

IN THE HIGH COURT OF KARNATAKA
DHARWAD BENCH

DATED THIS THE 09TH DAY OF FEBRUARY, 2022

BEFORE

THE HON'BLE MR. JUSTICE SACHIN SHANKAR MAGADUM

R.S.A.NO.5179/2012 (PAR)

BETWEEN

1. KUM.SAKASHATA
D/O. SHANKAR MUDALAGI
AGED ABOUT 08 YEARS.

2. KUM. AKSHTA
D/O SHANKAR MUDALAGI,
AGED ABOUT 06 YEARS.

BOTH APPELLANT NOS.1 & 2
ARE MINORS REPRESENTED BY
THEIR MINOR GUARDIAN,
SHANKAR YAMANAPPA MUDALAGI,
R/O GUNJATTI, TQ: GOKAK,
DIST: BELGAUM-591307.

3. SMT.MAYAWWA
W/O NINGAPPA MUDALAGI,
AGED ABOUT 26 YEARS,
OCC: AGRICULTURE,
R/O GUNJATTI, TQ: GOKAK,
DIST: BELGAUM 591 307.

4. SMT.SHANTAWWA
W/O. MALLAPPA BHARAMANNAVAR,
AGED ABOUT 24 YEARS,
OCC: AGRICULTURE,
R/O DURDUNDI, TQ: GOKAK,
DIST: BELGAUM-591 307.

5. LAXMI SANJU PIDAI,
AGE ABOUT 24 YEARS,
OCC: AGRICULTURE,

R/O. KHADAKBHAVI, TQ: GOKAK,
DIST: BELGAUM-591 307.

6. GOUDAPPA
S/O NINGAPPA KONI @ MULINANI ,
AGED ABOUT 23 YEARS, OCC: AGRICULTURE,
 7. SHRI KAMAPPA
S/O NINGAPPA KONI @ MULIMANI,
AGED ABOUT 21 YEARS, OCC: AGRICULTURE,
R/O GUNJATTI, TQ: GOKAK,
DIST: BELGAUM.
 8. SANTOSH
S/O NINGAPPA KONI @ MULIMANI
AGED ABOUT : 16 YEARS,
OCC: AGRICULTURE.
 9. SMT.HALAVVA BHIMAPPA MUDALAGI
AGED ABOUT : 27 YEARS.
 10. VITHAL
NINGAPPA KONI @ MULIMANI
AGED ABOUT 14 YEARS.
 11. LAKKAPPA
NINGAPPA KONI @ MULIMANI
AGED ABOUT : 14 YEARS.
- APPELLANT NOS.8, 10 & 11 MINORS
REPRESENTED BY THEIR MOTHER,
APPELLANT NO.12.
12. SMT.NIMBEWWA
NINGAPPA KONI @ MULIMANI
AGED ABOUT : 48 YEARS,
OCC: AGRICULTURE.
 13. SHRI LAKKAPPA
GOUDAPPA KONI @ MULIMANI
AGED ABOUT 24 YEARS.
 14. SIDDANNA
GOUDAPPA KONI @ MULIMANI
AGED ABOUT 23 YEARS.
 15. LAXMAPPA

GOUDAPPA KONI @ MULIMANI
 AGED ABOUT 15 YEARS, MINOR,
 REPTED. BY HIS MOHTER
 APPELLANT NO.16.

16. SMT.REVAKKA
 GOUDAPPA KONI @ MULIMANI
 AGED ABOUT 47 YEARS,
 OCC: AGRICULTURE.

APPELLANT NO.6 TO 16 ARE
 R/O GUNJATTI TQ. GOKAK,
 DIST: BELGAUM-591307.

... APPELLANTS

(BY SRI ANTHONY R.RODRIGUES, ADV.)

AND

1. NINGAPPA LAKKAPPA KONI @ MULIMANI
 AGE: 54 YEARS, OCC: AGRICULTURE,
 R/O. GUNJATTI, TQ: GOKAK-591 307,
 DIST: BELGAUM.
2. GOUDAPPA
 S/O. LAKKAPPA KONI @ MULIMANI
 AGED ABOUT 49 YEARS,
 R/O. GUNJATTI, TQ: GOKAK-591 307,
 DIST: BELGAUM.
3. SATTEPPA CHADAPPA BANDROLLI
 AGED ABOUT : 38 YEARS,
 R/O. GUNJATTI, TQ: GOKAK,
 DIST: BELGAUM-591 307.

... RESPONDENTS

(NOTICE TO RESPONDENT NOS.1 & 2 SERVED)
 (BY SRI G.B.NAIK & SMT.P.G.NAIK ADV. FOR R.3)

THIS RSA IS FILED UNDER SECTION 100 OF THE CODE OF CIVIL PROCEDURE, 1908 PRAYING THIS COURT TO SET ASIDE THE JUDGEMENT & DECREE DATED 21.04.2011 PASSED IN R.A.NO.426/2010 BY THE DISTRICT JUDGE, HUKKERI, SITTING AT GOKAK CONFIRMING THE JUDGMENT AND DECREE DATED 19.11.2010 PASSED IN O.S.NO.232/2007 BY THE PRL.SENIOR CIVIL JUDGE, GOKAK CONSEQUENTLY ALLOW THE DECREE THE SUIT IN THE INTEREST OF JUSTICE AND EQUITY.

THIS APPEAL COMING ON FOR ADMISSION THIS DAY,
THE COURT DELIVERED THE FOLLOWING:

: JUDGMENT :

The captioned regular second appeal is filed by the unsuccessful plaintiffs whose suit for partition and separate possession is dismissed by both the Courts below by recording a finding that the suit for partition is not maintainable.

2. The facts leading to the above said matter are as under:

The appellants-plaintiffs filed a suit for partition and separate possession by specifically contending that the suit schedule properties are the joint family ancestral properties of present appellants and defendant Nos.1 and 2. The appellants-plaintiffs specifically averred in the plaint that the suit schedule properties are irrigated lands and they are yielding sufficient income. It is alleged that in the month of January-2007, respondent No.3-defendant No.3

started to interfere with appellants/plaintiffs' possession over the properties at Sl.No.1 & 2 of the schedule. On enquiry, the appellants-plaintiffs came to know that defendant Nos.1 and 2 have sold Item Nos.1 and 2 of the schedule property for sale consideration of Rs.3,98,000/-. The appellants/plaintiffs specific contention is that it was not for legal necessity and hence filed the present suit for partition and separate possession by contending that the alienation made by defendant Nos.1 and 2 is not binding on their share. They also challenged the agreement to sell in respect of Item Nos.3 and 4 of the schedule properties which were already subject matter of suit in O.S.No.288/2006 filed for specific performance of contract by present respondent No.3-defendant No.3.

3. Respondent No.3-defendant No.3 contested the proceedings by filing written statement. Respondent No.3-defendant No.3 purchaser stoutly

denied the entire averments made in the plaint and specifically contended that the present suit is collusive suit. Defendant Nos.1 and 2 who are ancestors of plaintiffs have sold Item Nos.1 and 2 for legal necessity and in respect of Item Nos.3 & 4, defendant Nos.1 & 2 have executed an agreement to sell. Respondent No.3-defendant No.3 further specifically contended that the present suit is a collusive suit and the appellants-plaintiffs are seeking share only in respect of alienated properties without including other ancestral properties.

4. The Trial Court having assessed oral and documentary evidence on record has answered Issue No.1 in the negative and Issue No.2 in the affirmative and recorded a categorical finding that defendant Nos.1 & 2 have sold Item Nos.1 and 2 of schedule properties and further agreed to sell Item Nos.3 & 4 for family necessity. While dealing with Issue No.2, the Trial Court taken judicial note of the fact that

respondent No.3-defendant No.3 has succeeded in O.S.No.288/2006, wherein respondent No.3-defendant No.3 was granted discretionary relief of specific performance of contract in respect of Item Nos.3 & 4.

5. While dealing with additional Issue No.1, the Trial Court having examined material on record has recorded a specific finding that the present suit is filed only in respect of alienated properties without including the other joint family ancestral properties. It is in this background, the Trial Court has come to conclusion that the present suit is a collusive suit and accordingly proceeded to dismiss the suit.

6. The First Appellate Court on re-appreciation of oral and documentary evidence has concurred with the findings of the Trial Court. The First Appellate Court having meticulously examined the recitals in sale deed vide Ex.P.1 has also concurred with the findings of the Trial Court and has come to conclusion

that defendant Nos.1 and 2 who are ancestors were compelled to sell Item Nos.1 and 2 for family necessity in order to repay hand loan. The First Appellate Court has also come to conclusion that they were also compelled to execute an agreement to sell in respect of Item Nos.3 & 4. It is in this background, the First Appellate Court has also recorded a finding that the appellants-plaintiffs have not at all produced cogent and clinching evidence to substantiate their claim that the family of appellants-plaintiffs and defendant Nos.1 & 2 possessed sufficient nucleus which generated sufficient income and there was no necessity to alienate the suit schedule properties.

7. The First Appellate Court was also of the view that the sale deed executed by defendant Nos.1 and 2 in respect of Item Nos.1 & 2 would bind on the plaintiffs also as alienations were for family necessity. It is against these concurrent findings, the unsuccessful plaintiffs are before this Court.

8. Heard learned counsel appearing for the appellants-plaintiffs and learned counsel appearing for respondents and perused the judgments under challenge.

9. Both the Courts have concurrently held that the present suit is collusive suit. On examination of the judgments under challenge, this Court would find that defendant Nos.1 & 2 having sold Item Nos.1 & 2 and further having agreed to sell Item Nos.3 & 4 have instigated the present appellants-plaintiffs to file present suit. The pattern and the conduct can be gathered from the records. Defendant Nos.1 and 2 who are the ancestors and who are in charge of affairs of the family have not chosen to contest the proceedings and they are placed *exparte*. These significant details would clearly indicate that this is a collusive suit. If defendant Nos.1 & 2 are the ancestors and it is a huge family comprising of nine children to defendant No.1 and five children to

defendant No.2, no further enquiry is required. Having regard to the number of family members would clearly give an indication that they were not able to cope-up with the domestic requirements and therefore were compelled to avail hand loans. Defendant Nos.1 & 2 having sold Item Nos.1 & 2 properties and also having lost their rights in Item Nos.3 & 4 pursuant to decree passed in O.S.No.288/2006, cannot fight litigation through their children. One more relevant fact which would go against appellants-plaintiffs is that they have consciously excluded other ancestral properties which are in their possession.

10. It is a trite law that non-alienating coparceners can seek for partition if they are aggrieved by alienation either by the kartha or by any one of family members i.e., best cause of action. But in the present case on hand, the suit is filed consciously only against those properties which are subject matter of alienation at the instance of

defendant Nos.1 and 2. This clearly establishes that the present suit is collusive suit. Therefore, even otherwise, the suit for partition and separate possession is not maintainable. Since there is a concurrent finding by both the Courts that the present suit filed by appellants-plaintiffs is a collusive suit, there is no scope for interference under Section 100 of CPC. No substantial question of law arises. The appeal is devoid of merits. Accordingly the same stands ***dismissed.***

SD/-
JUDGE

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