedings has been now completely terminated before the trial Court. Therefore, the petitioners have to file either a regular appeal against the termination or dismissal of the final decree proceedings as the same amounts to a decree passed by the trial Court. Secondly it is contended that even if it is considered that the trial Court has passed the orders on I.A. No. 18 and 19 terminating the final decree proceedings without adjudicating the rights of the parties in the final decree proceedings, then the petitioners ought to have filed a revision petition u/S 115 of the CPC. Therefore, in any event, the writ petitions are not maintainable before this Court.

4. Per contra, learned counsel for the petitioner Sri A.P. Murari, strenuously contends before this Court that the final

decree proceedings is completely terminated but the trial Court has passed the orders I.A. Nos.18 and 19 and in view of the amendment to Sec. 115 of CPC and in view of the decision rendered by the Apex Court in ***(2003) 6 SCC 675*** between ***Surya Dev Rai Vs. Ram Chander Rai and Others***, neither the appeal nor the revision lies against the orders passed on the IAs but the writ petition before this Court. Therefore, the writ petition is very well maintainable before this Court.

He further submits that the another connected W.P. No. 109840/2014 is nothing but a half-shoot of the final decree proceedings as the proceedings have already been terminated the said order merges with the final order. Therefore, the said writ petition is dependent upon the result of the W.P. No. 113059/2014.

5. Learned counsel Sri A.P. Murari, also further submits that, if for any reason the Court comes to the conclusion that the appeal or the revision is maintainable and the writ petitions are not maintainable, then in order to administer

substantial and real justice the writ petitions may be converted either to a regular appeal or a revision petition and the same may be heard thereafter.

6. Though the learned counsels have argued on the merits of the writ petitions, but before adverting to the merits of the case, this Court has to decide on the jurisdiction to entertain the writ petitions and then has to proceed on the merits of the case. If for any reason the Court comes to the conclusion that the writ petitions are not maintainable, then the Court has to pass appropriate order and thereafter hear the parties and to pass appropriate orders in this regard. Therefore, it is just and necessary for this Court to decide whether writ petitions are maintainable before this Court.

7. The first and foremost ground urged before this Court is that the final decree proceedings have been completely terminated. Therefore, the appeal has to be preferred under Order 41 of CPC. Of course, Order 41 Rule of CPC deals with

the regular first appeals. Order 41 Rule 1 R/W Sec. 96 of CPC mandates that:

> *"An appeal shall lie from <u>every decree passed by any Court exercising original jurisdiction</u> to the Court authorized to hear the appeals from the decision of such order."*

Order 41 Rule 1 of CPC narrates about the form of appeal as to how it should be filed and how it should be disposed of by the Court.

Sec. 96 of CPC reads as follows:

> ***96. Appeal from original decree.-*** *(1) Save where otherwise expressly provided in the body of this Code or by any other law for the time being in force, <u>an appeal shall lie from every decree passed by any court exercising original jurisdiction to the court authorized to hear appeals from the decisions of such court.</u>*
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> *(2) An appeal may lie from an original decree passed ex parte.*
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> *(3) No appeal shall lie from a decree passed by the court with the consent of parties.*
>
> *[(4) No appeal shall lie, except on a question of law, from a decree in any suit of the nature cognizable by courts of small causes, when the amount or value of the subject matter of the original suit does not exceed {ten thousand rupees}].*
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> (emphasis supplied)

8. In view of the above said provision a decree passed by a Court having original jurisdiction is appealable before the

appellate Court. It is contended by the learned counsel that the final decree proceedings, though it is dismissed, it is not virtually a decree, because no adjudication of the rights of the parties have been done in the final decree proceedings. In this background it is just and necessary to see the definition of "a decree" which is defined under Section 2(2) of CPC which reads thus:

> *2. Definitions – In this Act, unless there is anything repugnant in the subject or context,-*
>
> *(1) "Code" includes rules;*
>
> *(2) "decree" means the formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final. It shall be deemed to include the rejection of a plaint and the determination of any question within [3]* * * section 144, but shall not include-*
>
> *(a) any adjudication from which an appeal lies as an appeal from an order, or*
>
> *(b) any order of dismissal for default.*
>
> *Explanation-A decree is preliminary when further proceedings have to be taken before the suit can be completely disposed of. It is final when such adjudication completely disposes of the suit, it may be partly preliminary and partly final;*

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9. It is clear from the above said definition that there are two types of decrees, one is preliminary decree where further proceedings have to be taken before the suit can be completely disposed of it is final when such adjudication completely disposes off the suit and it may be partly preliminary and partly final as per the explanation appended to the definition of the decree. If we meaningfully understand the meaning of decree, it is nothing but a formal expression of adjudication from which an appeal lies. Therefore, according to the definition the expression of adjudication of rights of the parties should conclusively determine all the rights of the parties with regard to all or any of the matter in controversy in the suit.

10. Therefore, if the above said definition is thoughtfully understood, whether it is a preliminary decree or a final decree, it should be in the nature of conclusive adjudication and determination of the rights of the parties with regard to all or any matters in controversy. By means of a preliminary

decree the Court would adjudicate conclusively the rights of the parties in a partition suit with regard to their respective shares as done in this particular case in O.S. No. 12/1995 dated 30.03.1996 passed by the Principal Civil Judge & JMFC, Ballari. Subsequently, the FDP No. 63/1995 was filed for the purpose of adjudication of the rights of the parties in respect of their shares by means of allocation of the properties by metes and bounds as per the preliminary decree. Therefore, it goes without saying that the allocation of the shares by metes and bounds in respect of the rights of the parties which is in controversy has not been conclusively concluded by the Court. In the final decree proceedings the Court has to decide the controversy with regard to the portion of the properties to be allocated between the parties to the proceedings.

11. In this particular case the trial Court, on careful perusal of the orders passed which is impugned under W.P. No. 113059/2014 has dismissed the final decree proceedings on

technical grounds and it has not at all adjudicated the real controversy between the parties in respect of the subject matter of the final decree proceedings. The trial Court has dismissed the final decree proceedings on the ground of want of specific boundaries to the suit schedule properties on the ground that, some sale transaction subsequent to the filing of the suit in O.S. No. 12/1955 being taken place and that the subsequent purchasers were not made as parties. Therefore, it cannot at any stretch of imagination be said that the final decree proceedings has been conclusively determined by the Court disposing of the entire controversy between the parties. Therefore, as rightly contended by the learned counsel for the petitioner, no appeal lies against the said order passed by the trial Court terminating the final decree proceedings by allowing the interlocutory applications on I.A. Nos.18 and 19.

12. So far as the orders of the trial Court are concerned, they are disposed of by terminating the final decree proceedings by allowing IA Nos.18 and 19. By virtue of the

amendment to Sec. 115 of CPC as amended by Act 46 of 1999 it is not permissible to file a revision petition against an order disposing of on interlocutory application when the matter is still pending before the trial Court. The entire gamut of effect of amendment to CPC and also the powers of the High Court under Articles 226 and 227 of the Constitution of India, has been considered by the Apex Court in ***Surya Dev Rai's case***. It is worth to extract some of the important guiding factors of the said decision.

13. In ***Surya Dev Rai's case*** as noted above, the Apex Court has extensively dealt with the maintainability of the writ petitions on the interlocutory applications wherein it is observed by the apex Court that:

> *"The power of the High Court under Articles 226 and 227 of the Constitution is always in addition to the revisional jurisdiction conferred on it. The curtailment of revisional jurisdiction of the High Court under Section 115 CPC by amendment Act 46 of 1999 does not take away and could not have been taken away the constitutional jurisdiction of the High Court to issue a writ of certiorari to a civil court, nor is the power of superintendence conferred on the High Court under Article 227 of the Constitution taken away or whittled down. The power exists, untrammeled by the amendment in*

> *Section 115 CPC, and is available to be exercised subject to rules of self-discipline and practice which are well settled.*

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The Apex Court by differentiating and distinguishing the jurisdiction between Article 226 and 227 of the Constitution has also observed at paragraph No. 25 that:

> *"In exercise of supervisory jurisdiction, the High Court may not only quash or set aside the impugned proceedings, judgment or order but it may also make such directions as the facts and circumstances of the case may warrant, may be, by way of guiding the inferior court or tribunal as to the manner in which it would now proceed further or afresh as commended to or guided by the High Court. In appropriate cases the High Court, while exercising supervisory jurisdiction, may substitute such a decision of its own in place of the impugned decision, as the inferior Court or tribunal should have made. Lastly, the jurisdiction under Article 226 of the Constitution is capable of being exercised on a prayer made or on behalf of the party aggrieved; the supervisory jurisdiction is capable of being exercised suo motu as well."*

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It is also relevant to note here the observation made by the Apex Court at paragraph No. 26 in explaining the supervisory jurisdiction of the Court. The sum and substance of the observation is as follows:

> *"Supervisory jurisdiction may be refused to be exercised when an alternative efficacious remedy by way of appeal*

> *or revision is available to the person aggrieved. The High Court may have regard to the legislative policy formulated on experience and expressed by enactments where the legislature in exercise of its wisdom has deliberately chosen certain orders and proceedings to be kept away from exercise of appellate and revisional jurisdiction in the hope of accelerating the conclusion of the proceedings and avoiding delay and procrastination which is occasioned by subjecting every order at every stage of proceedings to judicial review by way of appeal or revision."*
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It is also observed that:

> *"Care, caution and circumspection need to be exercised, when <u>any of the abovesaid two jurisdictions is sought to be invoked during the pendency of any suit or proceedings in a subordinate court and the error though calling for correction is yet capable of being corrected at the conclusion of the proceedings in an appeal or revision preferred thereagainst and entertaining a petition invoking certiorari or supervisory jurisdiction of the High Court would obstruct the smooth flow and/or early disposal of the suit or proceedings.</u> The High Court may feel inclined to intervene where the error is such, as, if not corrected at that very moment, may become incapable of correction at a later and refusal to intervene would result in traversity of justice or where such refusal itself would result in prolonging of the lis. But, there may be cases where "a stitch in time would save nine."*
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> (emphasis supplied)

Therefore, the power that has to be exercised by the High Court under Articles 226 and 227 is discretionary which will

be governed solely by the dictates of judicial conscience enriched by judicial experience and practical wisdom of the judge.

14. Though the Apex Court has discussed the legal effect extensively but still it is stated that the Court may under circumstances may fall in dilemma whether the writ petition is maintainable or revision is maintainable. On overall study of the above said judgment including the guidelines narrated at paragraph no. 38 of the judgment, it is crystal clear that the interlocutory orders passed by the Court where the remedy of revision has been excluded then they are open to challenge by way of invoking the writ jurisdiction of the Court. But, where the entire proceedings are terminated though the High Court can set aside the said judgment but in such circumstances the Court has to examine whether the revision is maintainable. In this backdrop it is relevant to peruse Sec. 115 of Code of Civil Procedure, which deals with 'Revisions'.

15. Sec. 115 of CPC says with regard to the entertainment of the revision petition by the High Court, which reads as follows:

> ***"115. Revision.-*** *(1) The High Court may call for the record of any case which has been decide by any court subordinate to such High Court and in which no appeal lies thereto, and if such subordinate court appears—*
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> *(a) to have exercised a jurisdiction not vested in it by law, or*
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> *(b) to have failed to exercise a jurisdiction so vested, or*
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> *(c) to have acted in the exercise of its jurisdiction illegally or with material irregularity, the High Court may make such order in the case as it thinks fit:—*
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> *Provided that the High Court shall not, under this section, vary or reverse any order made, or any order deciding an issue, in the course of a suit or other proceeding, except where the order, if it had been made in favour of the party applying for revision, would have finally disposed of the suit or other proceedings.*
>
> *(2) The High Court shall not, under this section vary or reverse any decree or order against which an appeal lies either to the High Court or to any court subordinate thereto.*
>
> *(3) A revision shall not operate as a stay of suitor other proceeding before the Court except where such suit or other proceeding is stayed by the High Court.*
>
> *Explanation .- In this section, the expression "any case which has been decided" includes any order made, or any order deciding an issue, in the course of a Suit or other proceeding."*

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16. On careful perusal of the above said provision the High Court has got power to exercise power of revision where any

case has been decided by any Court subordinate to the High Court when no appeal lies thereto with other condition appended to the said provision. Therefore, if the order of the trial Court can not be treated as a decree as provided under the definition u/S 2(2) of the CPC and if it is not a purely interlocutory order in a pending proceedings nevertheless the proceedings has been terminated by virtue of such interlocutory orders it amounts to deciding a case by the trial Court. Therefore, in my opinion, the revision u/S 115 of the CPC, can said to be an efficacious statutory remedy.

17. As I have narrated above that in view of the decision of the apex Court the writ petitions are not maintainable and appeal is also not provided u/S 96 of the CPC. Therefore they way out to the petitioner to prosecute their remedies is only by way of preferring a revision petition against the order passed by the trial Court.

Under the above said facts and circumstances, I am of the opinion, the writ petition for all statistical purpose to be taken as disposed off with a direction to the office to convert the writ petition to revision petition and to place the same before the Court having roster for disposal, which order would meet the ends of justice. Hence, the following order is passed.

ORDER

Registry is directed to convert the Writ Petition No. 113059/2014 as that of a revision petition and post the same before the Court having roster. For all practical purposes the writ petition in W.P. No. 113059/2014 is ordered to be disposed off.

W.P. No. 109840/2014 can not be bifurcated from the W.P. No. 113059/2014 as the grounds urged therein and the order challenged has to be tested at the time of hearing the converted revision petition. Therefore, the said W.P. No. 109840/2014 is dependent upon the decision in the converted revision petition. Therefore, the same has to be

tagged with the said revision petition and to be disposed off by the same Court along with the revision petition.

Sd/-
JUDGE

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