NC: 2024:KHC-D:18523
RFA No. 100494 of 2024

**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.100494 OF 2024 (PAR/POS-)

BETWEEN:

1. ADAVAYYA S/O MALLAYYA MATHAPATI
AGE. 64 YEARS, OCC. AGRICULTURE
R/O. JALIBER, TQ. MUDHOL
DIST. BAGALKOT-587313.

2. KASTURI W/O ADAVAYYA MATHAPATI
AGE. 54 YEARS, OCC. HOUSEHOLD
R/O. JALIABER, TQ. MUDHOL
DIST. BAGALKOT-587313.

...APPELLANTS

(BY SRI. DINESH M KULKARNI, ADVOCATE)

AND:

KAMALAWWA W/O GIRAMALLAPPA MATHAPATI
AGE. 64 YEARS, OCC. AGRICULTURE
AND HOUSEHOLD, R/OL YADAHALLI,
TQ. BILAGI, DIST. BAGALKOT-587117.

...RESPONDENT

(BY SRI ARUN L.NEELOPANT,
SRI N.B.JODALLI AND
SMT KAVITA S.JADHAV., ADVOCATES)

Digitally signed by ASHPAK KASHIMSA MALAGALADINNI
Location: HIGH COURT OF KARNATAKA

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THIS RFA IS FILED UNDER ORDER 41 RULE 1 R/W SEC.96 OF CPC., PRAYING TO SET-ASIDE BY THE FINAL ORDER IN FDP NO.7/2021 DATED 06.11.2024 BY THE PRINCIPAL SENIOR CIVIL JUDGE AND JMFC, MUDHOL AS NULL AND VOID IN THE INTEREST OF JUSTICE AND EQUITY.

THIS APPEAL IS COMING ON FOR FINAL HEARING THIS DAY, THE COURT DELIVERED THE FOLLOWING:

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

ORAL JUDGMENT

This appeal is arising from a decree for partition granted in a final decree proceeding. The final decree proceeding was initiated pursuant to the decree for partition in O.S.No.95/2018 on the file of Principal Senior Civil Judge, Mudhol. There were three properties in the suit schedule i.e., Sy.No.116/2 measuring 2 acres 22 guntas, Sy.No.117/2 measuring 2 acres 37 guntas and Sy.No.231/1 measuring 2 acres 10 guntas.

2. The plaintiff claimed ½ share in the suit schedule properties. The suit is decreed. Regular First Appeal No.100014/2020 is still pending before this Court. Pursuant to the preliminary decree, the final decree proceeding is filed and in the final decree proceeding, the properties are divided and surveyor has measured and divided Sy.No.231/1 which totally measured 2 acres 10 guntas. The surveyor has noted that out of 2 acres 10

guntas in the said survey number, 34 guntas is acquired for irrigation and that portion is marked as 'ABCD' in the sketch appended to the plaint and that portion is identified as portion-I and another portion is identified as portion-II. Further, the report would indicate that portion-I is allotted to the share of the present appellants, which according to the surveyor is inclusive of 34 guntas already acquired for the purpose of lift irrigation. The report would also indicate that division is carried out in such a fashion as per the oral directions of the Court.

3. Learned counsel appearing for the appellants Sri.Dinesh M. Kulkarni would submit that the property was acquired long back in the year 1972, pursuant to the notification under Section 4(1) of the Land Acquisition Act,1894 and compensation of Rs.2,334/- was awarded in favour of grandmother of appellants and grandson i.e., defendant No.1. Thus, he would contend that the allotment of share is inequitable. He would contend that

the equal share should have been allotted in respect of the un-acquired portion bearing R.S.No.231.

4. Learned counsel appearing for the respondent would contend that the allotment of share is equitable as the appellants have received the compensation along with their grandmother. The grandson i.e., defendant No.1 has received the compensation as the grandmother was not alive when the compensation was paid.

5. This Court has considered the contention raised at the Bar and perused the records.

6. The following points arise for consideration.

> *"Whether the trial Court is justified in allotting a share to the petitioner in Sy.No.231/1 including 34 guntas acquired under the land acquisition proceedings.?"*

7. From the records which have been placed before this Court by way of additional documents, it is noticed that 34 guntas in Sy.No.231/1 are allotted to the share of the present respondent/petitioner. Even the surveyor who went to the spot has indicated that the 34

Guntas of land have been acquired. However, the trial Court has issued an oral direction to include that property as also the property available for partition. Probably, the trial Court carried the impression that the decree is already passed in respect of entire Sy.No.231/1 measuring 2 acres 10 guntas. However, the fact remains that 34 guntas of land have been acquired in the year 1974 and award came to be passed in the year 1982 and that being the position, those 34 guntas of land could not have been the subject matter of the suit at all. Hence, those 34 guntas of land are to be excluded from the scheme of partition.

8. Excluding those 34 guntas, what remains is 56 guntas or 1 acre 16 guntas in Sy.No.231/1 and same has to be divided between the plaintiff and defendant No.1. Each parties will get 28 guntas in that event. Hence, to that extent, the impugned judgment and decree have to be set-aside and the matter has to be remitted to the trial

Court for effecting division in Sy.No.231/1 measuring 1 acre 16 guntas.

9. Learned counsel appearing for the appellants and respondent jointly submit that in case the property is divided in such a way where one party is required to have access to his property through another person's property, a suitable provisions is to be made for such access and the person in whose property the access is made, should be adequately compensated either by allotting a larger share in another portion or by evaluating the property value and awarding compensation. There is justification in the submission.

10. Hence, the following:

ORDER

i) Appeal is allowed in part.

ii) The judgment and decree dated 06.11.2024 passed in FDP No.07/2021 on the file of Principal Senior Civil Judge and JMFC, Mudhol are set-aside insofar as

division of Sy.No.231/1 measuring 2 acre 10 guntas.

iii) Final decree proceeding shall be carried out in respect of Sy.No.231/1 measuring 1 acre 16 Guntas and plaintiff and defendant No.1 shall be awarded equal share keeping in mind the observations relating to the access referred to above. The final decree in respect of other property is affirmed, subject to outcome of pending appeal from preliminary decree.

iv) No order as to cost.

Sd/-
(ANANT RAMANATH HEGDE)
JUDGE

Para 1, 2 & 6 to end-AM
Para 3 to 5-gab
List No.: 1 Sl No.: 29