



IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 5TH DAY OF AUGUST, 2024

PRESENT

THE HON'BLE MR JUSTICE SREENIVAS HARISH KUMAR

AND

THE HON'BLE MR JUSTICE UMESH M ADIGA

REGULAR FIRST APPEAL NO. 570 OF 2016 (PAR/INJ)

BETWEEN:

SMT. D DIVYA,
W/O RAMALINGEGOWDA,
AGED ABOUT 41 YEARS,
D/O. DODDA SHANAIAH,
R/O. AKKURU VILLAGE,
CHANNAPATNA TALUK,
BANGALORE RURAL DISTRICT-571 501.

...APPELLANT

(BY SRI. RAMESH K R., ADVOCATE)

AND:

1. SRI DODDA SHANAIAH,
S/O. LATE KALASHANE GOWDA,
AGED ABOUT 61 YEARS.
2. SMT. M L VISHALAKSHI,
W/O.DODDA SHANAIAH,
AGED ABOUT 61 YEARS.
3. D NAVYA,
D/O DODDA SHANAIAH,
AGED ABOUT 32 YEARS.
4. SRI AJAY KUMAR,
S/O. DODDA SHANAIAH,
AGED ABOUT 31 YEARS.



RESPONDENTS 1 TO 4 ARE
R/O. SARASWATHIPURAM,
KUNIGAL MAIN ROAD,
TUMKUR-572 101.

5. SMT. D VIDYA,
W/O SRI MANJUNATH,
D/O.DODDA SHANAIAH,
AGED ABOUT 41 YEARS,
R/A BOMMASHETTIHALLI,
GOWRIBIDANUR TALUK,
KOLAR DISTRICT-563 101.

...RESPONDENTS

(BY SMT. D NAVYA, ADVOCATE FOR R-3;
SRI. PRAMOD.R, ADVOCATE FOR R-4;
SMT. D VIDYA, ADVOCATE FOR R-5;
V/O DATED 11.03.2022, R-3 TO R-5 ARE
TREATED AS LR'S OF DECEASED R-1 & R-2)

THIS RFA IS FILED UNDER SEC.96 OF CPC., 1908
AGAINST THE JUDGMENT AND DECREE DATED 13.01.2016
PASSED IN OS.NO.48/2004 ON THE FILE OF THE II ADDL.
SENIOR CIVIL JUDGE AND JMFC., TUMAKURU, DISMISSING
THE SUIT FOR PARTITION, SEPARATE POSSESSION,
PERMANENT INJUNCTION AND MESNE PROFIT.

THIS APPEAL COMING ON FOR HEARING THIS DAY,
JUDGMENT WAS DELIVERED THEREIN AS UNDER:

CORAM: HON'BLE MR JUSTICE SREENIVAS HARISH KUMAR
and
HON'BLE MR JUSTICE UMESH M ADIGA



ORAL JUDGMENT

(PER: HON'BLE MR JUSTICE SREENIVAS HARISH KUMAR)

Plaintiff No.2 in O.S.No.48/2004 on the file of II Additional Senior Civil Judge and JMFC, Tumakuru, has preferred this appeal challenging the judgment and decree dated 13.01.2016.

2. The parties are referred with respect to their ranks in the suit, for the sake of convenience.

3. Plaintiffs are the daughters of the defendants 1 and 2. Defendant No.3 is another daughter and defendant No.4 is the son of defendants 1 and 2. The plaintiffs brought a suit for partition in respect of certain items of landed and house properties described in schedules 'A to D' of the plaint. The plaintiffs stated that all the items of the properties mentioned in the 'A' schedule property were ancestral properties of the first defendant and he acquired the rest of the properties mentioned in schedule 'B' to 'D' from the income of 'A' schedule property. Stating that they



are in joint possession with the defendants and they too are entitled to equal share in the properties, they brought a suit for partition.

4. The defendants filed written statement contending that although certain items in 'A' schedule belong to joint family, the first defendant acquired the rest of the properties from his self efforts. With respect to 'C' schedule property, it is specifically contended by second defendant that it was her separate property, which was not amenable to partition.

5. The trial court framed nine issues. After appreciating the oral evidence of PW.1 and DW.1 and documents produced on behalf of the plaintiffs, the trial court came to the conclusion that except item Nos.1 and 2 of 'A' schedule property, the rest were found to have not been acquired from the joint family nucleus. This was the main reason for dismissal of the suit. Aggrieved by the same, second plaintiff has preferred this appeal.



6. We have heard the arguments of Sri. K.R. Ramesh, learned counsel for the appellant and Sri. Pramod R, learned counsel for respondent No.4. During the pendency of this appeal, the appellants counsel filed two applications, one under Order XLI Rule 27 of CPC as per I.A.No.2/2021 for producing additional evidence and the other under Order VI Rule 17 of CPC as per I.A.No.3/2021 for amending the plaint to insert paragraph No.8A and one more schedule i.e. schedule 'E' consisting of 12 items of the properties. We have considered these two applications at the time of final hearing of the appeal.

7. Sri. K.R. Ramesh, learned counsel for the appellant submitted that defendants 1 and 2 died after this appeal was filed. Defendant No.1 died on 04.05.2021 and defendant No.2 died on 22.03.2017. He also submitted that second plaintiff/appellant came to know about the existence of certain other properties described in proposed schedule 'E' and that the plaintiffs were also entitled to seek share in those properties. In relation to the



properties described in schedule 'E', he has produced documents, which are sought to be produced under I.A.No.2/2021. His submission is that in view of death of defendants 1 and 2, there is a change in the circumstance, in that the plaintiffs will become entitled to share in all the items of the properties. The trial court may have given a finding that the plaintiffs are not entitled to share, but it was during the time when defendants 1 and 2 were alive. Now that defendants 1 and 2 are dead, the entire scenario changes and plaintiff will become entitled to claim share in all the properties mentioned in the plaint schedule as well as schedule 'E' mentioned in I.A.No.3/2021. Therefore, it is the argument that these applications are to be allowed and the matter be remanded to the trial court for fresh disposal in accordance with law.

8. Sri. Pramod. R, learned counsel for respondent No.4 opposes the applications and submits that the findings of the trial court cannot be disturbed because the



trial court has considered the entire evidence in right perspective. He also submits that the first defendant was working as an employee in Agro Industries and also doing real estate business. Though some items were ancestral properties, the income from ancestral properties was very meager and it was not possible for him to purchase the other items of the suit property and therefore, the trial court has given a correct finding that the properties were self acquisition of the first defendant. In this view, the suit was rightly dismissed. The applications for amendment and additional evidence cannot be considered. He submits that the first defendant executed a will in favour of defendant No.4 on 07.12.2020 and for this reason, plaintiffs cannot claim any share.

9. Since we are of the opinion that the applications I.A.Nos.2/2021, 3/2021 deserve to be allowed, we may not advert to the findings given by the trial court. No doubt, the judgment of the trial court discloses that certain items were self acquisitions of the first defendant



and probably this was one of the reasons for dismissing the suit. Now that defendants 1 and 2 are dead and as rightly submitted by Sri. K.R. Ramesh, change in circumstance needs to be considered.

10. I.A.No.3/2021 is filed under Order VI Rule 17 of CPC for amending the plaint. The plaintiffs want to state by inserting paragraph No.8A that twelve items of property, which are described in schedule 'E' were also acquired by the first defendant. The existence of these properties was not known to the plaintiffs when they filed the suit. They came to know about those properties after the death of their father i.e., first defendant on 04.05.2021 and therefore they want these properties to be included in the plaint. The contesting respondent – defendant No.4 has not filed statement of objections, however, it is orally opposed by Sri. Pramod, learned counsel for respondent No.4.

11. If according to the plaintiffs, there exists some more properties which were not included in the plaint



when they filed the suit and they came to know about those properties only after the death of first defendant, the amendment as sought by the plaintiffs can be granted. The burden lies on the plaintiffs to prove that these properties were also acquired by first defendant from the joint family nucleus and in this view, the interest of the fourth defendant will not get prejudiced.

12. It is the contention of learned counsel for respondent No.4 that first defendant executed a will in favour of fourth defendant on 07.12.2020. It appears that execution of a will was during pendency of the appeal. This is one of the defenses available to the fourth defendant, which can be set up by him in the additional written statement to be filed. In this view, it may be stated that if the amendment is allowed, it may help in deciding the entire controversy between the parties once for all without there being any room for disputes in future. For all these reasons, application under Order VI Rule 17 of CPC can be allowed.



13. So far as application as per I.A.No.2/2021 is concerned, all the documents sought to be produced there under are in relation to the properties which are sought to be included in the plaint by way of 'E' schedule. Therefore, this application can also be allowed.

14. Now a situation for remand of the entire case to the trial court has arisen. Order XLI Rule 23, 23(A) of CPC are the two provisions relating to remand. Normally, when an application under Order XLI Rule 27 of CPC is allowed, there is no scope for remand. But there is no total prohibition, if a case falling within the scope of Order XLI Rule 23 (A) of CPC is made out. Here in view of subsequent development plaint is permitted to be amended; the defendants have to file additional written statement and in this view, additional issues are to be raised. Moreover, the trial court has to record evidence on the new plea taken by the plaintiffs about the acquisition of schedule 'E' property from the joint family nucleus. All the above i.e., the death of defendants No.1 and 2



changes the entire circumstance and the court has to examine whether the plaintiffs will become entitled to share in all the properties. For this reason, we find a situation for remand as envisaged under Order XLI Rule 23 (A) of CPC. Therefore, we proceed to pass the following:

ORDER

- i. The appeal is ***allowed***.
- ii. The judgment dated 13.01.2016 in O.S.No.48/2004 on the file of II Additional Senior Civil Judge and JMFC, Tumakuru, is set aside.
- iii. The matter stands remanded to the trial Court. The parties shall appear before the trial Court on 30.08.2024 without expecting court notices to be issued.
- iv. The plaintiffs shall carry out amendment to the plaint before the trial court and file neatly typed amended plaint.
- v. Defendants are given liberty to file additional written statement raising all such contentions available to them to the proposed amendment.



vi. The documents produced under I.A.No.2/2021 under Order XLI Rule 27 of CPC shall be forwarded to the trial court along with trial court records. The trial court shall receive the documents in evidence subject to rules of admissibility. If the plaintiffs have not produced original or certified copies of those documents; they can produce them before the trial court.

vii. The trial court shall expedite the disposal of the case.

viii. There is no order as to costs.

**Sd/-
(SREENIVAS HARISH KUMAR)
JUDGE**

**Sd/-
(UMESH M ADIGA)
JUDGE**

AG
List No.: 1 Sl No.: 15