IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 20TH DAY OF DECEMBER, 2024

BEFORE

THE HON'BLE MR JUSTICE HANCHATE SANJEEVKUMAR

MISCELLANEOUS SECOND APPEAL NO. 53 OF 2019

BETWEEN:

1 . SMT. SARASWATHI,
W/O, LATE SRI. KRISHNAMURTHY S. P.,
AGED ABOUT 58 YEARS,
R/AT NO.45/15, L.B.S. NAGAR,
NEAR N.E.S. OFFICE,
YELAHANKA, BENGALURU - 560 064.

2 . SMT. SUBBAMMA @ SUPATHA,
W/O. SUBRAMANI,
AGED ABOUT 54 YEARS,
R/AT ANNUR VILLAGE AND POST,
KUMARAPALYAM, COIMBATORE,
TAMIL NADU - 661 653.

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Location: HIGH COURT OF KARNATAKA

3 . SMT. PADMA
W/O. THAMBI,
AGED ABOUT 48 YEARS,
R/AT NO. 696,
NEAR BANK OF INDIA,
MAHADEVAPURA,
S.R. PATNA TALUK,
MANDYA DISTRICT.

...APPELLANTS

(BY SRI. SHARAN.B TADAHAL AND
SRI. SWAROOP ADVOCATES)

AND:

1 . SRI. KANDASWAMY @ MARA KUYUVA,
S/O. LATE KALISWAMY,
AGED ABOUT 66 YEARS,

R/AT. AKKIHEBBALU VILLAGE,
K.R. PETE TALUK,
MANDYA DISTRICT.

2 . SMT. PAPAMMA
W/O. LATE VELUSWAMY,
AGED ABOUT 56 YEARS,

3 . SMT. BHAGYA
D/O. LATE. VELUSWAMY,
AGED ABOUT 36 YEARS,

4 . SMT. PUSHPA
D/O. LATE VELUSWAMY,
AGED ABOUT 35 YEARS,

5 . SMT. NAGARATHNA
D/O. LATE VELUSWAMY,
AGED ABOUT 33 YEARS,

6 . SRI. THAMBI
S/O. LATE VELUSWAMY,
AGED ABOUT 31 YEARS,

7 . SRI. RAJU
S/O. LATE VELUSWAMY,
AGED ABOUT 30 YEARS,

RESPONDENT NO.2 TO 7 ALL
RESIDING AT:
MAHAKALAMMA STREET,
KUMARAPALYAM VILLAGE,
AVINASI TALUK,
COIMBATORE DISTRICT,
TAMIL NADU-661 653.

8 . SRI. ARMUGAM @ MARA KUYUVA RAJANNA
S/O. LATE. KALISWAMY,
AGED ABOUT 62 YEARS,
R/A. BEHIND NARASIMHA SWAMY TEMPLE,
HOSAHOLALU VILLAGE AND POST,
K.R.PETE TALUK, MANDYA DISTRICT.

9 . SRI. SUBBANNA
S/O. LATE KALISWAMY,
AGED ABOUT 56 YEARS,
R/AT AKKIHEBBALU VILLAGE,
K.R. PETE TALUK,
MANDYA DISTRICT.

10 . SRI. JAYARAMU
S/O. LATE. PAPAIAH,
AGED ABOUT 63 YEARS,

11 . SRI. H. T. SRINIVASA
S/O. NAGARAJU,
AGED ABOUT 36 YEARS,

RESPONDENT NO.10 & 11 BOTH RESIDING AT
HOSA ANANDOOR VILLAGE,
BELAGOLA HOBLI,
SRIRANGAPATTANA TALUK,
MANDYA DISTRICT.

…..RESPONDENTS

(BY SRI. M.R.RAJAGOPAL, SR. ADVOCATE A/W;
SRI. NARASIMHARAJU ADVOCATE FOR R10;
SRI. SUBRAMANYA.R. ADVOCATE FOR
SRI. S. RAJU ADVOCATE FOR R11;
R2 SERVED; V/O DATED 15.10.2020 NOTICE TO R1,R3 TO R9 ARE HELD SUFFICIENT)

THIS MSA FILED UNDER ORDER 43 RULE 1(U) OF THE CPC, AGAINST THE JUDGMENT AND DECREE DATED 18.06.2018 PASSED IN RA.NO. 5027/2016 ON THE FILE OF THE III ADDITIONAL DISTRICT AND SESSIONS JUDGE, MANDYA (SITTING AT SRIRANGAPATNA) PARTLY ALLOWING THE APPEAL AND SETTING ASIDE THE JUDGMENT AND DECREE DATED 06.06.2016 PASSED IN FDP NO.9/2010 ON THE FILE OF THE ADDITIONAL SENIOR CIVIL JUDGE, SRIRANGAPATNA AND FURTHER REMANDING THE MATTER TO THE COURT BELOW WITH THE DIRECTION TO HEAR BOTH THE PARTIES.

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

CORAM: THE HON'BLE MR JUSTICE HANCHATE SANJEEVKUMAR

CAV JUDGMENT

The above miscellaneous second appeal is filed calling in question the order dated 18.06.2018 passed in R.A.No.5027/2016 by the III Additional District and Sessions Judge, Mandya (Sitting at Srirangapattana), thereby the first appellate court has set aside the order dated 06.06.2016 passed by the Additional Senior Civil Judge, MACT, Srirangapatna, in FDP No.09/2010 and remanded the case to the final decree Court.

2. One Kaliswamy is the original propositus and Nanjamma is his wife having seven children, who are four sons and three daughters. The appellants herein are three daughters, who filed a suit for partition and separate possession and trial court has decreed the suit by granting 8/56th share each to the plaintiffs and defendants. The defendant No.11 has challenged the said judgment and decree in R.A.No.358/2010 before the Court of III Additional District and Sessions Judge, Mandya (Sitting at

Srirangapatna) and first appellate court has modified the decree by declaring that the plaintiffs are entitled to 1/8th share each in the suit schedule property. Further it is ordered that at the time of drawing up of decree as far as possible, suit item No.2 of schedule property be allotted to the share of defendant Nos.1 to 9 to protect the right of defendant No.11 under the principle of equity.

3. The plaintiffs have filed FDP No.9/2010 under Section 54 of CPC for drawing up of final decree in terms of preliminary decree in O.S.No.158/2006. The FDP Court in FDP.No.9/2010 has passed the following order:

"***ORDER***

- *"The petition filed by the petitioner to draw final decree is hereby allowed in terms of the judgment and decree in O.S.158/2006 as per order dated 18.02.2016.*

- *Petitioners No.1 to 3 are entitle for in total 2 acre 15¼ guntas in item No.1 of the suit schedule property out of 2 acre 25 guntas of land.*

- *The petitioners are not entitled for any share in item No.2 of the petition schedule properties.*

- *Office is directed to draw final decree as state above.*

- *The Commissioner report dated 09.11.2013 filed by the Tahsildar, Srirangapatna and report submitted by the Member of the Bar as Court Commissioner dated 08.09.2013 are part and parcel of the final decree*.

- *By considering the nature of the petition, no order as to cost.* "

4. The said order is challenged by the defendant Nos.10 and 11 before the first appellate court in R.A.No.5027/2016 and the first appellate court by following the judgment of Hon'ble Supreme Court in the case of ***PRAKASH AND OTHERS V. PHULAVATI AND OTHERS***[1] and in the case of ***MANGAMMAL @ THULASI AND ANOTHER V. T.B.RAJU AND OTHERS***[2] has held that the plaintiffs are entitled for only notional partition out of 1/5th share of their father. Hence, consequently, the order dated 06.06.2016 in FDP.No.9/2010 is set aside.

[1] ILR 2015 KAR 5329
[2] Civil Appeal No.1933/2009 dated 19.04.2018

5. The first appellate court in the judgment dated 25.09.2013 in RA.No.358/2010 has ordered that schedule item No.2 of the property is to be allotted to defendant No.11 and that fact has not been challenged by any other parties in any appeal, therefore, the plaintiffs to the suit as per order are not entitled for any share in item No.2 of the suit schedule property. Therefore, it is held that the FDP Court has committed an error calculating shares and allotting 2 acre 15¼ guntas in schedule item No.1 to plaintiff Nos.1 to 3. Therefore, matter is remanded to FDP Court with a direction to pass orders afresh in terms of observations made in the order and pass final decree.

6. The learned counsel for the appellants/plaintiffs submitted that the first appellate court has committed an error in holding that plaintiffs are not entitled to the extent of 2 acres 15¼ guntas of land in item No.1 property, but when it is ordered by the first appellate court that plaintiffs are entitled for 1/8th share each, then it comes to 2 acres 15¼ guntas to the plaintiffs and that is correct. Hence,

remand made by the first appellate court is not correct. Therefore, prays for confirmation of the order dated 06.06.2016 passed in FDP No.9/2010.

7. Further the learned counsel for the appellants/plaintiffs submitted that defendant No.10 has not preferred appeal challenging the preliminary decree, therefore, he is procluded to prefer appeal in RA.No.5027/2016 as per Section 97 of Code of Civil Procedure challenging the final decree passed in FDP.No.9/2010.

8. Sri.M.R.Rajagopal, learned Senior Counsel appearing for defendant No.10 submitted that defendant No.10 is the purchaser of land from defendant Nos.1 to 9, who is also entitled for protection and interest as that of defendant No.11. Even for defendant No.11, the defendant Nos.1 to 9 are vendors. Therefore, defendant Nos.1 to 9 are common vendors of selling lands at item Nos.1 and 2 to both defendant Nos.10 and 11 respectively. Therefore, submitted

that remand order made by the first appellate court is correct and hence let FDP Court decide the matter afresh in allotting the shares. Hence, justified the order passed by the first appellate court.

9. Sri. Subramanya.R, learned counsel for the defendant No.11 submitted that defendant No.11's share is protected by the order in R.A.No.358/2010 and hence, there could not be alteration by FDP Court. Therefore, he supported the order passed by the first appellate court.

10. Upon considering the case there are totally seven coparceners. The suit came to be decreed by the trial court by granting partition of 8/56th share each in O.S.No.158/2006. This is modified in R.A.No.358/2010 by granting 1/8th share by the judgment and decree dated 25.09.2013, but which ought to have been 1/7th share. Therefore, plaintiffs are entitled for 1/7th share each along with other defendants – co-parceners. Hence, each coparcener is entitled for 1/7th share. However, the said

judgment and decree passed in R.A.No.358/2010 has not been challenged so far as questioning quantum of share. The defendant No.10 is the purchaser of suit at item No.1 property from defendant Nos.1 to 9 and defendant No.11 is the purchaser of suit item No.2 of the property from the same vendors-defendant Nos.1 to 9. Upon appeal being filed by defendant No.11 in R.A.No.358/2010, the share was modified declaring that plaintiffs are entitled to 1/8th share in the suit schedule property, but at the same time it was ordered that at the time of drawing up of final decree as far as possible suit item No.2 property be allotted to the share of defendant Nos.1 to 9 to protect the right of defendant No.11 under the principle of equity. Therefore, now virtually as per this order if the interest of defendant No.10 is protected so far as item No.1 is concerned from defendant Nos.1 to 9, then virtually the plaintiffs would not get any share in the suit item Nos.1 and 2 properties, then the plaintiffs would be defeated to get the share in the final decree proceedings though they are declared 1/8th share in

the suit schedule property. This is the situation by virtue of order passed in R.A.No.358/2010.

11. Further by virtue of order passed in FDP No.9/2010 it is ordered that plaintiffs are not entitled for any share in item No.2 of the schedule property. Therefore, in FDP Court it is ordered that the plaintiffs shall get their share only in item No.1 property. Furthermore, the trial court and first appellate court by following the principles laid down by the Hobble Apex Court in the case of ***PRAKASH AND OTHERS V. PHULAVATI AND OTHERS***[3] and in the case of ***MANGAMMAL @ THULASI AND ANOTHER V. T.B.RAJU AND OTHERS***[4] has crystallized the right of plaintiffs at 1/8th share. But as per the judgment of Hon'ble Apex Court in the case of ***VINEETA SHARMA vs. RAKESH SHARMA***[5], the plaintiffs could get 1/7th share each. In this Case, the question which comes up before this Court is that, whether this Court can modify the allotment of shares as

[3] ILR 2015 KAR 5329
[4] Civil Appeal No.1933/2009 dated 19.04.2018
[5] AIR 2020 SC 3717

per ***VINEETA SHARMA's case*** when the order passed by the first appellate court is not challenged.

12. Learned counsel for the appellants/plaintiffs has placed reliance on the judgment of Hon'ble Supreme Court in the case of ***GANDURI KOTESHWARAMMA AND ANOTHER V. CHAKIRI YANADI AND ANOTHER***[6], wherein at paragraphs 19, 20 and 21 Hon'ble Supreme Court has held as follows:

> ***"19.*** *The High Court was clearly in error in not properly appreciating the scope of Order 20 Rule 18 CPC. In a suit for partition of immovable property, if such property is not assessed to the payment of revenue to the Government, ordinarily passing of a preliminary decree declaring the share of the parties may be required. The court would thereafter proceed for preparation of final decree. In Phoolchand [AIR 1967 SC 1470] , this Court has stated the legal position that CPC creates no impediment for even more than one preliminary decree if after passing of the preliminary decree events have taken place necessitating the readjustment of shares as declared in the preliminary decree. The court has always power to revise the preliminary decree or pass another preliminary decree if the situation in the changed circumstances so demand. A suit for partition continues after the passing of the preliminary decree and the proceedings in the suit get extinguished only on passing of the final decree. It is not correct statement of law that once a preliminary decree has been passed, it is not*

[6] (2011) 9 SCC 788

capable of modification. It needs no emphasis that the rights of the parties in a partition suit should be settled once for all in that suit alone and no other proceedings.

20. *Section 97 CPC that provides that where any party aggrieved by a preliminary decree passed after the commencement of the Code does not appeal from such decree, he shall be precluded from disputing its correctness in any appeal which may be preferred from the final decree does not create any hindrance or obstruction in the power of the court to modify, amend or alter the preliminary decree or pass another preliminary decree if the changed circumstances so require.*

21. *It is true that final decree is always required to be in conformity with the preliminary decree but that does not mean that a preliminary decree, before the final decree is passed, cannot be altered or amended or modified by the trial court in the event of changed or supervening circumstances even if no appeal has been preferred from such preliminary decree. The view of the High Court is against law and the decisions of this Court in Phoolchand [AIR 1967 SC 1470] and S. Sai Reddy [(1991) 3 SCC 647].”*

13. The final decree shall be in conformity with the preliminary decree. But that does not mean that the preliminary decree before passing final decree cannot be altered or changed where changed circumstances or supervening circumstances occurred. If there are changed circumstances necessitating the readjustment of the shares as declared in the preliminary decree, then the final decree

can be modified and the Court has always power to revise the preliminary decree according to the changed circumstances or change of law, if such situations so arises. The Appellate Court in R.A.No.358/2010 has modified the decree by granting only 1/8th share each to the coparceners. There are seven coparceners, then how 1/8th share is allowed, there is no reason. Admittedly, when seven coparceners with three daughters and four sons, it would have been 1/7th share to each coparceners. The Hon'ble Supreme Court in ***VINEETA SHARMA's*** case (supra) has recognized that daughter is also coparcener equal to that of son. Therefore, the plaintiffs being daughters are entitled for 1/7th share each in Item Nos.1 and 2 of schedule properties.

14. In the present case, the shares of the coparceners are crystallized before delivery of the judgment by the Apex Court in ***VINEETA SHARMA's*** case by following the judgment of Hon'ble Supreme Court in ***PRAKASH V. PHULAVATI's*** case and in the case of ***MANGAMMAL @ THULASI V. T.B.RAJU's*** case. When the first appellate

court has passed order in O.S.358/2010 dated 25.09.2013, the law prevailing was ***PRAKASH V. PHULAVATI's*** case and in the case of ***MANGAMMAL @ THULASI V. T.B.RAJU***. The Hon'ble Apex Court delivered the judgment in ***VINEETA SHARMA's*** case by recognizing the daughters as coparceners and held that they are entitled for equal shares as that of sons. Therefore, under this changed circumstances as per dictum above stated in ***GANDURI KOTESHWARAMMA's*** case, the share of the coparceners are made to be crystallized by granting 1/7th share each to the plaintiffs as coparceners. Therefore, the remand order made by the first appellate court need not be interfered with, but the FDP Court shall pass final decree according to the rights already crystallized, but with 1/7th share each and pass necessary final decree by combining both item Nos.1 and 2 properties. In this regard, the order passed by the first appellate court in R.A.No.358/2010 and in FDP No.9/2010 that the plaintiffs are not entitled for any share in item No.2 of the schedule property, is modified by setting aside the same. The first appellate court is justified in

remanding the case to FDP Court but with a direction to pass final decree in respect of both item Nos.1 and 2 properties of allotting respective shares as far as possible protecting the rights of purchasers - defendant Nos.10 and 11 and also the plaintiffs.

15. It is pertinent to observe that the first appellate court in R.A.No.358/2010 has also ordered that as far as possible suit item No.2 of schedule property is allotted to the share of defendant Nos.1 to 9 to protect the right of defendant No.11 on the principle of equity. Therefore, here the first appellate court has observed and ordered "as far as possible" to make an endeavour to protect the right of the defendant No.11. This does not mean that the defendant No.11 to be given item No.2 absolutely. Therefore, justifying the order passed by the first appellate court in remanding the matter to FDP Court to pass final decree as far as possible protecting the right of defendant Nos.10 and 11 determine the shares for all the coparceners - plaintiffs and other defendants. It is made clear that the plaintiffs shall

not be deprived of getting their shares legitimately crystallized as above stated. The share of defendant Nos.10 and 11 shall be what the defendant Nos.1 to 9 would get their share.

16. With this observation, appeal stands ***disposed of***.

SD/-
(HANCHATE SANJEEVKUMAR)
JUDGE

DR
List No.: 2 Sl No.: 1