IN THE HIGH COURT OF KARNATAKA

KALABURAGI BENCH

DATED THIS THE 20TH DAY OF JULY, 2021

BEFORE

THE HON'BLE MR.JUSTICE P.N.DESAI

RSA NO.7102/2010 (DEC/INJ)

C/W.

RSA NO.7101/2010 (DEC/INJ)

RSA NO.7103/2010 (DEC/INJ)

IN RSA NO.7102/2010:

BETWEEN:

1. BAJIRAO S/O MADHAVRAO
(SINCE DECEASED BY LRS)

1A. ANJAN BAI W/O LATE BAJIRAO
AGE: 75 YEARS, OCC: HOUSEHOLD
R/O BASANTHPUR VILLAGE
CHILLARGI POST, TQ. & DIST. BIDAR.

1B. SHIVAJIRAO S/O LATE BAJIRAO
AGE: 56 YEARS, OCC: AGRICULTURE
R/O BASANTHPUR VILLAGE
CHILLARGI POST, TQ. & DIST. BIDAR.

1C. RAMRAO S/O LATE BAJIRAO
AGE: 54 YEARS, OCC: BUSINESS
R/O H.NO.6-2-246/30,
NEW BHOIGUDA SECUNDERABAD - 500 003
(TELANGANA STATE)

1D. VITHALRAO S/O LATE BAJIRAO
AGE: 50 YEARS, OCC: PRIVATE SERVICE

R/O H.NO.6-14-62, NAMDEVWADA
NIZAMABAD - 503 002
(TELANGANA STATE)

1E. THANAJIRAO S/O LATE BAJIRAO
AGE: 48 YEARS, OCC: PRIVATE SERVICE
R/O H.NO.19-1/313, BHAVANI COLONY
SHIVNAGAR, BIDAR.

1F. SUMAN W/O TULASIRAM
AGE: 45 YEARS, OCC: HOUSEHOLD
R/O SANTPUR POST, TQ. AURAD, DIST. BIDAR

2. MANOHAR S/O DHULBARAO
AGE: 45 YEARS, OCC: AGRICULTURE
R/O BASANTHPUR, TQ. & DIST. BIDAR.

...APPELLANTS

(SRI. AMEETKUMAR DESHPANDE, ADVOCATE)

AND:

PANDURANGA RAO
SINCE DECEASED BY LRS

NAMDEV S/O PANDURANGARAO
DIED BY LRS

1. SHANKUNTALA BAI W/O LATE NAMDEV
AGE: 61 YEARS, OCC: HOUSEHOLD
R/O H.NO.18-8 SRIRAM NAGAR
NEAR ARYASAMAJ MANDIR BADEPALLI
JETCHARLA, DIST. MAHABOOBNAGAR - 509 302
(TELNGANA STATE)

2. RAJESHWAR S/O LATE NAMDEV
AGE: 41 YEARS, OCC: AGRICULTURE

3. RAMESH S/O LATE NAMDEV
AGE: 39 YEARS, OCC: AGRICULTURE

4. SURRENDER S/O LATE NAMDEV
AGE: 38 YEARS, OCC: BUSINESS

5. RAGHUNATH RAO S/O LATE PANDURANG RAO
AGE: MAJOR, OCC: AGRICULTURE

6. BHARATHIBAI W/O NARSINGH RAO
D/O LATE PANDURANGARAO
AGE: MAJOR, OCC: HOUSEHOLD

ALL R/O MIRZAPUR, DIST. BIDAR.

7. SAROJINI W/O LATE VITHALRAO
AGE: 58 YEARS, OCC: HOUSEHOLD
R/O BASANTHPUR VILLAGE
CHILLARGI POST, TQ. & DIST. BIDAR.

...RESPONDENTS

(BY SRI SANJEEVKUMAR C. PATIL, ADV. FOR R1 TO R6, NOTICE NOT ORDERED IN R/O. R7)

THIS REGULAR SECOND APPEAL IS FILED UNDER SECTION 100 OF CODE OF CIVIL PROCEDURE PRAYING TO ALLOW THIS APPEAL AND SET ASIDE THE JUDGMENT AND DECREE DATED 04.11.2009 PASSED IN R.A.NO.38/2008 BY THE LEARNED PRL. DISTRICT JUDGE AT BIDAR, MODIFYING THE JUDGMENT AND DECREE DATED 07.02.2008 PASSED IN O.S.NO.124/1994 BY THE LEARNED PRL. CIVIL JUDGE (SR.DN), AT BIDAR AND TO GRANT ANY OTHER APPROPRIATE RELIEF.

IN RSA NO.7101/2010:

BETWEEN:

1. BAJIRAO S/O MADHAVRAO
(SINCE DECEASED BY LRS)

1A. ANJANA BAI W/O LATE BAJIRAO
AGE: 75 YEARS, OCC: HOUSEHOLD
R/O BASANTHPUR VILLAGE
CHILLARGI POST, TQ. & DIST. BIDAR.

1B. SHIVAJIRAO S/O LATE BAJIRAO
AGE: 56 YEARS, OCC: AGRICULTURE
R/O BASANTHPUR VILLAGE
CHILLARGI POST, TQ. & DIST. BIDAR.

1C. RAMRAO S/O LATE BAJIRAO
AGE: 54 YEARS, OCC: BUSINESS
R/O H.NO.6-2-246/30
NEW BHOIGUDA
SECUNDERABAD - 500 003
(TELANGANA STATE)

1D. VITHALRAO S/O LATE BAJIRAO
AGE: 50 YEARS, OCC: PRIVATE SERVICE
R/O H.NO.6-14-62, NAMDEVWADA
NIZAMABAD - 503 002,
(TELANGANA STATE)

1E. THANAJIRAO S/O LATE BAJIRAO
AGE: 48 YEARS, OCC: PRIVATE SERVICE
R/O H.NO.19-1/313, BHAVANI COLONY
SHIVNAGAR, BIDAR.

1F. SUMAN W/O TULASIRAM
AGE: 45 YEARS, OCC: HOUSEHOLD
R/O SANTPUR POST, TQ. AURAD, DIST. BIDAR

2. MANOHAR S/O DHULBARAO
AGE: 45 YEARS, OCC: AGRICULTURE
R/O BASANTHPUR,
TQ. & DIST. BIDAR.

...APPELLANTS

(SRI. AMEETKUMAR DESHPANDE, ADVOCATE)

AND:

PANDURANGA RAO
SINCE DECEASED BY LRS

NAMDEV S/O PANDURANGARAO
DIED BY LRS

1. SHANKUNTALA BAI W/O LATE NAMDEV
   AGE: 61 YEARS, OCC: HOUSEHOLD
   R/O H.NO.18-8 SRIRAM NAGAR
   NEAR ARYASAMAJ MANDIR BADEPALLI
   JETCHARLA, DIST. MAHABOOBNAGAR - 509 302
   (TELNGANA STATE)

2. RAJESHWAR S/O LATE NAMDEV
   AGE: 41 YEARS, OCC: AGRICULTURE

3. RAMESH S/O LATE NAMDEV
   AGE: 39 YEARS, OCC: AGRICULTURE

4. SURRENDER S/O LATE NAMDEV
   AGE: 38 YEARS, OCC: BUSINESS

5. RAGHUNATH RAO S/O LATE PANDURANG RAO
   AGE: MAJOR, OCC: AGRICULTURE

6. BHARATHIBAI W/O NARSINGH RAO
   D/O LATE PANDURANGARAO
   AGE: MAJOR, OCC: HOUSEHOLD
   ALL R/O MIRZAPUR, DIST. BIDAR.

7. SAROJINI W/O LATE VITHALRAO
   AGE: 58 YEARS, OCC: HOUSEHOLD
   R/O BASANTHPUR VILLAGE
   CHILLARGI POST, TQ. & DIST. BIDAR.

...RESPONDENTS

(BY SRI SANJEEVKUMAR C. PATIL, ADV. FOR R1 TO R6)

THIS REGULAR SECOND APPEAL IS FILED UNDER SECTION 100 OF CODE OF CIVIL PROCEDURE PRAYING TO ALLOW THIS APPEAL AND SET ASIDE THE JUDGMENT AND DECREE DATED 04.11.2009 PASSED IN R.A.NO.40/2008 BY THE LEARNED PRL. DISTRICT JUDGE AT BIDAR, MODIFYING THE JUDGMENT AND DECREE DATED 07.02.2008 PASSED IN O.S.NO.77/1995 BY THE LEARNED PRL. CIVIL JUDGE (SR.DN), AT BIDAR AND TO GRANT ANY OTHER APPROPRIATE RELIEF.

IN RSA NO.7103/2010:

BETWEEN:

1. BAJIRAO S/O MADHAVRAO
(SINCE DECEASED BY LRS)

1A. ANJANA BAI W/O LATE BAJIRAO
AGE: 75 YEARS, OCC: HOUSEHOLD
R/O BASANTHPUR VILLAGE
CHILLARGI POST, TQ. & DIST. BIDAR.

1B. SHIVAJIRAO S/O LATE BAJIRAO
AGE: 56 YEARS, OCC: AGRICULTURE
R/O BASANTHPUR VILLAGE
CHILLARGI POST, TQ. & DIST. BIDAR.

1C. RAMRAO S/O LATE BAJIRAO
AGE: 54 YEARS, OCC: BUSINESS
R/O H.NO.6-2-246/30
NEW BHOIGUDA SECUNDERABAD - 500 003
(TELANGANA STATE)

1D. VITHALRAO S/O LATE BAJIRAO
AGE: 50 YEARS, OCC: PRIVATE SERVICE
R/O H.NO.6-14-62, NAMDEVWADA
NIZAMABAD - 503 002
(TELANGANA STATE)

1E. THANAJIRAO S/O LATE BAJIRAO
AGE: 48 YEARS, OCC: PRIVATE SERVICE
R/O H.NO.19-1/313, BHAVANI COLONY
SHIVNAGAR, BIDAR.

1F. SUMAN W/O TULASIRAM
AGE: 45 YEARS, OCC: HOUSEHOLD
R/O SANTPUR POST, TQ. AURAD, DIST. BIDAR

2. MANOHAR S/O DHULBARAO
AGE: 45 YEARS, OCC: AGRICULTURE
R/O BASANTHPUR, TQ. & DIST. BIDAR.

...APPELLANTS

(SRI. AMEETKUMAR DESHPANDE, ADVOCATE)

AND:

PANDURANGA RAO
SINCE DECEASED BY LRS

NAMDEV S/O PANDURANGARAO
DIED BY LRS

1. SHANKUNTALA BAI W/O LATE NAMDEV
AGE: 61 YEARS, OCC: HOUSEHOLD
R/O H.NO.18-8 SRIRAM NAGAR
NEAR ARYASAMAJ MANDIR BADEPALLI
JETCHARLA, DIST. MAHABOOBNAGAR - 509 302
(TELNGANA STATE)

2. RAJESHWAR S/O LATE NAMDEV
AGE: 41 YEARS, OCC: AGRICULTURE

3. RAMESH S/O LATE NAMDEV
AGE: 39 YEARS, OCC: AGRICULTURE

4. SURRENDER S/O LATE NAMDEV
AGE: 38 YEARS, OCC: BUSINESS

5. RAGHUNATH RAO S/O LATE PANDURANG RAO
AGE: MAJOR, OCC: AGRICULTURE

6. BHARATHIBAI W/O NARSINGH RAO
D/O LATE PANDURANGARAO
AGE: MAJOR, OCC: HOUSEHOLD
ALL R/O MIRZAPUR, DIST. BIDAR.

7. SAROJINI W/O LATE VITHALRAO
AGE: 58 YEARS, OCC: HOUSEHOLD
R/O BASANTHPUR VILLAGE
CHILLARGI POST, TQ. & DIST. BIDAR.

...RESPONDENTS

(BY SRI SANJEEVKUMAR C. PATIL, ADV. FOR R1 TO R6, NOTICE NOT ORDERED IN R/O. R7)

THIS REGULAR SECOND APPEAL IS FILED UNDER SECTION 100 OF CODE OF CIVIL PROCEDURE PRAYING TO ALLOW THIS APPEAL AND SET ASIDE THE JUDGMENT AND DECREE DATED 04.11.2009 PASSED IN R.A.NO.41/2008 BY THE LEARNED PRL. DISTRICT JUDGE AT BIDAR, MODIFYING THE JUDGMENT AND DECREE DATED 07.02.2008 PASSED IN O.S.NO.77/1995 BY THE LEARNED PRL. CIVIL JUDGE (SR.DN), AT BIDAR AND TO GRANT ANY OTHER APPROPRIATE RELIEF.

THESE APPEALS HAVING BEEN HEARD, RESERVED FOR JUDGMENT AND COMING ON FOR PRONOUNCEMENT OF JUDGMENT THIS DAY, THIS COURT DELIVERED THE FOLLOWING:

JUDGMENT

These three appeals arise out of common judgment passed in R.A.Nos.38/2008, 40/2008 and 41/2008 dated 04.11.2009 by the learned Principal District Judge, Bidar, disposing of appeals by declaring that parties are entitled equal share in suit schedule property in the land bearing Sy.Nos.73 and 81 of Basanthpur village.

2. The appellants were the plaintiffs in O.S.No.124/1994 before the Trial Court. The respondents were the defendants before the Trial Court in O.S.No.124/1994 and wherein these respondents were the plaintiffs in O.S.No.77/1995 and the present appellants were defendant Nos.1 and 2. They will be referred as plaintiffs and defendants as per their ranks before the Trial Court for convenience.

3. The appellants herein filed suit in O.S.No.124/1994 for the relief of declaration of ownership and permanent injunction in respect of 8 acres and 28 guntas of land in Sy.No.73 and 23 acres 16 guntas of land in Sy.No.81 of Basanthapur village, Tq.Aurad, District Bidar.

4. The respondents herein were the plaintiffs in O.S.No.77/1995 claiming that plaintiffs are owners of suit land bearing Sy.No.73 measuring 8 acres 28 guntas to the extent of half share and in Sy.No.81 measuring 23 acres 16 guntas to the extent of half share situated in the same village (Basanthpur, Tq.Aurad, Dist.Bidar).

5. The plaintiffs in O.S.No.124/1994 contended that one Limbaji was the original propositor and he has got three children by name Madhavarao, Bhimrao and Kashibai. The said Madhavrao had two sons by name Bajirao and Dulbarao. Bhimarao had son by name Pandurangrao. All the children of Limbaji died. The

plaintiff No.1 who is the son of Madhavarao is the owner and possessor of the suit lands bearing Sy.No.73 measuring 08 acres 21 guntas and Sy.No.81 measuring 23 acres 16 guntas situated at Basanthpur village. It is further contended that defendants are the cousin of the plaintiffs and they were not concerned with the suit properties. It is further contended that uncle of the plaintiffs by name Bhimrao left the village Basanthpur long back. The paternal aunt of the plaintiffs by name Kashibai also went to the village Badepalli alongwith her husband Sangram. It is further contended that during the life time of said Kashibai and Gangaram, they took Bhimrao in adoption, as they were not having any male or female issues. Since, the date of adoption, father of the plaintiffs became the absolute owners and possessors of the suit lands by enjoying the same exclusively. It is further contended that younger brother of the plaintiff No.1 namely Dhulbarao was also residing separately by taking half share in the suit lands. He

died about 10 years back leaving behind the plaintiff No.2 as his legal heir and successor and now plaintiff No.2 is cultivating his half share in the suit lands. The land bearing Sy.No.73 is known as "Singada Jangam land" and land Sy.No.81 is known as "Ling Naik land". It is further contended that the dispute arose between the father of the plaintiffs, Madhavarao and one Laxman who was the sister's son of the father of the plaintiff namely Madhavrao. The said Laxman had filed case before Sub Judge Court of Ward, Govt. Marathwadi division in case No.8 of 1329 Fasli Naib Nazim had decided that the late Laxman had half share as per his claim and Madhavrao had half share as per his claim. As per the decision dated 26th Shanevar 1329 Fasli, the father of the plaintiffs was the owner and possessor of suit land to the extent of half of the suit land. It is further contended that after the death of said Laxman his only son by name Bapurao went in illatom son-in-law to one Gundappa at Shamshalapur Nyalkal

Mandal A.P. by relinquishing his father's half share to the father of the plaintiffs long back after the death of his father - Laxman. Thus, the plaintiffs became absolute owners of both the suit lands. Thereafter, the defendant came to village Basanthpur and with the collusion of the then revenue officials got the mutation sanctioned in their names to the extent of their alleged half share on 20.04.1982. The plaintiffs preferred an appeal before the Assistant Commissioner, Bidar in the year 1982. The said appeal came to be dismissed. It is further contended that even though the defendants are not in possession, they have got entered their names in the revenue records. It is further contended that the defendant alternatively waived all their alleged rights in the suit property by choosing themselves to be out of possession. As such the plaintiffs are in adverse possession of the suit property to the extent of half share of the defendant. The defendant by taking the undue advantage of some entries and mutation in his

name is trying to dispossess the plaintiffs by causing illegal interference. Hence, the plaintiffs have filed the suit.

6. The defendant appeared and filed his written statement. Defendant admitted the relationship between the plaintiffs and the defendant. He has denied that the plaintiffs are the owners and possessors of the entire suit properties. He has denied that the father of the defendant by name Bhimrao left the village at Basanthpur long back and Kashibai also went to the Badepalli village along with her husband long back. He has denied regarding relinquishment of right and also adoption of the Bhimrao by Kashibai. Defendant has denied all other averments of the plaint as false. He has also denied about the case filed by one Laxman before the Sub Judge Court of Ward, Govt. Marathwadi Division in case No.8 of 1329. He has contended that plaintiffs are not in possession of the suit properties. In

fact he is in possession of the suit properties. It is further contended that the suit of the plaintiffs is barred by time. The name of father of the defendant appeared in the revenue record in the year 1954, so question of adverse possession is not applicable. Accordingly, defendant prayed to dismiss the suit.

7. Similarly, in O.S.No.77/1995 the plaintiff contended that he is the owners and possessors to the extent of half share in land Sy.No.73 measuring 08 acres 28 guntas and to the extent of half share in land Sy.No.81 measuring 23 acres 10 guntas. Similar contentions as taken by them in their written in another suit are also taken in their plaint in this case also. The plaintiff father and defendants father are no more. The suit lands are the ancestral properties and they were divided between the father of the plaintiff and defendants long back. They are separately cultivating the suit lands. The plaintiff has gone to Badepally

village for doing petty business after the death of his father, the plaintiffs were cultivating the suit ands through servant personally and they are supervising the same. The mutation was also sanctioned in the name of the plaintiffs. The defendants have filed the appeal against the said order, which was dismissed due to non-prosecution. The defendants have filed the suit for declaration of ownership in respect of land Sy.Nos.73 and 81 along with perpetual injunction in O.S.No.124/1994 which is pending. After filing of the suit, the defendants taking the law into hands have dispossessed the plaintiff from the suit lands to the extent of half share on 03.06.1995. The plaintiff requested the defendants to admit the ownership of the suit lands, but they have refused to admit the same. Hence, they have filed the suit.

8. The defendants appeared and filed their written statement. Similar contentions are taken as taken in their plaint in O.S.No.124/1994 and they denied the half share of the plaintiffs. It is denied that the plaintiffs went to Badepalli village for doing petty business after death of their father after long back. It is contended that Kashibai had no issues, as such she had adopted the late Bhimrao, when he was about 12 years and he was residing at Badepalli in Jedeherla Taluka (AP) by carrying out his business and getting constructed his house. After adoption, late Bhimarao had severed all his relations as a member of the Joint Family relinquishing all the rights in the ancestral property, including the suit lands. When the late Bhimarao had lost his rights, the plaintiffs are absolutely debarred from claiming any rights in the suit property. Alternatively, it is submitted that the defendants are in adverse possession of the suit land. The plaintiff very well known that the father of the

defendants was in possession. Hence, they prayed to dismiss the suit.

9. The Trial Court framed the issues separately in both the suits.

10. In O.S.No.124/1994 the plaintiff No.1 got examined as PW.1, three other witnesses are examined as PWs.2 to 4 and plaintiff No.2 got examined as PW.2. In both the suits common documents were marked as Exs.P.1 to 15(a). In both the suits commonly the defendants have examined the defendant No.2 as DW.1. Other two witnesses were examined as DW.2 and 3. The documents Ex.D.1 to 9 were got marked on behalf of defendants.

11. After hearing the arguments of both sides, the Trial Court dismissed the suit in O.S.No.124/1994 and O.S.No.77/1995 was partly decreed.

12. Aggrieved by the dismissal of the suit in O.S.No.124/1994 the plaintiffs have filed R.A.No.38/2008. Aggrieved by the findings of the Trial Court in O.S.No.77/1995 the legal representatives of the plaintiff have filed R.A.No.40/2008. The plaintiffs in O.S.No.124/1994 and defendants in O.S.No.77/1995 have filed R.A.No.41/2008.

13. The First Appellate Court after hearing the arguments on both sides, passed the impugned order that the parties to both the suits are entitled for equal share in the suit properties i.e., lands in survey Nos.73 and 81 of Basanthpur village. A preliminary decree shall be drawn accordingly. The plaintiff in O.S.No.77 of 1995 shall pay the deficit court fee, which is actually payable according to Section 35(2) of the KCF and SV Act.

14. Aggrieved by the same, the appellants who are the plaintiffs in O.S.No.124/1994 and defendants in O.S.No.77/1995 have filed these regular second appeals.

15. The learned counsel for the appellants Sri. Ameet Kumar Deshpande, argued that the relationship of the plaintiffs with defendants is admitted by both sides. Both the Trial Court and the First Appellate Court have not properly appreciated the evidence, particularly evidence of PW.4. The evidence of PW.4 indicates that half share was relinquished in favour of plaintiffs. The affidavit of PW.4 clearly indicates that the defendants - respondents have no share in the suit lands. Ex.P.4 is not at all challgned by the respondents. The respondents have failed to prove that they are the owners and in possession of suit land. They have taken contention that after filing of the suit they were dispossessed. Unless the defendants prove that they are the owners of the suit lands, they are not entitled for any relief. The First Appellate Court has granted only declaration and no consequential relief under the Specific Relief Act about the possession or any other relief was granted. Therefore, mere declaration without

giving consequential relief of possession is not valid in the eye of law. Such declaration cannot be given at all. Once the relief of possession is not given, then only relief of declaration also cannot be given. It is evident that the appellants are in possession of the suit property. Therefore, unless the person shows that he has got better title, he cannot seek possession also. The relief of partition cannot be granted in a suit for declaration. In a suit for partition, if it is Hindu Undivided Joint Family, all the family properties and joint family members must be included. Therefore, such relief of partition cannot be granted in a suit for declaration. There is no evidence produced by the respondents to show that whether there are other parties and properties. The learned counsel also argued that the relief of partition is larger relief than the relief of declaration. The court while moulding the relief under Order 7 Rule 7 of CPC cannot grant relief which is larger than the relief sought for. In this regard the

learned counsel relied upon the decision of the Hon'ble Supreme Court reported in ***AIR 2002 Supreme Court Cases 136*** in the case of ***Rajendra Tiwary V. Basudeo Prasad and another,*** referred to Para No.14 of the judgment wherein the Hon'ble Supreme Court has held as under:-

> *"14. Where the relief prayed for in the suit is a larger relief and if no case is made out for granting the same but the facts, as established, justify granting of a smaller relief, Order VII, Rule 7 permits granting of such a relief to the parties. However, under the said provisions a relief larger than the one claimed by the plaintiff in the suit cannot be granted."*

16. The learned counsel relied upon another decision of the Hon'ble Supreme Court reported in ***(1994) 4 Supreme Court Cases 294*** in case of ***Kenchegowda (Since Deceased) by Legal V. Siddegowda Alias Motegowda,*** relied on para No.16, wherein it is held as under:-

"16. Therefore, what has been held is that the property had not been allotted in favour of the first defendant in the partition. That is very different from holding that the case of partition had not been accepted by the first appellate court. This being so, a decree for partition could not have been passed on a mere application for amendment. In fact, as rightly urged by the learned counsel for the appellant that the causes of action are different and the reliefs are also different. To hold that the relief of declaration and injunction are larger reliefs and smaller relief for partition could be granted is incorrect. Even otherwise, a suit for partial partition in the absence of the inclusion of other joint family properties and the impleadment of the other co-sharers was not warranted in law. Thus, we find no difficulty in allowing these appeals which are accordingly allowed. The judgment and decree of the trial court as affirmed by the first appellate court are restored. However, there shall be no order as to costs."

17. With these main argument, the learned counsel for the appellants contended that in view of the principles stated in above referred decisions in a suit for declaration relief of partition could not have been passed by the First Appellate Court. The First Appellate Court not appreciated the evidence on record. Hence, he prayed to admit the appeal by framing substantial question of law for consideration as pleaded in appellants' memorandum of appeal.

18. Against this Sri. Sanjeevkumar C. Patil, the learned counsel for the respondents argued that issue regarding adoption is already not pressed by the appellants. Both the courts have considered the evidence and came to the conclusion that the suit of appellants is barred by time. The order of the Tahasildar was within the knowledge of the plaintiffs in the year 1982 itself. The name of both the parties was appearing since 1954. The evidence of PW.4 will not help the

appellants in any way. There are no documents to show any relationship of the Laxman with plaintiffs' family. There are no documents to show that Laxman has relinquished his rights. There is no declaration of title over the suit properties in the said revenue cases. Admittedly, Limbaji is the original prepositus. The plaintiffs and defendants who claims through him have equal share in the suit properties. The learned counsel further argued that the Court can mould the relief under Order 7 Rule 7 of CPC. The learned counsel further argued that the First Appellate Court has considered all the aspects and has rightly held that both the plaintiffs and defendants are the owners to the extent of half share. Since, actually there are only two brothers and only two properties, the question of inclusion of other persons or other properties in this suit does not arise. Therefore, the principles stated in the decision relied upon by the appellants will not apply to these cases. After disposing the cases by both the

courts parties proceeded further and a final decree is also passed in the year 2015 itself. Nothing remains to be done. The substantial question of law as urged by the learned counsel for the appellants does not arise in these cases as concurrent findings of fact given by both the courts. With these main arguments the learned counsel for the respondents supported the judgment and decree of the first appellate court and prayed to dismiss all the appeals.

19. I have carefully perused the judgment of the trial court and the first appellate court in the light of the arguments advanced. Admittedly, the appellants and respondents have claim the properties through one Limbaji who was propositus of their family. It is also not in dispute that Kashibai is no more and father of plaintiff No.1 is also no more and the other son Bhimrao is also no more.

20. It is seen from the judgments of both the courts that the relationship of the parties is not in dispute. It is also not in dispute that the suit properties are the ancestral properties. The plaintiffs (respondents in these appeals) have filed suit in O.S.No.77/1995. They claim 1/2 share in the suit properties. It is also evident that in the revenue proceedings which have taken place in the year 1982, the Tahsildhar has directed the parties to approach the civil court. Admittedly, both the trial court and the first appellate court have disbelieved the contention of the appellants that the father of the appellants was the exclusive owner of the suit lands. Both the courts have considered the oral and documentary evidence in detail. The main defence of the appellants is that Bhimrao who is the brother of plaintiffs' father was adopted by Kashibai and Gangaram and they left the village and went to Badepalli, Andhra Pradesh. So it is the plantiffs' father who was enjoying the entire property. But as

evident from the judgment of the trial court and first appellate court, the issue regarding adoption is not pressed. Therefore, once if the main issue is not pressed, then automatically, the father of the plaintiffs-Madhavrao and Bhimarao being the brothers are entitled to 1/2 share in their ancestral joint family properties. The trial court and the first appellate court have referred to the proceedings that took place before the Sub-Judge, Court of Wards Marathawada Division between the plaintiffs' father Madhavrao and one Laxuman. The said document Ex-P14 was discussed in detail by the first appellate court. The said Ex.P.14 is the revenue Court order, that too, an interim order. Admittedly, the said Bhimrao was not a party to it. Apart from that, in what way, this Laxuman has got any right over the suit properties and how he could relinquish these properties in favour of the plaintiffs is not forthcoming. There is no evidence about relationship of Laxman with family of Limbaji. The question of

adoption is already given up. Therefore, a contention of the appellants is not at all tenable. When the main issue regarding adoption has gone, then automatically, the plaintiffs and defendants will be entitled to 1/2 share as two branches of Joint Hindu Family. There is absolutely no legally admissible evidence to show as to how the appellants' father was the owner of entire extent of suit properties. There is clear evidence regarding enjoyment of half share by both branches of family. However, the record of rights Exs-D1 to D8 indicates names of both Madhavrao and Pandurang Rao. Mutation is also accepted. On what basis, the mutation was entered is not forthcoming. However, the Tahsildhar held that both the petitioners are entitled for mutation only in respect of "eight annas" i.e., 50% share and they are directed to approach the civil court to claim their "eight annas" right. However, at the same time, the Appellate Court rightly held that as partition is not proved by metes and bound, but names of both parties are shown to the

extent of 50% share in suit lands i.e., "eight annas", they have got half share each in suit land. Now the declaration is sought by respondents in respect of 8 acres 28 guntas in Sy.No.73 and 23 acres and 16 guntas in Sy.No.81, that is, only to the extent of 1/2 (50%) share. Of-course, regarding dispossession of the respondents, the first appellate court held that since there is no clear evidence as to the boundaries within which the respondents were in possession and when their plaint does not contain boundaries, it is every difficult to ascertain in which portion the plaintiffs in O.S.No.77/1995 were in possession. Therefore, the first appellate court rightly held that the finding of the trial court in this regard is not correct. It is also evident that the Tahsildhar directed both the parties to get their share declared. The suit seeking declaration was filed by respondents to the extent of 50% of their share. But in the absence of clear demarcation of the share or evidence regarding exclusive possession or the

boundaries of 1/2 share by metes and bound, the parties are not entitled for relief of declaration in respect of 1/2 share inspite of assertion of possession of 50%. Therefore, the first appellate court held that since the suits are pending between the parties for a long time and the parties have already spent number of years litigating against each other, held that simply because the relief of declaration cannot be granted, that does not mean that the relief sought by the parties regarding 1/2 share also cannot be granted. The first appellate court held that the parties are entitled to get relief of partition in view of their relationship and the nature of the suit properties. The first appellate court moulded the relief relying on the decision of this Court in the case of ***Ibrahim v. Ismail and Another*** reported in ***2008(2) KCCR 752: equivalent ILR 2008 KAR 1539*** wherein it is held at Para No.15 as under :-

> *"15. Therefore, considering the nature of the relief sought for by the appellant and also considering the available evidence on record, it may not be proper on the part of this Court to direct the appellant to go for a fresh trial to get his right by way of partition. Therefore, to secure the ends of justice and also to avoid unnecessary ligitation between the parties, the suit filed by the appellant/plaintiff has to be decreed, though may not be on its entirety and also may not be in the same form".*

21. Further, the First Appellate Court relied upon the Division Bench decision of this Court to show that relief of partition can be granted if the parties are entitled even though it is not specifically asked for. In the case of ***Rangappa v. Jayamma*** reported in ***ILR 1987 KAR 2889*** the Division Bench of this Court held at Para Nos. 7, 8.1 and 8.7 held as under:-

> "7. Order VII Rule 7 CPC, reads thus:
>
> *"Relief to be specifically stated: Every plaint shall state specifically the relief which the plaintiff claims either simply or in the alternative and it shall not be necessary to ask for general or other relief which may*

always be given as the Court may think just to the same extent as if it had been asked for. And the same rule shall apply to any relief claimed by the defendant in his written statement".

(Emphasis supplied)

The words "and it shall not be necessary to ask for general or other relief which may always be given as the Court may think just to the same extents if it had been asked for" are wide enough to empower the Court to grant such relief as the plaintiff is entitled to, on the facts established on the evidence on record, even if such relief has not been specifically prayed for.

8.1. The provisions of Order VII Rule 7 of the C.P. Code are so widely worded that they do enable the court to pass a decree for partition in a suit for declaration of title to immovable property and in possession thereof where it turns out that the plaintiff is not entitled to all the interest claimed by him in the suit property. In such a situation there is nothing unusual in giving relief to the parties

by directing partition of the suit property according to the shares of the parties established in the suit. The normal rule that relief not founded on the pleadings should not be granted is not without an exception. Where substantial matters constituting the title of all the parties or touched in the issues and have been fully put in evidence, the case does not fall within the aforesaid rule. The Court has to look into the substance of the claim in determining the nature of the relief to be granted. Of course, the court while moulding the relief must take care to see that relief it grants is not inconsistent with the plaintiffs claim, and is based on the same cause of action on which the relief claimed in the suit, that it occasions no prejudice or causes embarrassment to the other side, that it Is not larger than the one claimed in the suit, even if, the plaintiff is readily entitled to it, unless he amends the plaint; that it had not been barred by time on the date of presentation of the plaint."

8.7. In Rame Gowda vs. Kuntalinge Gowda and Others, a Division Bench following the aforesaid two decisions in Lingappa and Ramaiah's cases held thus:

> *"Though this is a suit for declaration of title and possession only, there is nothing unusual in giving relief to the [parties by directing a partition of the properties as has been done in other cases of this kind in order to avoid unnecessary litigation and waste of time of Courts; vide Lingappa vs. Chennabasappa (1917) 22 Mys. C.C.R. 293) and Ramaiah vs. Siddalingappa (1942) 48 Mys. H.C.R.317)".*

Thus, apart from the fact that the view taken by us is quite in conformity with the provisions contained in Order VII Rule 7 of C.P.C. which are in very wide terms, it also receives support from the several authorities referred to above. For the reasons stated above, we hold that the Trial ourt is not justified in refusing to pass a preliminary decree for partition and separate

possession of the plaintiff's half share in the suit properties. Point No.2 is accordingly answered in the negative and in favour of the plaintiff-appellant."

22. In view of the principles stated in the above decision, if the judgment of the first appellate court is considered, then it is evident that the first appellate court rightly moulded the relief and has come to the conclusion by allowing the relief of partition in the suit schedule property and accordingly disposed of all the three appeals therein granting 1/2 share to the parties and directed to draw the preliminary decree.

23. The principles stated in the decision relied by the appellants counsel in ***Kenchegoweda*** (supra) is very well settled, but the same is not applicable to the facts, evidence, issues, nature of properties and parties in the present cases. In that case, the necessary parties and all the suit properties were not before the court in that case. The cause of action and relief are different.

Here it is not the case of any parties that there are other parties or other properties left out in the joint family. In that case, there was an application for amendment and cause of action was different and it is held the relief of partial partition cannot be granted in the absence of inclusion of all the joint family properties and impleading other co-sharers. Therefore, said decision will not help the appellants in view of peculiar facts of this case, nature of properties, relationship and pleadings in this suit.

24. The principles stated in the decision of ***Rajendra Tiwary*** (supra) are also not applicable to present appeals. In that case, the provisions of Bihar Buildings (Lease, Rent and Eviction) Control Act and Section 11 (1) (d) and Order 7 Rule 7 of CPC was considered by the Hon'ble Supreme Court. There was a suit for eviction between tenant and landlord. The Court held in such a suit, the enquiry of the title of the

plaintiff is beyond the scope of Court exercising jurisdiction under the Act. The authority of the Civil Court and the Controller having limited jurisdiction to try suits on grounds specified in the Special Act obviously does not have jurisdiction of the ordinary civil court and therefore cannot pass a decree for eviction of the defendant on the ground other than one specified in the Act. The Hon'ble Supreme Court also held that if however, the alternative relief is permissible within the ambit of the Act, the position would be different. Therefore, principles stated in the decision shows that if the alternative relief is permissible, the same can be granted.

25. Here suits are before civil court only. Both the parties claim declaration in respect of 1/2 of the share. The plaintiffs (present respondents) while drafting the pleadings might have instead of using the word as 'partition', gave the nomenclature for relief as

'declaration' instead of 'partition and separate possession'. Because what is claimed by the respondents is their half share in the ancestral joint family properties. The dispute is also about half share in ancestral Joint Hindu Family properties between two branches of the same family. It is settled principles of law that mofussil pleading should be construed liberally. The intention and purpose for which the suit is filed is only claiming half share and dispute is also about half share in suit properties i.e., partition and separate possession of 1/2 share. Therefore, probably relief of partition and separate possession instead of mentioning half share in the said properties the respondents have sought 1/2 share declaration in suit properties i.e., nothing but claiming only half share in suit properties and nothing more or any different relief. The first appellate court rightly considered all these aspects and held that at this point of time, since the litigation started from the year 1994, in view of the

proved relationship and as the properties are ancestral properties belonging to one branch and both the plaintiffs and defendants are entitled for 1/2 share instead of giving declaration to 1/2 share, granted partition of 1/2 share which was already observed by the Tahsildhar while disposing of the revenue proceedings. The First Appellate Court rightly held that parties cannot be made to suffer luxury of litigation. Keeping in mind, the settled principles as stated by the decision of the Division Bench of this Court referred above, in order to do complete justice to the parties, the First Appellate Court has rightly moulded the relief under Order VII Rule 7 CPC.

26. The evidence of PW-4 and documentary evidence Ex-P14 and Ex-P14A will not help appellants to show any substantial question of law to be framed, as contended by learned counsel for the appellants. The First Appellate Court rightly appreciated the evidence in

this regard. There is nothing in the evidence of PW-4 which can help the appellants to frame any substantial question of law.

27. Therefore, in the light of the above discussion, if the present appeals are considered, then, it is evident that there is absolutely no ground to interfere with the well reasoned judgment of the first appellate court. No question of law, much less, any substantial question of law as pleaded by the appellants arise for consideration in these appeals in view of Section 100 of CPC. Therefore, the appeals being devoid of merits are liable to be dismissed. Accordingly, I pass the following;

O R D E R

The appeals in RSA.No.7102/2010 c/w RSA.No.7101/2010 and RSA.No.7103/2010 are dismissed.

The Judgment and decree passed by the Principal District Judge at Bidar in R.A.Nos.38, 40 and 41 of 2008 dated 04.11.2009 is hereby confirmed.

In view of the relationship of the parties, the parties shall bear their cost.

Send back the records secured to the concerned Courts forthwith.

Sd/-
JUDGE

Sdu/KJJ/mn/-