



CNR: KAHC010318382020

NC: 2026:KHC:53824
RFA No. 723 of 2021
C/W RFA No. 1530 of 2020
RFA No. 203 of 2021

IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 28TH DAY OF SEPTEMBER, 2026

BEFORE

THE HON'BLE MR. JUSTICE SHIVASHANKAR AMARANNAVAR

REGULAR FIRST APPEAL No. 723 OF 2021 (PAR/POS)

C/W

REGULAR FIRST APPEAL No. 1530 OF 2020 (PAR/POS)

REGULAR FIRST APPEAL No. 203 OF 2021 (PAR/POS)

IN RFA No. 723/2021

BETWEEN:

SRI. R.SAI SRINIVASAMURTHY @
S.R. SAI SRINIVASAMURTHY
S/O SRI RAMAMURTHY
AGED ABOUT 50 YEARS
"PRASHANTHI NILAYAM"
No.23, SERPENTINE ROAD
KUMARA PARK ROAD
BENGALURU – 560 020.



...APPELLANT

(BY SRI KIRAN V RON, ADVOCATE)

AND:

1. MRS. R. RADHA
D/O B RAMACHANDRA REDDY
W/O SRI N LAXMAN REDDY
AGED ABOUT 59 YEARS
No.87/1, 15TH CROSS
MAHALKSHMI LAYOUT

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BENGALURU – 560 086.

2. MR. R. SATHYANARAYANA
S/O RAMACHANDRA REDDY
No.250/D -9, 2ND CROSS
3RD "B" MAIN ROAD, 1ST PHASE
GIRINAGAR, BENGALURU – 560 085.
3. SRI. K.VASUDEVAN
S/O M KUPPASWAMY NAIKAR
AGED ABOUT 51 YEARS
RESIDING AT No. 42, OLD No.16
DR T. C .M RAYON ROAD
GOODS SHED ROAD
BENGALURU – 560 053.

...RESPONDENTS

(BY SRI. V D RAVIRAJ, ADVOCATE FOR R1
SRI M NARAYAN, ADVOCATE FOR R3
NOTICE TO R2 IS SERVED AND UNREPRESENTED)

THIS RFA IS FILED UNDER SECTION 96 OF CPC.,
AGAINST THE JUDGMENT AND DECREE DATED:30.05.2020
PASSED IN OS.No.9308/2004 ON THE FILE OF THE XLIII
ADDITIONAL CITY CIVIL AND SESSIONS JUDGE, BENGALURU,
PARTLY DECREETING THE SUIT FOR PARTITION, SEPARATE
POSSESSION AND MESNE PROFIT.

IN RFA No. 1530/2020

BETWEEN:

MRS. R RADHA
D/O B. RAMACHANDRA REDDY
W/O SRI.N. LAXMAN REDDY
AGED ABOUT 75 YEARS
No. 87/1, 15TH CROSS

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MAHALAKSHMI LAYOUT
BANGALORE- 560 086.

...APPELLANT

(BY SRI V D RAVIRAJ, ADVOCATE)

AND:

1. MR R SATHYANARAYANA
AGED ABOUT 81 YEARS
S/O SRI. RAMACHANDRA REDDY
No. 250/D-9, 2ND CROSS
3RD B MAIN ROAD, 1ST PHASE
GIRINAGAR, BANGALORE- 560 085.

2. SRI. R. SRINIVASAMURTHY
@S.R. SAI. SRINIVASAMURTHY
S/O SRI. S. RAMAMURTHY
AGED ABOUT 50 YEARS
"PRASHANTHI NILAYAM", No. 23
SEPENTINE ROAD
KUMARAPARK ROAD
BANGALORE- 560 020.

...RESPONDENTS

(BY SRI KIRAN V RON, ADVOCATE FOR R2
V/O DTD. 7.12.2020, NOTICE TO R3 IS DISPENSED WITH
NOTICE TO R1 IS SERVED AND UNREPRESENTED)

THIS RFA IS FILED UNDER SECTION 96 OF CPC 1908
AGAINST THE JUDGMENT AND DECREE DATED:30.05.2020
PASSED IN OS.No.9308/2014 ON THE FILE OF THE XLIII
ADDITIONAL CITY CIVIL AND SESSIONS JUDGE, BENGALURU,
PARTLY DECREETING THE SUIT FOR PARTITION, SEPARATE
POSSESSION AND MESNE PROFITS.

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IN RFA No. 203/2021

BETWEEN:

SRI K VASUDEVAN
S/O M KUPPUSWAMY NAIKAR
AGED ABOUT 67 YEARS,
RESIDING AT No.42, OLD No.60
DR. T .C .M ROYAN ROAD,
GOOD SHED ROAD
BANGALORE-560 053.

...APPELLANT

(BY SRI. NARAYAN M, ADVOCATE)

AND:

1. SMT. R RADHA
D/O B RAMACHANDRA REDDY
W/O SRI N LAXMAN REDDY
AGED ABOUT 75 YEARS,
No.87/1 15TH CROSS
MAHALAKSHMI LAYOUT
BENGALURU-560 086.
2. SRI R SATHYANARAYANAPPA
S/O B RAMACHANDRA REDDY
AGED ABOUT 78 YEARS
No.250/D9, 2ND CROSS
3RD 'B' MAIN ROAD, 1ST PHASE
GIRINAGAR
BENGALURU-560 085.
3. SRI R SAI SRINIVASAMURTHY
@ S R SAI SRINIVASAMURTHY
S/O SRI RAMAMRUTHY
AGED ABOUT 52 YEARS
"PRASHANTHI NILAYAM" No.23

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SERPENTINE ROAD KUMARA PARK
ROAD, BENGALURU-560 020.

...RESPONDENTS

(BY SRI KIRAN V RON, ADVOCATE FOR R3
SRI V D RAVIRAJ, ADVOCATE FOR R1
V/O DTD. 12.03.2026, NOTICE TO R2 IS DISPENSED WITH)

THIS RFA IS FILED UNDER SECTION 96 R/W ORDER XLI
RULE 1 OF THE CPC. AGAINST THE JUDGMENT AND DECREE
DATED 30.05.2020 PASSED IN O.S.No.9308/2004 ON THE FILE
OF THE XLIII ADDL.CIVIL AND SESSIONS JUDGE (CCH-44) AT
BENGALURU PARTLY DECREETING THE SUIT FOR PARTITION
AND SEPARATE POSSESSION.

THESE APPEALS, COMING ON FOR FURTHER HEARING,
THIS DAY, JUDGMENT WAS DELIVERED THEREIN AS UNDER:

CORAM: HON'BLE MR. JUSTICE SHIVASHANKAR AMARANNAVAR

CAV JUDGMENT

1. RFA No. 723/2021 is filed by defendant No. 2,
RFA No. 1530/2021 is filed by plaintiff and RFA No.
203/2021 is filed by defendant No. 3. In all the three
appeals judgment and decree dated 30.05.2020 passed in
O.S. No. 9308/2004 by XLIII Additional City Civil and
Sessions Judge, Bengaluru, (CCH-44) has been
challenged.

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2. The parties will be referred to as per their ranking before the trial Court.

3. Appellant in RFA No. 723/2021 was defendant No. 2, appellant in RFA No. 1530/2021 was plaintiff and appellant in RFA No. 203/2021 was defendant No. 3 before the trial Court.

4. Plaintiff had filed a suit for partition and separate possession of her share in suit item No. 1 and 2 properties and for mesne profits. Item No. 1 and 2 of suit properties are as under:

"Item No.1

Property bearing old No.58, new No.28, Corporation (Division No.23), Ward No.29, situated at Thotadadevara Mutdagali, Gowdanapete, Cottonpet, Bengaluru -53, measuring East to West:65 feet and North to South:54 feet., with a building thereon and bounded on the-

East by : Thotadadevera galli

West : Property No.42 TCM Royan Road

North by : Private property

South by : Private Property.

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Item No.2

Residential house property, bearing old No.16, new No.42, Old Kemmannagundi Road, Dr.T.C.M. Royan Road, Corporation Ward No.29, Bengaluru, measuring East to West: 85 ft. and North to South:16 ft. with a building thereon and bounded on the –

East by : Property bearing Old No.58, new No.28,Thotadadeveramatada Galli (Item No.1 property) vera galli

West : TCM Royan Road

North by : Property No.42/1

South by : Property No.43.”

5. Case of the plaintiff before the trial Court is as under:

a. Great grandfather of the plaintiff and defendant No. 1, namely late Reddy Nadkalu Muniyappa acquired and owned several properties. He had two sons, who predeceased the said propositus - Muniappa, who were Dodda Byrappa and Thayappa. Said deceased Dodda Byrappa had three sons namely, B.

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Ramachandra Reddy, B. Somashekara Reddy and B. Krishna Reddy.

b. Propositus - Reddy Nadakalu Muniyappa settled his properties in favour of his grandsons by registered deed of settlement dated 28.06.1939. Under the said settlement deed, said Reddy Nadakalu Muniyappa settled suit schedule item Nos. 1 and 2 properties in favour of father of plaintiff and defendant No. 1.

c. Father of plaintiff and defendant No. 1, namely B. Ramachandra Reddy, died intestate, in April 1980, leaving behind the plaintiff and defendant No. 1 as his legal heirs, since his wife had predeceased him. Hence, plaintiff and defendant No. 1 have got equal share in the suit schedule properties. Even though plaintiff demanded for partition with defendant No. 1, it was of no use. In the meanwhile, plaintiff came to know that defendant No. 1 had sold schedule item No. 1 property to defendant No. 2, as per registered sale deed dated 23.02.1998, without the consent of the plaintiff, which

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is not binding on the plaintiff. As per registered sale deed dated 05.12.2001, defendant No. 1 and his children sold suit schedule item No. 2 property in favour of defendant No. 3. Plaintiff is in joint possession of the suit schedule property.

6. Defendant No. 1 in his written statement has contented as under:

a. Defendant No. 1, except admitting the relationship between plaintiff and defendant No. 1 and execution of registered settlement deed dated 28.06.1939 by propositus - great grandfather of plaintiff i.e. Reddy Nadakalu Muniyappa denied all other allegations made in the plaint.

b. Defendant No. 1 contended that father of the plaintiff and defendant No. 1, namely B. Ramachandra Reddy had three children namely, Vishwanath Reddy, plaintiff and defendant No. 1. Said Viswanath Reddy died in the year 1948 at the age of 12 years, prior to the death of his father, B. Ramachandra Reddy. Mother

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of the plaintiff, plaintiff as well as defendant No. 1 sold the properties belonging to the brother of the plaintiff, namely, Vishwanath Reddy on 11.02.1991 for a sum of Rs.8,60,000/-. Plaintiff had taken her share from the said sale proceeds. In addition to said share of plaintiff, plaintiff had received a sum of Rs.4,50,000/- from defendant No. 1 on 11.02.1991 by executing an unregistered settlement deed in favour of defendant No. 1 as per panchayat. Plaintiff had no further claims, right or interest in her father's properties. Hence, defendant No. 1 was the absolute owner of the suit schedule properties.

c. Plaintiff is very much aware that defendant No. 1 had already sold the suit schedule properties in the year 1998 and 2001 in favour of defendant Nos. 2 and 3 respectively, since plaintiff had no claim over the same.

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7. Defendant No. 2 in his written statement has contended as under:

a. Defendant No. 2, except admitting the relationship between plaintiff and defendant No. 1 and execution of settlement deed by the propositus Reddy Nadkalu Muniyappa, denied all other allegations made in the plaint including the joint possession of the suit properties by plaintiff.

b. He further contented that to meet the family necessities of defendant No. 1 and his family members, suit schedule item No. 1 was sold to defendant No. 2 as per registered sale deed dated 23.01.1998. Afterwards, khatha in respect of suit schedule item No. 1 was transferred in the name of defendant No. 2. Therefore, defendant No. 2 is the absolute owner in possession of suit schedule item No. 1 property.

c. The Hindu undivided family consisted propositus - Reddy Nadkalu Muniyappa and his 5 grandchildren. The suit schedule properties were not

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self-acquired properties of the said propositus - Reddy Nadkalu Muniyappa. They constituted the properties of Hindu undivided family consisting of said Reddy Nadkalu Muniyappa and his grandchildren as coparceners. The settlement deed dated 28.06.1939 is in effect a partition deed effected by Reddy Nadkalu Muniyappa in the capacity as Kartha of the Hindu joint family. After execution of the said settlement deed, B. Ramachandra Reddy - father of plaintiff and defendant No. 1, constituted Hindu undivided family and they were coparceners. The suit schedule properties were owned by Hindu undivided family consisting of father B. Ramachandra Reddy and defendant No. 1 as coparceners. Defendant No. 1 had half share and father B. Ramachandra Reddy had other half share over the suit schedule properties.

d. Plaintiff executed an unregistered release deed dated 11.02.1999 in favour of defendant No. 1, for consideration releasing her share in favour of defendant

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No. 1 and hence the said document did not require registration. Since the date of execution of the said release deed, defendant No. 1 enjoyed the suit schedule property as exclusive owner.

e. The suit is barred by limitation. Court fee paid is not proper. Defendant No.1 has perfected his title over the suit schedule properties by the concept of adverse possession. Plaintiff has not sought for cancellation of sale deed dated 23.02.1998 within 3 years from the date of execution of the sale deed. Hence the suit is barred by limitation. The properties settled by propositus - Reddy Nadkalu Muniyappa as per registered settlement deed is 23.06.1939 were ancestral properties and not his self-acquired properties. Plaintiff is not in joint possession of the suit schedule properties.

8. The following issues and additional issue Nos. 1 and 2 dated 22.07.2008 and additional issue Nos. 1 to 4 dated 30.10.2012 were framed and they are as under:

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- "1. Whether plaintiff is entitled for half share in the suit schedule properties?*
- 2. Whether plaintiff is entitled for enquiry in to mesne profits of the suit schedule properties?*
- 3. Struck-off.*
- 4. Struck-off.*
- 5. Struck-off.*
- 6. Struck-off.*
- 7. To what decree or order the parties entitled to?*

Addl. issues, 22.07.2008

- 1. Whether defendant No.3 proves that he has purchased item No.2 of suit schedule property from defendant No.1 and his children under registered sale deed, dated 05.12.2001?*
- 2. Whether defendant No.3 prove that he is a bonafide purchaser of item No.2 suit schedule property for valuable consideration?*

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Addl. issues, dated 30.10.2012

1. Whether defendant No.2 proves that defendant No.1 has sold suit item No.1 to defendant No.2 to meet family necessities and family commitments?

2. Whether defendant No.2 proves that after the death of father of defendant No.1, defendant No.1 became an absolute owner of suit item No.1?

3. Whether defendants prove that the court fee paid is not proper?

4. Whether defendants prove that the suit is not notice as contended in the written statement?"

9. Plaintiff was examined as P.W.1 and got marked Ex.P.1 to Ex.P.10. Defendant No.1 was examined as D.W.1 and got marked Ex.D.1 to Ex.D.5. D.W.2 is a witness who has deposed regarding plaintiff executing unregistered deed in favour of defendant No. 1 on 11.02.1991 after receiving Rs.4,50,000/-. Defendant No. 3 was examined

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as D.W.3 and got marked Ex.D.6 to Ex.D.8. Defendant No. 2 was examined as D.W.4 and got marked Ex.D.9 to Ex.D.23.

10. The trial Court after hearing arguments and appreciating the evidence on record has answered the above issues as under:

"19. The answers to the above issues are-

Issue No.1 - Partly positive (half share in suit II property and 1/4 share schedule in suit schedule-I property

Issue No.2 - In the positive

Issue No.3 - Struck-off.

Issue No.4 - Struck-off.

issue No.5 - Struck-off.

issue No.6 - Struck-off.

Addl. issue Nos.-1 & 2, framed on 22.07.2008, need not be considered in view of the Judgment passed in R.F.A.No.1063/2010, which has become final.

Addl. Issues framed on 30.10.2012

Addl.issue-1 - In the negative



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Addl.issue-2 - In the negative

Addl.issue-3 - In the negative

Addl.issue-4 - In the negative

Issue No. 7 - As per the final order"

11. The trial Court decreed the suit partly with cost holding that the plaintiff is entitled to half share in suit schedule item No. 2 property as per judgment and decree passed in RFA No. 1063/2010 and separate possession of the same. Defendant No. 3 is entitled to half share in suit schedule item No. 2 property. Plaintiff is entitled to 1/4th share in suit schedule item No. 1 property and separate possession of the same. Defendant No. 2 is entitled to 3/4th share in suit schedule item No. 1 property and separate possession of the same.

12. Earlier defendant No. 2 was placed ex-parte and considered judgment was passed on 19.03.2010. Defendant No. 3 preferred appeal against the judgment and decree dated 19.03.2010 passed in RFA No. 1063/2010, which was dismissed on 02.12.2010. In the

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earlier judgment it was held that plaintiff is entitled to half share in the suit schedule properties. Defendant No. 2 filed Miscellaneous No. 276/2011 praying to set aside ex-parte decree and the same was allowed on 19.06.2012, judgment and decree passed in the suit was set aside and the suit was restored against all the defendants. The trial Court has observed that the decree of the suit passed earlier dated 19.03.2010 against defendant No. 3 has become final since the decree challenged in RFA No. 1063/2010 by defendant No. 3 was dismissed on 02.12.2010.

13. Heard arguments of learned counsel for appellant – defendant No. 2 in RFA No. 723/2021, learned counsel for the Appellant – Plaintiff in RFA No. 1530/2021 and learned counsel for appellant – defendant No. 3 in RFA No. 203/2021.

14. Learned counsel for appellant in RFA No. 723/2021 would contend that the plaintiff had filed the suit stating that she was in joint possession of the suit



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properties and paid the Court fee under Section 35(2) of the Karnataka Court Fee and Suit Valuation Act (hereinafter referred to as 'the Act'). Subsequently, the plaintiff got amended the plaint as per order passed on I.A. No. 29 that she is ready to pay the Court fee for possession. The plaint has not been amended for valuing the suit and paying the Court fee under Section 35(1) of the Act. But, Court fee of Rs.87,125/- was paid on 22/23-01-2019 along with I.A. No. 31, but, said I.A. was subsequently withdrawn on 15.02.2019. Subsequent I.A. filed by the plaintiff in I.A. No. 32 under Order 6 Rule 17 of CPC seeking amendment of the prayer was dismissed on the ground that earlier I.A. for similar prayer in I.A. No. 31 was withdrawn. Said order has not been challenged by the plaintiff. The plaintiff filed I.A. No. 1/2024 in RFA No. 1530/2020 for adding the prayer and it is pending consideration. Court fee paid without amending the plaint to include possession and paying the Court fee as required under Section 35(1) of the Act cannot be entertained. On

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that point he placed reliance on the decision of Division Bench of this Court in the case of ***B.S. Malleshappa Vs. Koratagigere B. Shivalingappa and others, 2001 SCC Online Kar. 297*** wherein it is held that the Court cannot either at the instance of defendant, or suo moto, convert the suit as one under Section 35(1) of the Act on the basis of defendant's pleadings or evidence. The Court cannot treat the suit as one falling under Section 35(1) of the Act without there being amendment to the plaint and directing the plaintiff to pay the Court fee under Section 35(1) of the Act does not arise and the suit has to be dismissed as possession has not been sought for. He, placing reliance on the decision of coordinate Bench of this Court in the case of ***Smt. Premaleela (dead) by LRs Vs. Sri. C. Nagappa and others, W.P. 11379/2015*** decided on **09.03.2020** contends, that plaintiff suffers the risk of having an adverse order, but there can be no direction that valuation is to be re-made as per Section 35(1) of the Act. He further submits that the suit of the plaintiff, one

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filed contending that she is in joint possession, valuing the suit and paying Court fee under Section 35(1) of the Act cannot be entertained and relief cannot be granted unless there is amendment to the plaint seeking possession and valuing the suit under Section 35(2) of the Act.

a. He further contended that the appellant – defendant No.2 was a tenant in item No. 1 of suit schedule property since the year 1980 and he has paid the rent to defendant No.1 and his father. Plaintiff has not claimed rent or not asserted that she is the owner/joint owner/co-owner of item No. 1 of suit schedule property.

b. Defendant No. 2 has purchased item No. 1 of suit schedule property under sale deed Ex.P.3 dated 23.02.1988 from defendant No.1. Plaintiff has not sought cancellation of the said sale deed nor sought any prayer that the said sale deed is not binding on her.

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c. The trial Court, considering Ex.P.2 – settlement deed has rightly held that the suit properties are coparcenary properties.

d. He contends that if a non-executant seeks annulment of a deed, he has to seek a declaration that the deed is invalid or non-est or illegal or that it is not binding on him and on that point he placed reliance on the decision of the Hon'ble Apex Court in the case of ***Sushrid Singh alias Sardool Singh Vs. Randhir Singh and others, (2010) 12 SCC 112.*** On the said point he places reliance on 3 other decisions, namely, ***Ganapati Santaram Bhosale Vs. Ramachandra Subbaro KulKarni, 1985 SCC OnLine Kar. 54, Vadde Sanna Hulugappa and others Vs. Vadde Sanna Hulugappa and others, 1998 SCC OnLine Kar 96*** and ***Omkar and others Vs. Sambhaji and another, 2021 SCC OnLine Kar 16311.***

e. The amendment sought in the appeal by the plaintiff seeking to include the prayer that the sale deed



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executed by defendant No. 1 in favour of defendant No. 2 is not binding on the plaintiff, the same cannot be allowed and on that point he placed reliance on the decision of the Hon'ble Apex Court in the case of ***Basavaraj Vs. Indira and others, (2024) 3 SCC 705.***

f. He further submits that if the suit is not filed within the period of limitation prescribed, then not only the limitation will come to an end and it stands extinguished as per Section 27 of the Limitation Act and on that point he placed reliance on the decision of this Court in the case of ***State of Karnataka and others Vs. Krishnappa, since dead by LRs and others, N.C. 2023 KHC 21494*** decided on ***19.06.2023.***

g. The sale deed executed by defendant No.1 in favour of defendant No.2 is a registered sale deed and plaintiff came to know of it and on that point he placed reliance on the decision of the Hon'ble Apex Court in the case of ***Dilboo (Smt) (Dead) by LRs and others***

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702. Therefore, suit is to be filed within 3 years from the year 1998 and suit filed in the year 2004 is beyond the period of limitation. On these grounds he prayed to allow the appeal and set aside the decree passed by the trial Court.

15. Learned counsel appearing for appellant – defendant No.3 in RFA No. 203/2021 submits that he will adopt the arguments of learned counsel for appellant – defendant No. 2 in RFA No. 723/2021.

16. Learned counsel for appellant – plaintiff in RFA No. 1530/2021 would contend that one of the properties has been allotted to the share of Vishwanath Reddy under Ex.P.2 – settlement deed. Said Vishwanath Reddy died and subsequent to his death said property was sold by the mother of plaintiff and defendant No. 1. Plaintiff, defendant No. 1 and son of defendant No. 1 joined for executing the sale deed wherein it is stated that mother of Vishwanath Reddy, namely, Janamma had inherited the

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said property after the death of Vishwanath Reddy and as insisted by the purchaser, plaintiff defendant No. 1 and Guruprasad – son of defendant No. 1 joined for executing the sale deed. In the sale deed – Ex.P.3 executed by defendant No.1 in favour of defendant No.2 it is mentioned that the property originally belonged to Reddy Nadukalu Muniyappa and that itself indicate that this property is not ancestral property at his hands. In Ex.P.2 – settlement deed said Reddy Nadukalu Muniyappa has stated that the property settled is his family property, that means that it is his separate property and not ancestral property. D.W.1 (defendant No. 1), in the cross-examination has admitted that the suit properties are the self-acquired properties of his grand father. He further contended that defendant Nos. 1 and 2 have taken the contention that the suit schedule properties are ancestral properties and it is for them to establish the same, they have not placed on record any material to show that the suit properties are the ancestral properties.

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a. There is no limitation for filing a suit for partition, it is a running cause of action and possession of one co-sharer is on behalf of all co-sharers and on that point he placed reliance on the decision of the Hon'ble Apex Court in the case of ***Vidya Devi alias Vidya Vati (DEAD) By LRs Vs. Prem Prakash and others, (1995) 4 SCC 496.***

b. He further contended that in paragraph No. 7 of the plaint it is averred that sale by defendant No. 1 in favour of defendant No. 2 is not binding on the plaintiff. Entire plaint is to be read to ascertain what is the case of the plaintiff and what reliefs are sought.

c. The plaintiff has filed fresh valuation slip on 23.01.2019 and paid Court fee of Rs.87,125/- under Section 35(1) of the Act. On that point he placed reliance on the decision of the Hon'ble Apex Court in the case of ***Hussain Ahmed Choudhury and others Vs. Habibur Rahman (Dead) through LRs and others, 2025 SCC OnLine SC 892.***

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d. He further contended that if property continues to be joint until partition, and unilateral act is not open to any member of the joint family to convert any joint family property into his personal property and on that point he placed reliance on the decision of the Hon'ble Apex Court in the case of ***Bhagawant P. Sulakhe Vs. Digambar Gopal Sulake and others, AIR 1986 SC 79.***

e. He further submits that seeking relief of declaration that the sale deed is not binding is not necessary and on that point he placed reliance on the decision of a coordinate Bench of this Court in the case of ***Munithayamma and another Vs. Byanna and others, AIR Online 2022 KAR 187*** and in the case of ***Ahalya H. Shetty Vs. Vathsala S. Shetty, AIR 2024 Karnataka 47.***

f. The learned counsel contends that if the suit is filed by paying the Court fee under Section 35(2) of the Act and contending that she is a sharer, she is

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presumed to be in constructive possession of the property and Court fee is payable under sub-Section (2) of Section 35 of the Act instead of sub-Section (1) of Section 35 of the Act and on that point he placed reliance on the decision of the Hon'ble Apex Court in the case of ***Jagannath Amin Vs. Seetharama (Dead) by LRs and others, (2007) 1 SCC 694.***

g. He contends that half share in item No. 2 of the property has been granted to the plaintiff by judgment and decree passed by the trial Court and the same has been challenged by defendant No.3 in RFA No. 1063/2010 and the said appeal has been dismissed on merits. Therefore, appellant – defendant No. 3 cannot maintain another appeal filed in RFA No. 203/2021.

h. Father of the plaintiff got item Nos. 1 and 2 of the properties under settlement deed and therefore, they are his separate properties and the plaintiff being the daughter is having half share in them and defendant No. 1 is having half share. Therefore,

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judgment of the trial Court allotting 1/4th share in item No. 1 property to the plaintiff is not proper.

17. In reply, learned counsel for defendant No. 2 would contend that what should be contained in a plaint in partition suit has been considered by the Hon'ble Apex Court in the case of ***Shasidhar and others Vs. Ashwini Uma Mathad and another, (2015) 11 SCC 269*** in paragraph No. 20. The plaint does not state whether the suit schedule properties are the self-acquired properties or ancestral properties. In Ex.D.1 – sale deed it is averred that the property was purchased by N. Muniyappa Reddy and there is no such averment in the sale deed – Ex.P.3 under which defendant No. 2 has purchased item No. 1 from defendant No. 1. Therefore, the property is ancestral property, if not that would have been stated in the sale deed that it is self-acquired property of N. Muniyappa Reddy. The property sold under Ex.D.1 – sale deed was allotted to the share of Vishwanath Reddy under settlement deed Ex.P.2. The plaintiff has not amended the



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plaint to make averment with regard to the date on which the plaintiff is not in possession as required under Section 35(1) of the Act. I.A. No. 31 filed seeking amendment of the plaint filed on 23.01.2019 along with DD for Rs.87,125/- has been not pressed by the plaintiff on 15.10.2019. Thereafter, the Court ought to have returned the said DD to the plaintiff. The trial Court while answering issue No. 2 gave a finding that the plaintiff is not in possession of the suit properties and it is based on her admission in the cross-examination. Said finding by the trial Court has not been challenged by the plaintiff. He placed reliance on the decision of a coordinate Bench of this Court rendered in the case of ***K.R. Ravishankar and another Vs. Smt. Vijayamma and others, RFA No. 345/2019*** decided on **26.10.2023** and contended that if there is no averment that the plaintiff is not in possession as required under Section 35(1) of the Act, the suit requires to be dismissed. He placed reliance on the decision of the Hon'ble Apex Court in the case of ***Eureka***

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Builders and others Vs. Gulabchand, s/o. Veljee Dand since deceased by legal representatives and others(2018) 8 SCC 67 with regard to limitation specifically referring to paragraph No. 54 of the judgment.

18. The following points arises for consideration:

(i) Whether the appeal filed by defendant No.3 in RFA No. 203/2021 is maintainable and whether it survives for consideration?

(ii) Whether the trial Court is justified in holding that the suit schedule Item No. 1 property is ancestral property?

(iii) Whether plaintiff has not amended the plaint for valuing the suit as required under Section 35(1) of the Act?

(iv) Whether the plaintiff has to seek declaration that the alienations made by defendant No. 1 to the other defendants is not binding on her?

(v) Whether the suit of the plaintiff is barred by limitation?

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Re-Point No.(i)

RFA No.203/2021 is filed by defendant No.3 with the following prayer:

"To set aside the divergent findings in judgment dated 30.05.2020 passed by the XLIII Additional City Civil and Sessions Judge, Bangalore,(CCH-44) in OS No.9308/2004 by allowing the appeal filed by the appellant in respect of Item No. 2 of schedule property belonging to him."

19. Appellant was defendant No.3 in O.S. No. 9308/2004 and he contested the said suit. In the said suit, judgment and decree was rendered on 19.03.2010 wherein the suit came to be decreed as under:

"The plaintiff is entitled for partition and separate possession of half share in a suit Item No. 1 and 2 by metes and bounds.

Plaintiff is entitled for mesne profits in accordance with law.

Draw preliminary decree."

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20. Defendant No.3 challenged the said judgment and decree dated 19.03.2010 passed in O.S. No. 9308/2004 before this Court in RFA No. 1063/2010. Said appeal came to be dismissed by judgment and decree dated 02.12.2010 passed in RFA No. 1063/2010.

21. Defendant No.2 in O.S. No. 9308/2004 was placed ex-parte and he had filed Misc.No.276/2011 praying to set aside the ex-parte decree passed against him. Said miscellaneous case came to be allowed on 19.06.2012 and ex-parte judgment and decree dated 19.03.2010 passed in O.S. No. 9308/2004 came to be set-aside and suit was restored. Thereafter the suit was contested by defendant No.2 and the judgment has been passed on 30.05.2020. In the said judgment the trial Court while answering issue No.1, additional issue Nos. 1, 2 and 4 framed on 30.10.2012 in paragraph No. 20 has observed as under:

"The peculiar and technical point involved in this case are to be considered. In the initial

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stage, the second defendant herein was placed exparte and considered judgment was passed on 19.03.2010. The 3rd defendant preferred appeal against the said judgment and decree in RFA No.1063/2010, which was dismissed, on 02.12.2010. In that event the earlier judgment passed holding that the plaintiff is entitled to half share in a suit schedule properties, against the third defendant, has become final and now this Court cannot pass inconsistent decree with that of the Judgment passed in RFA No.1063/2010 in relation to the 3rd defendant, in respect of suit schedule Item No.2 property."

22. While observing so the trial Court in the operative portion of the judgment has held as under:

"The suit schedule properties are to be partitioned and the plaintiff is entitled to 1/2th share in the below shown suit schedule Item No. 2 property as per the judgment and decree passed in RFA No. 1063/2010 and separate possession of the same shall be delivered to the plaintiff.

The 3rd defendant is entitled to half share in the below shown suit schedule Item No.2

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property and separate possession of the same shall be delivered to him, if required fee is paid."

23. Now defendant No.3 has filed the present RFA No. 203/2021 praying to set aside the findings in judgment dated 30.05.2020 passed in O.S. No. 9308/2004 in respect of Item No.2 of suit schedule property belonging to him. Said judgment passed by the trial Court dated 30.05.2020 is based on the dismissal of RFA No. 1063/2010 filed by the present appellant/defendant No.3. The decree passed against defendant No.3 dated 19.03.2010 has become final, since RFA No. 1063/2010 filed by him came to be dismissed on merits. Therefore, appeal filed by defendant No.3 in RFA No.203/2021 does not survive for consideration and it is not maintainable. Hence, it requires to be dismissed. The point is answered accordingly.

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24. **Re-point No.(ii)**

It is the specific case of the plaintiff that the Propositus - Reddy Nadakalu Muniyappa settled his properties in favour of his grandsons by registered deed of settlement dated 28.06.1939. Under the said settlement deed, said Reddy Nadakalu Muniyappa settled suit schedule Item Nos. 1 and 2 properties in favour of father of plaintiff and defendant No.1. Father of plaintiff and defendant No.1, namely, B. Ramachandra Reddy died intestate in April 1980 leaving behind plaintiff and defendant No.1 as his legal heirs. Hence, plaintiff and defendant No.1 have got equal share in the suit schedule properties.

25. Defendant No.1 has not disputed the execution of deed of settlement dated 28.06.1939 by Reddy Nadakalu Muniyappa, settling suit schedule Item Nos. 1 and 2 properties in favour of B. Ramachandra Reddy - father of plaintiff and defendant No.1.

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26. It is the specific case of plaintiff that late Reddy Nadakalu Muniyappa acquired and owned several properties including Item Nos.1 and 2 properties. Even under the said settlement deed, one property has been settled in favour of Vishwanath Reddy, son of B. Ramachandra Reddy, brother of plaintiff and defendant No.1. Said Vishwanath Reddy died in the year 1948 at the age of 12 years, prior to the death of his father B. Ramachandra Reddy. Mother of plaintiff and defendant No. 1 sold the properties belonging to said Vishwanath Reddy on 11.02.1991.

27. Defendant No.1 (D.W.1) in is cross-examination has admitted the suggestion in page 10, that suit properties are self-acquired properties of his great grandfather.

28. Defendant No.2 in his written statement at paragraph No. 6 has pleaded as under:

*"the settlement deed dated 28.06.1939 is
in effect a partition Deed effected by Shri*

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Muniyappa in his capacity as Karta of the Hindu joint family. The Item No.1 of the schedule property fell to the share of Shri D.Ramachandra Reddy after the Partition Deed dated 28.06.1939. After the execution of the said Deed, Shri Ramachandra Reddy, father of Plaintiff, and the 1st Defendant constituted a Hindu undivided family and they constituted a Hindu undivided family as coparceners."

29. Defendant No.2 is not a member of the family of plaintiff and defendant No.1. Since defendant No.2 has purchased Item No.1 of the suit schedule properties from defendant No.1, he is stepping into the shoes of defendant No.1. Defendant No.1 (D.W.1) has specifically admitted in his cross-examination that the suit schedule properties are self-acquired properties of his great grandfather. The said great grandfather Reddy Nadakalu Muniyappa settled his properties under registered Settlement Deed dated 28.06.1939, under which Item Nos.1 and 2 properties are settled in favour of B. Ramachandra Reddy - father of plaintiff and defendant No.1. Therefore, at the hands of B.

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Ramachandra Reddy, Item Nos. 1 and 2 properties are his separate properties.

30. The term 'settlement' does not find a place in the Transfer of Property Act. It is defined under the Indian Stamp Act, 1899. Section 2(24) of the Indian Stamp Act reads as under:

"Settlement - *Settlement means any non-testamentary disposition, in writing, of movable or immovable property made (a) in consideration of marriage, (b) for the purpose of distributing property of the settler among his family or those for whom he desires to provide, or for the purpose of providing for some person dependent on him, or (c) for any religious or charitable purpose;"*

31. Disposition for reference means a device, "intended to comprehend a mode by which a property can pass, whether by act of parties or by an act of the law," and "includes transfer and charge of property,".

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32. The Hon'ble Apex Court in the case of **Angadi Chandranna versus Shankar and others 2025 INSC 532** has observed as under:

"17. It cannot be disputed that the properties divided among Defendant No.1 and his brothers through partition deed dated 09.05.1986, are joint family properties. However, as per Hindu law, after partition, each party gets a separate and distinct share and this share becomes their self- acquired property and they have absolute rights over it and they can sell, transfer, or bequeath it as they wish. Accordingly, the properties bequeathed through partition, become the self-acquired properties of the respective sharers."

33. Considering the above aspects, Item Nos. 1 and 2 of the suit schedule properties are the self-acquired properties of Reddy Nadakalu Muniyappa – great grandfather of plaintiff and defendant No.1. He settled Item Nos.1 and 2 of suit schedule properties under registered settlement deed dated 28.06.1939 in favour of B. Ramachandra Reddy - father of plaintiff and defendant No.1. Therefore, the property at the hands of B.

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Ramachandra Reddy, who acquired the properties under settlement deed, which is in the sense partition deed is his self-acquired properties. Therefore, plaintiff and defendant No.1, who are daughter and son of said B. Ramachandra Reddy are having equal share in the suit schedule Item Nos.1 and 2 properties.

34. Insofar item No.2 of suit schedule property is concerned, judgment of the trial Court awarding half share to the plaintiff has been affirmed by this Court in RFA No. 1063/2010 by judgment dated 02.12.2010. Therefore, the trial Court is not justified in holding that suit schedule Item No. 1 is ancestral property, giving 3/4th share to defendant No.1 and 1/4th share to the plaintiff. The plaintiff and defendant No. 1 are having half share each in item Nos. 1 and 2 properties. Accordingly, the said point is answered.



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35. **Re-Point No. (iii)**

In **B.S. Malleshappa vs. Koratagigere**

B.Shivalingappa and others (supra), Division Bench of

this Court has held as under:

"11. We may now conveniently summarise the principles relating to Court fee in regard to suits for partitions and appeals therefrom:

(i) Payment of Court fee will depend on plaint averment alone. Neither the averments in the written statement, nor the evidence nor the final decision have a bearing on the decision relating to Court fee.

(ii) The scope of investigation under Section 11 is confined practically to determine two points: (i) Undervaluation of the subject-matter of the suit; and (ii) category under which the suit falls, for the purpose of Court fee. Once the category of suit is determined with reference to plaint averments, the Court cannot subsequently change the category on the basis of the averments in the written statement or on the basis of evidence and arguments. In short, if the suit is found to fall under Section 35(2) of the Act on the plaint averments, the Court has no power to convert the suit as one falling under Section 35(1) of the Act,

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at any point of time, much less while rendering judgment. The only exception is when the plaint is amended.

(iii) The plaintiff in a suit being dominus litis has the choice of filing a suit of a particular nature or seek a particular relief. Neither the defendant nor the Court can alter the suit as one for a different reliefs as a suit falling in a different category and require the plaintiff to pay Court fee on such altered category of suit.

(iv) If the plaintiff claims that he is in joint possession of a property and seeks partition and separate possession, he categorises the suit under Section 35(2) of the Act. He is therefore liable to pay Court fee only under Section 35(2). If on evidence, it is found that he was not in joint possession, the consequence is that the relief may be refused in regard to such property or the suit may be dismissed. But the question of Court treating the suit as one falling under Section 35(1) of the Act and directing the plaintiff to pay the Court fee under Section 35(1) of the Act does not arise. Even after written statement and evidence (which may demonstrate absence of possession or joint possession), if the plaintiff chooses not to amend the plaint to bring the suit under Section 35(1) and pay Court fee applicable thereto, he

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takes the chance of suit getting dismissed or relief being denied.

(v) On appreciation of evidence, if the Court disbelieves the claim of plaintiff regarding joint possession, it can only hold that the case does not fall under Section 35(2) and therefore plaintiff is not entitled to relief. It cannot, in the judgment, hold that the case of plaintiff should be categorised under Section 35(1) nor direct the plaintiff to pay Court fee on market value under Section 35(1) of the Act.

(vi) The Court fee payable on an appeal is the same as the Court fee payable on the suit. Therefore, even if the Trial Court holds that plaintiff was not in joint possession or that plaintiff had been excluded from possession, there will be no change in the Court fee payable in an appeal by the plaintiff against such decision. The Court fee on the appeal will still be the same as the Court fee paid on the plaint in the Court of first instance.”

36. Placing reliance on the said decision, Coordinate Bench of this Court in the case of **Smt. Premaleela and others vs. C. Nagappa (supra)** has held as under:

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"22. In a suit for partition, it is the averment in the plaint that needs to be taken note of. Till the shares of the parties are carved out, parties are deemed to be in constructive possession. Taking note of the observations of the Division Bench at Para 11 (iv) as noticed above, in the worst scenario, even if the court were come to a conclusion that parties not in joint possession, the plaintiff suffers the risk of having an adverse order, but there can be no direction that valuation is to be re-made as per Section 35 (1) of the Act. This court in RFA No.19/2013 c/w W.P.No.35239/2013 dated 27.02.2020 has also dealt this question and arrived at a similar conclusion."

37. Earlier plaintiff had valued the suit under Section 35(2) of the Act and paid Court fee accordingly. Subsequently, the plaintiff got amended the plaint as per order dated 02.06.2017 passed on I.A.No.29. As per the said order, the following paragraph has been included in the plaint after paragraph No.7. The same reads as under:

"If this Hon'ble Court comes to the conclusion that as against the second defendant the suit needs

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to be treated as suit for possession, then the decree may be given treating it so as partition and also the possession is sought in the prayer. The plaintiff is ready to pay the court fee treating the suit as suit for possession as against the 2nd defendant and schedule property item No.1."

38. P.W.1 in her cross-examination has admitted that she is not in possession of Item No.1 of the suit schedule property. After amendment as noted supra, plaintiff has filed a fresh valuation memo dated 23.01.2019 valuing the suit under Section 35(1) of Act and paid a Court fee of Rs.87,125/-. Said valuation slip is filed in terms of amendment made to the plaint as noted supra. Therefore, plaintiff has sought possession and amended the plaint accordingly and valued the suit as required under Section 35(1) of the Act and paid Court fee. Therefore, from the above, it is clear that plaintiff has sought possession of Item No.1 of the suit schedule property and valued the suit under Section 35(1) of the Act and paid Court fee of Rs.87,125/- on 22.01.2019.

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Therefore, the contention of learned counsel for appellant - defendant No.2 that suit is not valued under Section 35(1) of the Act and the plaint is not amended seeking possession holds no merit. Accordingly, the said point is answered.

39. **Re-Point No. (iv)**

Learned counsel for appellant - defendant No. 2 has contended that if a non-executant seeks annulment of a deed, he has to seek a declaration that the deed is invalid or non-est or illegal and on that point he places reliance on the following decisions.

The Hon'ble Apex Court in the case of **Suhrid Singh alias Sardool Singh** (supra) has observed as under:

"Where the executant of a deed wants it to be annulled, he has to seek cancellation of the deed. But if a non-executant seeks annulment of a deed, he has to seek a declaration that the deed is invalid, or non-est, or illegal or that it is not binding on him. The difference between a prayer for cancellation and declaration in regard to a deed of transfer/conveyance, can be brought out by the

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following illustration relating to 'A' and 'B' -- two brothers. 'A' executes a sale deed in favour of 'C'. Subsequently 'A' wants to avoid the sale. 'A' has to sue for cancellation of the deed. On the other hand, if 'B', who is not the executant of the deed, wants to avoid it, he has to sue for a declaration that the deed executed by 'A' is invalid/void and non- est/ illegal and he is not bound by it. In essence both may be suing to have the deed set aside or declared as non-binding. But the form is different and court fee is also different. If 'A', the executant of the deed, seeks cancellation of the deed, he has to pay ad-valorem court fee on the consideration stated in the sale deed. If 'B', who is a non-executant, is in possession and sues for a declaration that the deed is null or void and does not bind him or his share, he has to merely pay a fixed court fee of Rs. 19.50 under Article 17(iii) of Second Schedule of the Act. But if 'B', a non- executant, is not in possession, and he seeks not only a declaration that the sale deed is invalid, but also the consequential relief of possession, he has to pay an ad-valorem court fee as provided under Section 7(iv)(c) of the Act."

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A Division Bench of this Court in the case of
Ganapati Santaram Bhosale (supra) has held as under:

"19. The second contention that the suit should have failed for lack of specific relief in regard to the setting aside of the sales is also devoid of merit. It is now well settled that in a suit for partition by Hindu coparcener it is not necessary for him to seek the setting aside of the sale. It is sufficient if he asks for his share in the joint family properties and he be put in possession thereof and for a declaration that he is not bound by any alienations or interest of others created in such properties which, fall to his share."

In ***Vadde Sanna Hulugappa*** (supra), co-ordinate
Bench of this Court has held as under:

"10. It has been laid down by this Court in Ganapati Santaram Bhosale and Another v Ramachandra Subbarao Kulkarni and Others, that in a suit for partition by a Hindu coparcener, it is not necessary to seek setting aside of alienation and it is sufficient to seek his share

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and possession with declaration that he is not bound by the alienations."

In ***Omkar and others*** (*supra*), co-ordinate Bench of this Court has held as under:

"18. Now again the question arises as to whether when no relief is claimed in the suit, can the temporary injunction could be granted against him. The settled proposition is that, even if the plaintiffs contend that the registered sale deed executed by Defendant 1 in favour of Defendant 2 is not for the family necessity and that they are bound to ignore the said sale deed, they have to seek a declaration to that effect. Of course, plaintiffs who are not signatories to the sale deed in question are not required to seek a decree for setting aside the sale deed, but seeking declaration-in-respect of the sale deed is very much necessary".

40. Learned counsel appellant - defendant No. 2 placing reliance on the said decisions would contend that seeking declaration in respect of sale deed executed by

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defendant No. 1 in favour of defendant No. 2 is very much a necessary.

41. Coordinate Bench in the case of **Munithayamma** (supra) by referring to the decision of **Ganapati Santaram Bhosale** (supra) rendered by the Division Bench as observed as under:

"43. Thus, the conveyance by a coparcener of the entire coparcenary property without the consent of the other coparceners would be void in so far as it relates to the shares of other coparceners who had not joined in the conveyance. If the conveyance in respect of the share of other coparceners is void, then obviously, the other coparceners would also not be required to seek for a declaration that the sale by the other coparcener was void or was not binding upon them.

44. It is also relevant to state here that an alienation made by a person would only bind him and not a person who is not a party to the conveyance. If a person who is not a party to the conveyance is required to seek for a declaration that he is not bound by the conveyance made by another or that the instrument is required to be cancelled, it

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would virtually amount to an admission by him that he was bound by the sale unless he challenges it.

45. It is to be stated here that only if a person is a party to the conveyance, he would have to challenge the same by seeking for a declaration or its cancellation. A person who is not a party to the conveyance is not required to seek for cancellation of that instrument or for a declaration that he is not bound by the instrument, fundamentally because that conveyance is only by that person who had executed the document. A transfer of property under a document cannot traverse beyond the executant and the beneficiary of the transfer.

46. It must also be borne in mind that a purchaser of a coparcenary property is basically claiming title through all the coparceners and the denial of title of one or more coparceners by him would be a self-defeating exercise. Since a purchaser from one coparcener is not denying the title of the other coparceners, the need of the other coparceners, who are not parties to the transfer, to claim a declaratory decree under Section 34 of the Specific Relief Act on the premise that their title is being denied would also not be applicable.

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47. *If the argument that every coparcener is required to challenge the conveyance of another coparcener is accepted, it would tantamount to stating that the coparcener who had not sold his share is also a party to the sale made by the other coparcener, which would be irrational. The argument of the learned counsel for the appellants is, therefore, unacceptable.*

48. *Reliance placed by the learned counsel for the appellants on the judgment in Ganapati Santaram Bhosale's case cited supra would be of no avail. In the said case, the Division Bench has clearly stated that a Hindu coparcener doesn't need to seek for setting the sale and it would be sufficient if he merely asks for his share and be put in possession of that share and for a declaration that he is not bound by any alienation. The Division Bench has not examined whether it is imperative or mandatory for a coparcener to seek for a declaration that he is not bound by any alienations or interest that has been created in the properties. The Division Bench has not laid down the law that a declaration is required to be mandatorily sought for regarding alienation or interest created in the properties. Since the Division Bench has clearly stated that it was not necessary for a Hindu coparcener to seek for setting aside the*

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sale, it would naturally follow that it would not be mandatory for a declaration to be sought that the sale was not binding on him."

42. In **Ahalya H. Shetty** (supra) coordinate Bench considering the judgment rendered in the case of **Ganapati Santaram Bhosale** (supra) and in the case of **Munithayamma** (supra) has observed as under:

"16. On examining the judgment rendered by the trial Court, though defendant No.2 has taken a contention that the alienation by defendant No.1 on 27.02.1987 was for family necessity, there is absolutely no evidence let in by defendant No.2 to substantiate his claim that alienation by defendant No.1 was for family necessity. Accordingly, issue No.3 is answered in the negative. Though a plea of collusion is set up in the written statement, however, it seems that defendant No.2 has abandoned the said defence during trial. There is no issue framed by the trial Court and defendant No.2 has also not made any attempts by filing appropriate application calling upon the trial Court to frame an issue on collusion. If these two elements are taken out, then the question that needs to be examined by this Court in the light of

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substantial question of law framed at Sl.No.1 as to whether plaintiffs could have maintained a suit for partition without questioning the sale deed dated 27.02.1987. The law in that regard is no more res integra. The Division Bench of this Court in the judgment cited supra has clearly held that in a suit for partition, a non- alienating member need not question the sale deed executed by one of the family member. It is sufficient if he asks for his share in the joint family properties. The Division Bench held that he can seek a formal declaration. The question that needs examination is as to whether a suit for partition has to fail in the event plaintiffs who are non-alienating members of a joint family fail to seek a formal declaration. My answer is emphatically 'No'. As it is a trite law that in a joint family ancestral property, the members have a pre-existing right and such a right is acquired by birth. If the family members have an antecedent right, the alienation made by one of the member in excess of his/her legitimate share would not take away the right of the other non-alienating family members. The fact that defendant No.2 has failed to substantiate that the alienation was for family necessity and that alienation was with the consent of plaintiffs herein, a simple suit for partition and separate possession

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is very much maintainable. The Division Bench dictum rendered in the judgment cited supra calling upon the plaintiffs to seek a formal declaration is directory in nature and not mandatory. A joint family member who has a independent right, even in absence of a formal declaration cannot be non-suited as it is a pre-existing right and such a right is not lost merely because plaintiffs have not chosen to seek a formal declaration that it is not binding on their legitimate share. If plaintiffs have a independent right dehors alienation made by one family member, the plaintiffs can maintain a simple suit for partition and separate possession even without seeking a mere formal declaration. The fact that Division Bench held that plaintiffs have to seek a mere suit for formal declaration that they are not bound by alienation presupposes and refers to the pre-existing right of joint family members. If plaintiffs have independent right, the alienation in itself will not deprive their legitimate share in the suit schedule property unless that alienation is shown to be for the benefit of the family."

43. A sharer even in the absence of a formal declaration, cannot be non-suited, as it is a pre-existing

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right and such a right is not lost merely because plaintiff has not chosen to seek a formal declaration that it is not binding on her legitimate share. If plaintiff has a independent right dehors alienation made by a family member, the plaintiff can maintain a simple suit for partition and separate possession even without seeking a mere formal declaration. If the plaintiff has independent right, the alienation in itself will not deprive her legitimate share in the suit schedule property unless the alienation is shown to be for the benefit of the family. More so, the plaintiff in paragraph No. 7 of the plaint has pleaded that sale of item No. 1 property by defendant No. 1 and sale of item No. 2 property by defendant No. 1 are without the consent of the plaintiff, same are illegal and plaintiff is not bound by it. Therefore the contention of appellant - defendant No. 2 that the suit in the absence of declaration that said deed executed by defendant No. 1 in favour of defendant No. 2 is not binding on her has no merit. Accordingly, point is answered. In view of the above, the

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amendment sought in I.A. No. 1/2024 seeking declaration regarding alienation made by defendant No. 1 in favour of defendant No. 2 is not binding on plaintiff is not necessary. Hence, I.A. No. 1/2024 is disposed as not necessary.

44. **Re-Point No. (v)**

Learned counsel for appellant - defendant No. 2 would contend that the suit is not filed within the period of limitation prescribed as the suit is not filed within 3 years from the date of sale made by defendant No. 1 in favour of defendant No. 2 in the year 1998 and therefore suit is barred by limitation. He submits that the sale deed executed by defendant No. 1 in favour of defendant No. 2 is a registered sale deed and plaintiff came to know of it and on that point he placed reliance on the decision of the Hon'ble Apex Court in the case of ***Dilboo (Smt) (Dead) by LRs and others*** (supra). He further places reliance on the decision of this Bench rendered in the ***State of Karnataka and others Vs. Krishnappa, since dead by LRs and others*** (supra) contending that if the suit is not

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filed within the period of limitation prescribed, then not only the limitation will come to an end and it stands extinguished as per Section 27 of the Limitation Act.

45. The suit is for partition and separate possession of the plaintiff's share in the suit schedule properties. The Hon'ble Apex Court in the case of **Vidya Devi alias Vidya Vati (DEAD) By LRs** (supra) has held as under:

"20.The legislature has not prescribed any period of limitation for filing a suit for partition because partition is an incident attached to the property and there is always as running cause of action for seeking partition by one of the co-sharers if and when he decides not to keep his share joint with other co-sharers. Since the filing of the suit is wholly dependent upon the will of the co-sharer, the period of limitation, specially the date or time from which such period would commence, could not have been possibly provided for by the legislature and, therefore, in this Act also a period of limitation, so far as suits for partition are concerned, has not been prescribed. This, however, does not mean that a co-sharer who is arrayed as a defendant in the suit cannot raise the

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plea of adverse possession against the co-sharer who has come before the Court as a plaintiff seeking partition of his share in the joint property."

46. The suit filed by the plaintiff is for partition and separate possession of her share in the suit schedule properties. The legislatures have not prescribed any period of limitation for filing a suit for partition. Since partition is an incident attached to the property, there is always a running cause of action for seeking partition by one of the co-sharers. Defendant No. 2 was tenant in item No. 1 of the suit schedule property since the year 1980. Defendant No. 2 purchased item No. 1 of the suit schedule property in the year 1998 and continued in possession. Sale deed executed by defendant No. 1 in favour of defendant No. 2, transferring item No. 1 of the suit sale property had not come to the knowledge of the plaintiff since defendant No. 2 was in possession as a tenant and he continued in possession even after the sale deed. Plaintiff is not seeking

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any setting aside of the sale deed executed by defendant No. 1 in favour of defendant No. 2 in respect of item No. 1 of the suit schedule property. Plaintiff is seeking her share in the suit schedule properties. Therefore, the suit for partition filed by the plaintiff cannot be said to be barred by limitation. Accordingly, the point is answered.

47. In view of the above appeal filed by defendant No. 2 in RFA No. 723/2021 and appeal filed by defendant No. 3 in RFA No. 203/2021 are required to be dismissed. The appeal filed by the plaintiff in RFA No. 1530/2021 is required to be allowed and decree requires to be modified.

48. In view of the above, the following

ORDER

I. RFA No. 723/2021 and RFA No. 203/2021 are dismissed.

II. RFA No. 1530/2021 is allowed.

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III. The judgment and decree dated 30.05.2020 passed in OS No. 9308/2004 by XLIII Additional City Civil and Sessions Judge, Bengaluru (CCH-44) is modified as under:

"The suit of the plaintiff is decreed with costs.

Plaintiff is entitled to half share in suit schedule item No. 1 property and separate possession of the same shall be delivered to her.

Defendant No. 2 is entitled to half share in suit schedule item No. 1 property and separate possession of the same shall be delivered to him.

Plaintiff is entitled to half share in suit schedule item No. 2 property as per judgment and decree passed in RFA No. 1063/2010 and separate possession of the same shall be delivered to her.

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Defendant No. 3 is entitled to half share in
suit schedule item No. 2 property and separate
possession of the same shall be delivered to
him.

Draw decree accordingly.”

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(SHIVASHANKAR AMARANNAVAR)
JUDGE

LRS
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