IN THE HIGH COURT OF KARNATAKA,

DHARWAD BENCH

DATED THIS THE 19TH DAY OF DECEMBER, 2024

BEFORE

THE HON'BLE MR. JUSTICE ANANT RAMANATH HEGDE

REGULAR FIRST APPEAL NO.1229 OF 2007 (DEC/PAR)

C/W

REGULAR SECOND APPEAL NO. 1119 OF 2008

REGULAR SECOND APPEAL NO. 100271 OF 2015

IN RFA NO.1229/2007
BETWEEN:

1. BHARAMAPPA
   S/O.FAKIRAPPA ANCHATAGERI,
   AGED ABOUT 66 YEARS,
   OCC:AGRICULTURE,
   R/O.BIDNAL,
   TAL:HUBLI.
   DIST: DHARWAD.

2. CHANNAPPA
   S/O. BHARAMAPPA ANCHATAGERI,
   AGED 38 YEARS,
   OCC:AGRICULTURE,
   R/O.BIDNAL TAL:HUBLI,
   DIST:DHARWAD.

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Location: HIGH COURT OF KARNATAKA

3. MALLIKARJUN
   S/O. BHARAMAPPA ANCHATAGERI,
   AGED ABOUT 35 YEARS,
   OCC:AGRICULTURE,
   R/O.BIDNAL, TAL:HUBLI,
   DIST:DHARWAD.

4. GANGAPPA BHARAMAPP ANCHATAGERI,
   AGE: 32 YEARS,
   OCC: AGRICULTURE,
   R/O.BIDNAL TAL:HUBLI,
   DIST: DHARWAD.

5. KALLAVVA SOMAPPA ANCHATAGERI,
AGE: 55 YEARS, OCC: AGRICULTURE,
R/O. BIDNAL VILLAGE,
TQ: HUBLI, DIST: DHARWAD.

6. PRABHA SOMAPPA ANCHATAGERI,
AGE: 35 YEARS, OCC: AGRICULTURE,
R/O. BIDNAL VILLAGE,
TQ: HUBLI, DIST: DHARWAD.

...APPELLANTS

(BY SRI. S.K. KAYAKAMATH, ADVOCATE)

AND:

1. SHIVAPPA
S/O. FAKIRAPPA ANCHANTAGERI,
AGE: 60 YEARS,
OCC: AGRICULTURE,
R/O. BIDNAL,
TAL: HUBLI,
DIST: DHARWAD.

2. SINCE DECEASED SHEKAPPA
S/O. FAKIRAPPA ANCHATAGERI,

2a. NINGAWWA SHEKAPPA ANCHATAGERI,
AGE: 55 YEARS, OCC: HOUSEHOLD,
R/O. BIDNAL VILLAGE,
TQ: HUBLI, DIST: DHARWAD.

2b. SMT. MINAKSHI BASANGOUDA NIMBANGOUDAR,
AGE: 35 YEARS,
OCC: HOUSEHOLD,
R/O. BETADUR VILLAGE,
TQ: KUNDAGOL,
DIST: DHARWAD.

2c. SINCE DECEASED BASAPPA
S/O. SHEKAPPA ANCHATAGERI

2c. 1.SMT. SUJATA
W/O. BASAVARAJ ANCHATAGERI,
AGE: 40 YEARS, OCC: HOUSEHOLD,
R/O. BIDNAL VILLAGE,
TQ: HUBLI, DIST: DHARWAD.

2d. SMT. JAYAWWA
W/O. SURESH BYLAL,
AGE: 28 YEARS, OCC: HOUSEHOLD,
R/O. BIDNAL VILLAGE,
TQ: HUBLI, DIST: DHARWAD.

3. SHANKARAPPA
S/O. FAKIRAPPA ANCHATAGERI,
AGE: 28 YEARS,
OCC: AGRICULTURE,
R/O. BIDNAL VILLAGE,
TQ: HUBLI,
DIST: DHARWAD.

4. NARAYANAPPA CHITTANGUNJAL,
AGE: 60 YEARS, OCC: BUSINESS,
R/O. NEKAR ONI,
OLD HUBBALI, TQ: HUBLI,
DIST: DHARWAD.

5. HAZARESAB S/O. CHANDSAB BENDIGERI,
AGE: 55 YEARS, OCC: BUSINESS,
R/O. BANKAPUR CHOWK,
INDIRA NAGAR CROSS,
P.B. ROAD,
TQ: HUBLI,
DIST: DHARWAD.

6. HAZARATBI
W/O. ABDULSALAM BAHADUR,
AGED ABOUT 40 YEARS,
OCC: HOUSEHOLD,
R/O.ISLAMPUR ROAD,
BULDOZER NAGAR,
HUBLI - 580 024.
DIST.DHARWAD.

7. PARVATEVVA
W/O. NARAYANAPPA CHITTANGINJAL,
AGE: 52 YEARS,
OCC: HOUSEHOLD,
R/O. NEKAR ONI,
OLD HUBLI, TQ: HUBLI-24.
DIST: DHARWAD.

8. SINCE DECEASED NELLAVVA
W/O. KALLAPPA BANAPPANAVAR

9. SMT. SAROJAVVA
W/O. BALAPPA SHIRUR,
AGE: 75 YEARS,
OCC: HOUSEHOLD,
R/O. GOPANKOPP,
TQ: HUBLI,
DIST: DHARWAD.

10. SINCE DECEASED KALLAPPA BANAPPANAVAR

10a. SHIVAPPA KALLAPPA BANAPPANAVAR,
AGE: 50 YEARS, OCC: AGRICULTURE,
R/O. NAVALURU,
TQ: HUBLI, DIST: DHARWAD.

10b. MOHAN KALLAPPA BANAPPANAVAR,
AGE: 45 YEARS,
OCC: AGRICULTURE,
R/O. NAVALURU, TQ: HUBLI,
DIST: DHARWAD.

…RESPONDENTS

(BY SRI. DINESH M. KULKARNI AND SMT. VIDYA D. KULKARNI, ADVOCATES FOR R1, R2(A), R2(B) AND R2(D);
SRI. LAXMAN T. MANTAGANI, ADV. FOR R8, R9 AND R10 (A & B);
R2(C) AND R3 ARE SERVED;
SRI. VISHNU BHAT, ADVOCATE FOR R4 TO R7)

THIS RFA IS FILED U/S 96 R/W ORDER 41 RULE 1 OF CPC AGAINST THE JUDGEMENT AND DECREE DATED 19.04.2007 PASSED BY THE II ADDL. CIVIL JUDGE (SR. DN.), HUBLI, IN O.S.NO.114/1996 IN O.S.NO.114/1996, DECREEING THE SUIT FOR DECLARATION, INJUNCTION, PARTITION AND SEPARATE POSSESSION AND COST.

IN RSA NO.1119/2008

BETWEEN:

BHARAMAPPA
S/O. FAKIRAPPA ANCHATAGERI,
AGE: 70 YEARS,
OCC: AGRICULTURE,
R/O: BIDNAL,
TQ: HUBLI,
DIST: DHARWAD - 580 028.

…APPELLANT

(BY SRI. S. K. KAYAKMATH, ADVOCATE)

AND:

1. SHIVAPPA
   S/O. FAKIRAPPA ANCHATAGERI,
   AGE: 67 YEARS,
   OCC: AGRICULTURE,
   R/O: BIDNAL,
   TAL: HUBLI,
   DIST: DHARWAD – 580028.

2. SHEKHARAPPA
   S/O. FAKIRAPPA ANCHATAGERI,
   AGE: 65 YEARS,
   OCC: AGRICULTURE,
   R/O: BIDNAL, TAL: HUBLI,
   DIST: DHARWAD – 580028.

…RESPONDENTS

(BY SRI. DINESH M. KULKARNI, AND SMT. VIDYA D. KULKARNI, ADVOCATES)

THIS RSA IS FILED UNDER SECTION 100 OF THE CPC., 1908., AGAINST THE JUDGEMENT & DECREE IN R.A.207/2005 DATED 14.12.2007 PASSED BY THE LEARNED II ADDL. CIVIL JUDGE (SR.DN.), HUBLI CONFIRMING THE JUDGMENT AND DECREE DATED 22.11.2005 IN O.S.NO.413/2003 PASSED BY THE LEARNED IV ADDL. CIVIL JUDGE (JR.DN.) DISMISSING THE SUIT FILED FOR POSSESSION.

IN RSA NO.100271/2015

BETWEEN:

1. SHRI. SHIVAPPA
S/O. FAKIRAPPA ANCHATAGERI,
AGED ABOUT 64 YEARS,
OCC: AGRICULTURE,

2. SHANKAR
S/O. FAKIRAPPA ANCHATAGERI,
AGE: 52 YEARS, OCC: AGRICULTURE,

BOTH ARE R/O BIDNAL,
TALUK: HUBBALLI,
DIST: DHARWAD.

...APPELLANTS

(BY SRI. DINESH M. KULKARNI AND SMT. VIDYA D. KULKARNI, ADVOCATES)

AND:

1. NEELAWWA
W/O. KALLAPPA BANAPPANAVAR,
(SINCE DECEASED BY HER LRS)

1a. SHRI. SHIVAPPA
S/O. KALLAPPA BANAPPANAVAR,
AGE: 55 YEARS, OCC: AGRICULTURE,

1b. SHRI. MOHAN,
S/O. KALLAPPA BANNAPPANAVAR,
AGE: 52 YEARS,
OCC: AGRICULTURE,
R/O. NAVALUR,
TQ & DIST: DHARWAD.

2. SAROJAVVA
W/O. BASAPPA SHIRUR,
AGE: 62 YEARS,
OCC: HOUSEHOLD,
R/O: GOPANAKOPPA,
TALUK: HUBBALLI,
DIST: DHARWAD.

3. DHARAMAPPA
S/O. FAKIRAPPA ANCHATAGERI,
AGED ABOUT 71 YEARS,
OCC:AGRICULTURE,
R/O: BIDNAL,
TALUK HUBBALLI,
DIST: DHARWAD.

4. SOMAPPA
S/O. FAKIRAPPA ANCHATAGERI
(SINCE DECEASED BY HIS LRS)

4a. PARABHAPPA @ PRABHU
S/O. LATE SOMAPPA ANCHATAGERI,
AGE: 50 YEARS,
OCC: AGRICULTURE,
R/O. BIDNA,
TQ: HUBBALLI,
DIST: DHARWAD.

4b. SMT. KALLAWWA
W/O. LATE SOMAPPA ANCHATAGERI,
AGE: MAJOR,
OCC: AGRICULTURE,
R/O. BIDNAL,
TQ: HUBBALLI,
DIST: DHARWAD.

…RESPONDENTS

(BY SRI. LAXMAN T. MANTAGANI, ADVOCATE FOR R1 (A & B) & R2;
SRI. S.K. KAYAKAMATH, ADVOCATE FOR R3;
R4(A) AND R4(B) - SERVED)

THIS RSA IS FILED UNDER SECTION 100 OF THE CIVIL PROCEDURE CODE PRAYING TO SET ASIDE THE JUDGMENT AND DECREE DATED 08.07.2005 PASSED BY THE LEARNED I ADDITIONAL DISTRICT JUDGE, DHARWAD SITTING AT HUBBALLI IN R.A.NO.65/2004, DISMISSING THE APPEAL AND CONFIRMING THE JUDGMENT AND DECREE DATED 05.12.2002 PASSED BY THE LEARNED PRINCIPAL CIVIL JUDGE (SR.DN), HUBBALLI IN O.S.NO.257/1997, PARTLY DECREEING THE SUIT FILED FOR PARTITION AND SEPARATE POSSESSION.

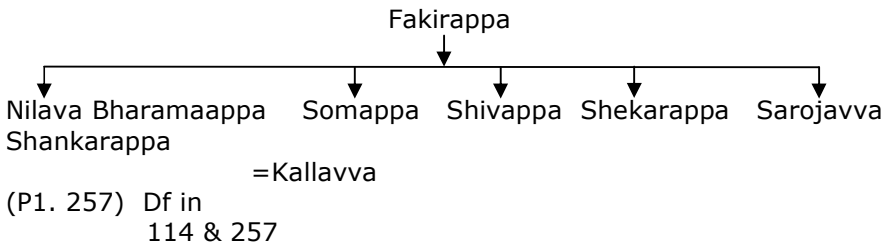
THESE APPEALS COMING ON FOR FINAL HEARING THIS DAY, THE COURT DELIVERED THE FOLLOWING:

CORAM: THE HON'BLE MR. JUSTICE ANANT RAMANATH HEGDE

ORAL JUDGMENT

1. RFA No.1229 of 2007 is arising from a decree for declaration and partition in O.S.No.114/1996 on the file of the Additional Senior Civil Judge, Hubballi. The suit for declaration and partition was filed by respondents No.1 and 2. Aggrieved by the decree for declaration and partition, defendants Nos.1 to 4 filed this first appeal.

2. The relationship of the parties is not in dispute and the genealogy is as under:



3. **Facts in O.S.No.114/1996:-** One Fakirappa was the propositus. He died on 14.06.1982, and his wife

Dyamavva died in the year 2011. The couple had five sons, namely, Bharamappa, Somappa, Shivappa, Shekhappa and Shankrappa and two daughters, namely, Neelavva and Sarojavva.

4. The suit for declaration and partition was filed by Shivappa and Shekappa. The suit was filed against Bharamappa, the elder son who is arrayed as defendant No.1 and his three sons, Channappa, Mallikarjuna and Gangappa, who are arrayed as defendants No.2 to 4, Somappa, the second son of Fakirappa, was arrayed as defendant No.5, Prabhappa, son of Somappa was arrayed as defendant No.6. Shankarappa, fifth son of Fakirappa was arrayed as defendant No.7.

5. In the said suit, the daughters of Fakirappa i.e., Neelavva and Sarojavva were not made parties. R.S.No.140/1A (Old R.S.No.5)measuring 5 acres 26 guntas and R.S.No.207 (Old R.S.No.72), measuring

38 acres, in Gabbar village, Taluka Hubballi, are the suit properties.

6. The suit is filed on the premise that, in the year 1962, there was a partition effected by the propositus Fakirappa and in the said partition, the aforementioned two properties were fallen to the share of plaintiffs, Shivappa, Shekhappa and defendant No.7 Shankrappa. The Mutation Entry No.1260 in the year 1971 indicated that all the family properties have been partitioned afresh among the contesting defendants and the plaintiffs.

7. The plaintiffs sought a declaration that the said mutation entry No.1260 is illegal and not binding on them in respect of the two properties described as the suit properties. The plaintiffs also sought a declaration that the suit properties are allotted to the share of the plaintiffs and defendant No.3 in terms of partition of 1962, which is evidenced in Mutation Entry No.704.

8. Defendants No.1 to 4 contested the suit. Defendant No.1 filed a written statement and so also defendant No.7. Defendants No.2 to 4 adopted the written statement filed by defendant No.1. Defendant No.5 filed separate written statement. The defendants took a stand that in the year 1962, no partition took place and in the year 1971, there was a partition as evidenced in Mutation Entry No.1260 and as per the said partition, the properties have been mutated in the names of the parties who have got share in the partition of 1972. The said partition is acted upon. Accordingly they prayed for dismissal of the suit.

9. Defendants also raised a contention that the suit is time barred. Defendants also took a stand that daughters of Fakirappa were necessary parties to the suit and the suit without including all the family members is not maintainable.

10. It is also contended by the defendants that, the daughters' suit in O.S.No.257/1997, seeking partition

in respect of all the family properties was dismissed, upholding the plea of partition of 1971 and they contend that the judgment and decree in the said suit is confirmed in R.A.No.650/2004, and that decree has attained finality, binding both parties to the suit. The Trial Court, on appreciation of the evidence, has concluded that 1962 partition is established and that 1971 partition, as contended by the defendants, is not established. The Trial Court held that the 1971 partition is only in respect of Survey No. 190 and it cannot alter the 1962 partition and accordingly, decreed O.SNo.114/1996 as prayed for.

11. Aggrieved by the aforementioned judgment and decree, defendants No.1 to 4 are in appeal.

12. **Facts in O.S.No.257/1997:-** The daughters of Fakirappa, namely, Neelavva and Sarojavva, had filed O.S.No.257/1997, seeking partition and separate possession of all family properties. In that

suit, all the sons of deceased Fakirappa and also his wife Dyamavva were impleaded as parties.

13. The defendants in the said suit, including defendant No.1 and 2 filed written statement contending that there was a partition in the year 1971 and defendants No. 3 to 5 filed written statement contending that there was a partition in 1962 and partition in 1971 in respect of survey No.190.

14. Defendant No.5 also filed written statement claiming share in all the properties. During the pendency of the first appeal she died.

15. The suit is decreed granting 1/8th share to the plaintiffs only in Survey No.140/1A measuring 5 acres 26 guntas, holding that there was already a partition in the year 1962 and in the year 1971. The Court held that Survey No.140/1A measuring 5 acres 26 guntas was allotted to the share of father Fakirappa in the partition of 1971. Thus, daughters

are held to be entitled to the share of father Fakirappa. The Court awarded the share in the property of father to the daughters as well as sons.

16. Aggrieved by the aforementioned judgment and decree, the defendants No.3 to 5 filed R.A. No.65/2004 on the file of I Additional District Judge, Dharwad. Said appeal is dismissed on the ground of limitation. Aggrieved by the said judgment and decree, defendants No.3 to 5 in O.S. No.257/1997 are in appeal in RSA No.100271/2015.

17. **Facts in O.S.No.413/2003:-** Bharmappa, the elder son of Fakirappa filed a suit for injunction in O.S. No.413/2003 on the file of Additional Civil Judge, Junior Division, Hubli in respect of property bearing Survey No.207B. That the said suit was for injunction that was filed against his two brothers Shivappa and Shekhappa. The said suit is dismissed. That suit was filed on the premise that the suit property was allotted to the share of plaintiff

Bharmappa in the partition of 1971. In the said suit, the plaintiff has contended that the property was given to defendants on leave and licence basis and Court has held that such a plea is not established and the relief of mandatory injunction sought to evict the defendants was rejected on the premise unless the plaintiffs seek a relief of possession, the relief of mandatory injunction cannot be granted.

18. Aggrieved by the aforementioned judgment and decree, plaintiff had filed an appeal in R.A. No.207/2005. The said appeal is dismissed confirming the judgment and decree passed by the trial Court. Hence, RSA No.1119/2008 is filed. In RSA No.1119/2008 in terms of order dated 02.07.2014, the following substantial questions of law are framed.

> *"(a) Whether both the Court have committed a serious error in dismissing the suit of the plaintiff without looking into the aspect of res-judicata more*

particularly in the light of judgment passed in O.S.257/1997 as evidenced in Ex.P-2 filed by the sisters for partition and separate possession, being dismissed in which it is specifically held that properties including suit property bearing Sy.No.207B are not joint family properties and that partition had taken place in the year 1971?

(b) Whether the judgments of both the courts are perverse and illegal by ignoring the material evidence on record?"

19. It is noticed that no substantial question of law is framed in RSA No.100271/2015. Hence, this Court is of the view that the following substantial question of law has to be framed in respect of RSA No.100271/2015.

"Whether the trial Court and the first appellate Court were justified in granting a decree for partition in Survey No.140/1A on

premise that the said property was allotted to the share of Fakirappa?"

20. Heard the learned counsel appearing for the appellants as well as respondents on all the substantial questions of law framed.

21. Sri S.K.Kayakamath, learned counsel appearing for the appellants in RFA No.1229/2007 would contend; the partition of 1971 is established in M.E.No.1620 marked at Ex.P60. Said mutation is preceded by an application filed by Fakirappa and all the children of Fakirappa. The said mutation is acted upon and not questioned till the suit is filed in the year 1996. The plaintiffs in O.S.No.114/1997 who are allotted share in the partition of 1971 have sold portion of the property allotted to their share in the partition of 1971 as such, plaintiffs cannot contend that the partition of 1971 is illegal.

22. If at all the plaintiffs have to challenge the partition of 1971, the challenge must be in respect of entire

properties covered under the Mutation Entry No.1620 and not in respect of only one property i.e. Survey No.190.

23. The partition of 1962 is not a valid partition. Same is effected only through the *varadi*. It has no sanctity in the eye of law. It was only a family arrangement and despite the said family arrangement, the family continued to live together and father thereafter effected the partition in the 1971 which is acted upon.

24. The suit without impleading daughters of Fakirappa is not maintainable and suit without including all the joint family properties is not maintainable. The trial Court committed an error in appreciating the oral and documentary evidence produced by the parties.

25. This Court framed an issue relating to the 1962 partition and directed the trial Court to record the evidence on the said issue. In the cross examination

of PW1 has admitted that 1961 partition has not taken place. This being the position, he would urge that the appeal is to be allowed and judgment and decree in O.S. No.114/1997 are to be set aside.

26. As far as RSA No.1119/2008, it is submitted that in the partition of 1971, the suit property in the said O.S. No.413/2003 was allotted to his share and defendants in the said suit were allowed to occupy the property as licencees for a limited period. After the expiry of the licence period, the defendants refused to vacate the premises. As such, the plaintiff filed a suit for mandatory injunction to direct the defendants to vacate the premises to the plaintiff. The trial Court could not have dismissed the suit on the promise that the suit for mandatory injunction is not maintainable despite the plaintiff establishing mandatory injunction is not maintainable and trial Court erred in holding that the

remedy for the plaintiff is to file a suit for possession.

27. It is his contention that since the defendants were in possession of the properties as licensees, after the expiry of the licence period the plaintiff is entitled to file a suit for injunction and there is no need to seek possession. He would also contend that in the suit filed by the daughters in O.S. No.257/1997, the Court has concluded that the partition of 1962 is not established and partition of 1971 is established. Having given a finding that the partition of 1971 is established, the trial Court should have held that the suit property is allotted to the share of plaintiff/appellant and the plea of licence urged before the trial court should have been accepted. Thus he would urge that the suit has to be decreed by setting aside the judgment and decree passed by the trial Court as well as the first appellate Court. In Survey No.207 to the extent of 24 guntas the

appellants have made improvements and put up a structure by investing huge amount after obtaining the loan from the bank. As such, it is to be construed that the property is allotted to the share of appellants in the partition of 1971.

28. Sri Dinesh Kulkarni, learned counsel appearing for the defendants would contend that 1962 partition is established from M.E.No.704 marked at Ex.P43 which is certified based on *vardi* Marked at Ex. P18. It is also his contention that said entry of 1962 was never questioned by anyone. In the partition of 1962 the property bearing Survey No.5/1A (now renumbered as 140A), measuring 5 acres 26 guntas and Survey No.72 (now renumbered as 207) measuring 38 guntas were allotted to the share of Shivappa, Shekhappa and Shankarappa and Ex.P18 which is the application given by the father Fakirappa would also reveal that property bearing Survey No.59, measuring 7 acres 11 guntas is

allotted to the share of Bharmappa and Somannappa. To this effect, there is an indication in last line of M.E.No.704 where it is stated that Bharmappa and Somannappa are allotted share in Gabbur village.

29. Thus, it is the contention of Sri Dinesh Kulkarni that these 3 properties were subject matter of partition of 1962 and they could not have been the subject matter of partition of 1971. In 1971 according to him the partition took place in respect of Survey No.190. Thus, he contends that the partition of 1971 was intended to be effected in respect of the properties which are not the subject matter of partition of 1962.

30. It is also urged that the appellants colluded with the revenue officials and changed the entries in the original records by showing allotment of share in the properties which were subject matter of partition of 1962. Thus, he would contend that the trial Court is

justified in granting a decree for declaration and partition in respect of the properties allotted to the share of the plaintiffs and defendant No.7 in the partition of 1962.

31. In the aforementioned partition of 1971 in Survey No.189/1, 11 acre 10 guntas allotted to the share of Bharmappa. Survey No.45/2B measuring 3 acre 35 guntas allotted to the share Somappa and Survey No.185, measuring 12 acres 15 guntas allotted to the share of Shankarappa and Fakirappa. This division of 3 properties is not disputed by either of the parties.

32. It is also the contention of Sri Dinesh Kulkarni that the Tahasildar is examined to prove the interpolation and the evidence of the Tahasildar would indicate that the mutation was interpolated. It is also his contention that in the application submitted by the parties, the parties expressed the intention only to

effect partition of Survey No.190 and no other properties.

33. It is his further contention that the division of properties in Survey No.189/1, 45/2B and 185 is in consonance with earlier partition effected by the father wherein, he has moved the application to mutate the properties in the names of the sons against whose name the properties were mutated. Thus, he would urge that the appeals be dismissed.

34. Sri Laxman Mantagani, learned counsel appearing for the respondents No.8 and 9 in RSA No.100271/2015 the daughters would contend that the trial Court is justified in decreeing the suit for partition given the fact that the father owned the property bearing Survey No.140/A at the time of his death pursuant to partition of 1971. It is his further contention that 1971 partition is valid and in the alternative, he would submit that in case 1971 partition is held to be invalid then the daughter

should be given share in all the properties mentioned Mutation Entry No.1620. The property bearing Survey No.189 are purchased in the name of father and later in terms of *varadi* on the basis of an application by the father, names of all these things are entered vide Mutation No.1302.

35. This Court has considered the contentions raised at the bar.

36. The following point arises for consideration in RFA No.1229/2007:

> *"Whether the suit filed by the plaintiffs in O.S.No.114/1996 is maintainable without impleading the daughters as parties to the proceeding?"*

37. As can be noticed from the records that the appellants in the Regular First Appeal, who are the defendants in the suit, have raised a contention that the suit is bad for non-joinder of necessary parties namely the sisters of the plaintiffs and the defence is

also taken that the suit is time barred. However, issues have not been framed on these contentions.

38. The question is whether the daughters become necessary parties to the suit. The plaintiffs' claim is based on the premise that in the year 1962, there was a partition and in the year 1971, there was a partition only in respect of Sy.No.190. The plaintiffs contend that in the partition of 1971, Sy.No.140/1A and Sy.No.207 are not partitioned at all and they were partitioned in 1962 itself. The sisters who filed a suit for partition claimed that in the year 1971 the partition took place and Sy.No.140/1A is allotted to their father.

39. If the plaintiffs contention is to be accepted that the alleged partition of 1971 is valid only in respect of Sy.No.190 and all other properties have been partitioned in the year 1962, then their sisters are not entitled to any share. This question cannot be decided without daughters being added as parties in

the suit for declaration and partition in O.S.No.114/1996. Thus, the suit becomes defective.

40. It is also noticed that defence is also raised relating to limitation and issue is not framed.

41. It is well settled position of law that merely because the necessary parties is not added, the suit cannot be dismissed without affording opportunity to the parties to implead the necessary parties.

42. For the aforementioned reasons, this Court is of the view that the judgment and decree in O.S.No.114/1996 are to be set-aside and the matter needs to be remitted to the trial Court for fresh consideration and the plaintiffs should be permitted to implead their sisters as parties to the proceeding.

43. Before this Court, the sisters have come on record as respondents No.8, 9, 10(a) and 10(b). Since the judgment in O.S.No.114/1996 will have a bearing on the other two suits namely O.S.No.257/1997 and

O.S.No.413/2003, the judgments in the aforementioned cases have to be set-aside and accordingly set-aside. All the three cases are to be tried together and disposed of. Hence, O.S.No.257/1997 and O.S.No.413/2003 shall be tried along with O.S.No.114/1996.

44. Hence, the following:

ORDER

i) The appeal in RFA No.1229/2007 is allowed in part.

ii) The judgment and decree dated 19.04.2007 in O.S.No.114/1996 on the file of II Additional Civil Judge (Sr.Dn), Hubli are set-aside. The suit is remitted to the trial Court for fresh consideration in accordance with law.

iii) The plaintiffs are permitted to implead respondents No.8, 9, 10(a) and 10(b) as defendants No.12 to 15.

iv) The parties who are represented before this Court shall appear before the trial Court without awaiting any further notice.

v) The trial Court shall issue notice to the respondents before this Court who are not represented.

vi) The parties who are represented by the counsel in this case shall appear before the trial Court on 28.01.2024.

vii) It is further made clear that nothing is expressed on the merits of the matter.

viii) All contentions of the parties are kept open.

ix) All the three suits shall be clubbed together and disposed of by a common judgment. The parties are further permitted to lead additional evidence in support of their case.

x) The parties to the suits shall not create any third party rights/charges over the suit properties.

xi) The RSA No.1119/2008 and RSA No.100271/2015 are accordingly allowed in part. The judgments and decrees passed by the trial Court and the First Appellate Court in the aforementioned appeals are set-aside and suits are remitted to Court to be decided along with O.S.No.114/1996.

xii) No order as to cost.

Sd/-
(ANANT RAMANATH HEGDE)
JUDGE

Para 1 to 12-GAB,
Para 13 to 37-CHS,
Para 38 to end AM.
List No.: 1 Sl No.: 25.