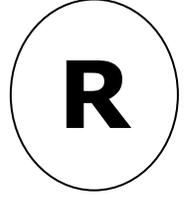


IN THE HIGH COURT OF KARNATAKA AT BENGALURU



DATED THIS THE 6<sup>TH</sup> DAY OF OCTOBER, 2023

BEFORE

THE HON'BLE MR. JUSTICE H.P. SANDESH

**R.S.A. NO.1090/2020 (PAR)**

**BETWEEN:**

... APPELLANT

(BY SRI A.MADHUSUDHANA RAO, ADVOCATE)

**AND:**

RESPONDENTS

(BY SRI. VINOD GOWDA, ADVOCATE FOR C/R1 AND R2;  
SRI G.CHANDRASHEKHARAIHAH, ADVOCATE FOR R3;  
SRI S.D.N.PRASAD, ADVOCATE FOR R4)

THIS R.S.A. IS FILED UNDER SECTION 100 OF CPC AGAINST THE JUDGMENT AND DECREE DATED 17.01.2020 PASSED IN R.A.NO.70/2017 ON THE FILE OF THE PRINCIPAL DISTRICT AND SESSIONS JUDGE, CHIKKAMAGALURU, PARTLY ALLOWING THE APPEAL AND FILED AGAINST THE JUDGMENT AND DECREE DATED 07.10.2017 PASSED IN O.S.NO.53/2014 ON THE FILE OF THE SENIOR CIVIL JUDGE AND JMFC, MUDIGERE.

THIS APPEAL HAVING BEEN HEARD AND RESERVED FOR JUDGMENT ON 26.09.2023 THIS DAY, THE COURT PRONOUNCED THE FOLLOWING:

**J U D G M E N T**

The factual matrix of the case of the plaintiffs/respondents No.1 and 2 in this appeal that suit schedule properties are the joint family properties of plaintiffs and defendant No.1 who is the father of deceased Santhosh and plaintiffs are the wife and son of the deceased Santhosh and they are entitled for share in the suit schedule properties of ½ share and gift deed executed by defendant No.1 in favour of defendant No.2 is not binding. It is also the case of the plaintiffs that sale deed executed in favour of defendant No.3 by defendant No.2 is also not binding on the plaintiffs.

2. The defendants appeared and filed written statement contending that there was a partition during the life time of deceased Santhosh long back and he had taken money from the defendants as his share. Out of that money deceased Santhosh had purchased 16 guntas of land in Sy.No.101/1 of Jogannanakere Village. The defendants also took the contention that said property has to be included in the suit in the event that suit schedule properties are considered as joint family

properties. It is also contended that plaintiff No.2 had remarried one Paramesh Gangadhar subsequent to the death of said Santhosh and she is not entitled for share in the suit schedule properties. The defendant No.3 took the contention that he is the bonafide purchaser of the suit schedule properties. The Trial Court having taken note of the pleadings of the plaintiffs and defendants has framed the issues and allowed the parties to lead evidence.

3. The wife of deceased Santhosh had examined herself as PW1 and also examined the first plaintiff as PW2 and got marked the documents Exs.P1 to P19. Defendant No.1 examined himself as D.W.1 and subsequent purchaser who is defendant No.3 also examined himself as D.W.2 and no documents are produced before the Trial Court. The Trial Court having considered both oral and documentary evidence comes to the conclusion that suit schedule properties are joint family properties and gift deed is not binding on the plaintiffs and also the sale deed executed by defendant No.2 in favour of defendant No.3 is also not binding on the plaintiffs and defence which have

been taken by the defendants answered as negative in coming to the conclusion that there was no partition during the life time of Santhosh and out of the said share he had purchased the property and the said property cannot be included for partition and also comes to the conclusion that remarriage of defendant No.2 with one Paramesh Gangadhar has not disentitled her right and comes to the conclusion that plaintiffs are entitled for 1/3<sup>rd</sup> share in the suit schedule properties by metes and bounds and also entitled for mesne profits.

4. Being aggrieved by the judgment and decree of the Trial Court passed in O.S.No.53/2014, the defendants No.1 and 2 have filed an appeal and the same is numbered as R.A.No.70/2017 and the First Appellate Court having considered the grounds urged in the appeal formulated the points whether the trial Judge has erred in holding that plaintiffs are entitled for 1/3<sup>rd</sup> share, whether the trial Judge erred in not holding that Sy.No.101/1 is also a joint family property, whether the trial Judge has erred in not holding that suit is bad for non-joinder of necessary party i.e., wife of defendant No.1 is also necessary

party and entitled for share in the suit schedule properties and whether the judgment of the Trial Court is erroneous, arbitrary and illegal.

5. The First Appellate Court on re-appreciation of both oral and documentary evidence comes to the conclusion that the Trial Court has not committed an error in granting  $1/3^{\text{rd}}$  share. However, the trial Judge reversed the finding of the Trial Court answering point No.2 as affirmative that Sy.No.101/1 measuring 16 guntas is also a joint family property. The First Appellate Court comes to the conclusion that suit is not suffers from non-joinder of necessary party and mother is also not entitled for any share and Trial Court judgment is modified answering point No.4 as partly affirmative and partly allowed the appeal and held that appellants No.1 and 2 each are entitled for  $1/3^{\text{rd}}$  share and respondents No.1 and 2 i.e. plaintiffs are also entitled for  $1/3^{\text{rd}}$  share in Sy.No.101/1 measuring 16 guntas and confirmed the other findings of the Trial Court. Being aggrieved of the judgment of the First Appellate Court, the present second appeal is filed by the appellant Smt.T.N.Susheelamma, who is the

mother of the deceased Santhosh and she also passed away during the pendency of this R.S.A. and hence her daughter has been transposed as the appellant.

6. The main grounds urged in the appeal is that the judgment and decrees passed by the Trial Court as well as the First Appellate Court are highly illegal, arbitrary and unjust and both the Courts have failed to consider the fact that respondents No.1 and 2 who are seeking the relief of partition, ought to have directed to make the appellant as party to the proceedings as she is the mother of the deceased shareholder and that she is a necessary party and that she is also entitled to a share in the share of deceased Santhosh. It is also contend that admittedly the original appellant herein was not made as party before the Trial Court and only on an application filed by the original appellant in this appeal was impleaded as party to the proceedings. When the First Appellate Court allowed the application, but failed to consider the fact that mother of the deceased is also entitled to a share in the property left by her son Santhosh. It is contend that the original appellant is none

other than the mother of the deceased Santhosh and the suit being one for partition and separate possession of the share of late Santhosh and all the legal heirs are necessary parties to the proceedings and the mother of the deceased is a Class-I heir as per the schedule to the Hindu Succession Act and she is entitled to the share of son and widow of the deceased male Hindu. The First Appellate Court failed to consider the same and erroneously comes to the conclusion that she is not a co-parcener and original appellant has not claimed the share as a co-parcener in the joint family property and as she has claimed that she is the legal heir of deceased Santhosh and the same has not been considered by the Trial Court. This Court having considered the grounds urged in the appeal memo and heard the appellant's counsel and admitted the appeal. While admitting the appeal this Court framed the following substantial questions of law that arise for consideration in this appeal:

- i. Whether the First Appellate Court committed an error in ignoring the fact that the ap herein was a Class-I heir of deceased Santhosh, and therefore, was entitled to claim his share along with plaintiffs in the suit?

- ii. Whether the First Appellate Court committed an error in not allotting appropriate share to the appellant herein?

and issued notice against the respondents.

The respondents are also appeared and represented through counsel.

7. The counsel appearing for the appellant has reiterated the grounds urged in the appeal. The counsel would vehemently contend that the mother being the Class-I heir of deceased Santhosh is entitled for a share along with wife and son of the deceased Santhosh and the First Appellate Court failed to consider the said fact and both the Trial Court as well as the First Appellate Court comes to the conclusion that the mother is not the co-parcener and the very approach of both the Courts is erroneous.

8. The counsel also vehemently contend that during the pendency of the appeal the appellant passed away leaving behind her husband, daughter and also the son of the

predeceased son and hence, the daughter was transposed as appellant and out of the share of the appellant they are all entitled for a share in the property and hence to that extent this Court has to modify the judgment and decree of the Trial Court as well as the First Appellate Court.

9. The counsel appearing for the respondents in his argument vehemently contend that when the share of the mother was not allotted and before allotment of her share she passed away, the question of granting any share in favour of the transposed appellant and other her legal heirs does not arise and they are not entitled for any share in the share of the mother, since she passed away before the allotment of her share and hence it does not requires any modification of the judgment and decree of the Trial Court and hence, prayed this Court to dismiss the appeal.

10. Having heard the arguments of the appellant's counsel and also the counsel for the respondents this Court has to consider the substantial questions of law framed by this Court.

11. I would like to consider both substantial question of law for consideration in keeping the materials available on record and also the grounds urged in the appeal, since both are interconnected.

12. This Court has framed the substantial question of law for consideration, whether the First Appellate Court committed an error in ignoring the fact that the appellant herein was a Class-I heir of deceased Santhosh, and therefore, she was entitled to claim her share along with plaintiffs in the suit?

13. The second substantial question of law is with regard to, whether the First Appellate Court committed an error in not allotting appropriate share to the appellant herein and the said substantial question of law is also interconnected with the first substantial question of law.

14. Having considered both substantial questions of law, whether the mother was a Class-I heir of the deceased Santhosh and whether the appellant was entitled for a share along with

plaintiffs and hence taken up together both substantial questions of law.

15. Having considered the material on record, it is not in dispute that the original appellant Susheelamma is the mother of the deceased Santhosh and also it is not in dispute that suit schedule properties are belongs to the joint family and defendants also took the contention that the property was purchased in the name of deceased Santhosh, is also the property of joint family. The said contention was turned down by the Trial Court, but First Appellate Court reversed the said finding in coming to the conclusion that the deceased Santhosh was aged about 19 years at the time of purchasing the property and he was not having his own independent and separate income and First Appellate Court answered the point No.2 as affirmative in coming to the conclusion that the said property is also a joint family property.

16. I would like to make it clear that here also that the plaintiffs 1 and 2 have not filed any appeal against the said finding and hence it is clear that the suit schedule properties as

well as the claim of the defendants is that other property bearing Sy.No.101/1 to the extent of 16 guntas is also a joint family property and to that effect now there is no dispute.

17. Now the substantial question of law before the Court is with regard to the fact that the original appellant is a Class-I heir of deceased Santhosh and to that effect also there is no dispute, since under the schedule the mother become the Class-I heir of deceased Santhosh. Now the question before this Court is with regard to the subsequent development after filing of the present second appeal, the mother also passed away.

18. It is also not in dispute that the original appellant was brought on record before the First Appellate Court on her application and First Appellate Court while considering whether she is entitled for a share in the property, while answering point No.3 formulated whether suit is for non-joinder of necessary party and whether she is entitled for a share, answered the same as negative and the very approach of the Appellate Court is erroneous. Once impleaded as party and she is also a Class-I heir of the deceased Santhosh, ought not to have answered the

same as negative and she is also a necessary party to the said suit, since the deceased passed away leaving behind the mother, wife and son and they are the Class-I heirs of the deceased Hindu male member of the joint family and the original appellant herein is also entitled for a share in the property left by the deceased Santhosh as Class-I heir and the very approach of the First Appellate Court is erroneous.

19. The First Appellate Court while answering point No.3 mainly concentrated that appellants have not explained how the mother became co-parcener in the present suit in the family of parties to the suit, when defendant No.1 is alive.

20. No doubt, defendant No.1 who is the husband of the original appellant of this appeal is alive and the First Appellate Court lost sight of the fact that her son Santhosh passed away prior to filing of the suit and as a result she became Class-I heir, but the First Appellate Court comes to the conclusion that during the life time of defendant No.1, in the suit for partition, she cannot be considered as necessary party. The First Appellate Court fails to take note of the fact that she became Class-I heir

on account of death of her son. No doubt her husband is alive, but as soon as her son passed away, she became the Class-I heir of the deceased son Santhosh and the same was not considered by the Trial Court and erroneously proceeded that mother cannot be considered as co-parcener and she cannot claim any independent share in the ancestral and joint family properties. The very approach of the First Appellate Court is also erroneous since the original appellant in this appeal has not claimed any independent share in the ancestral and joint family properties as co-parcener and she has claimed the share out of the share of her son Santhosh who passed away leaving behind his mother who is the original appellant in this appeal and hence, the very approach of the First Appellate Court that the original appellant in this appeal is not a necessary party is erroneous and also erroneously comes to the conclusion that she is not entitled for share and the very approach of the First Appellate Court that during the life time of Defendant No.1 i.e. husband of the original appellant of this appeal is not entitled for a share is also erroneous approach and hence this Court has to reverse the said finding in coming to the conclusion that she is a Class-I heir and

she is also entitled for a share in the property left by her son being the Class-I heir along with wife of the deceased and also the son of the deceased.

21. Now the question before the Court is that the original appellant also passed away during the pendency of this second appeal leaving behind her husband, her daughter and also son of the pre-deceased son.

22. The counsel appearing for the appellant also vehemently contend that, on account of death of original appellant her legal heirs are entitled for share out of her share and hence this Court has to modify the judgment and decree of the Trial Court and First Appellate Court.

23. The counsel appearing for the respondents would vehemently contend that when the share of the original appellant was not allotted and she passed away during the pendency of this second appeal, question of allotting any share in favour of the legal heirs left behind her does not arise and if she is alive then this Court ought to have considered her claim

and it is only an enlargement of share among them and already her husband got  $1/3^{\text{rd}}$  share in the suit schedule property and her daughter also got  $1/3^{\text{rd}}$  share and deceased son legal heirs have also got  $1/3^{\text{rd}}$  share and hence it does not require any modification of the judgment and decree of the Trial Court and the First Appellate Court.

24. Now the question before this Court whether they are entitled for share in the property left by the original appellant and the same enlarges the share of her husband and her daughter and her grand son i.e. son of the said deceased Santhosh.

25. It is not in dispute that she is passed away during the pendency of the appeal and this Court also comes to the conclusion that she is a Class-I heir of her deceased son Santhosh and she is also entitled for a share in the property of her son i.e.  $1/3^{\text{rd}}$  share of suit schedule property devolves upon her son as a co-parcener. But the fact is that she also passed away during the pendency of this appeal and whether it enlarges the share of her husband, her daughter and her grand son. It is

also important to note that the Trial Court granted  $1/3^{\text{rd}}$  share in respect of plaintiffs No.1 and 2 as they are the legal representatives of the deceased Santhosh by collectively.

26. The second plaintiff is wife of the deceased Santhosh. The son is the first plaintiff of the pre-deceased son and property is undivided in the Co-parcenary property during his life time and rightly Trial Court granted  $1/3^{\text{rd}}$  share towards the deceased. It is also important to note that when the son passed away, the plaintiffs ought to have made the mother as party to the suit since, she became Class-I heir of the deceased son, but they have not included her as party to the proceedings, but voluntarily she has filed an application before the Appellate Court and the same is allowed. But while considering her claim the Appellate Court has rejected her claim as discussed above and this Court already comes to the conclusion that she is entitled for a share out of  $1/3^{\text{rd}}$  share of her son i.e.  $1/9^{\text{th}}$ . The same has to be re-divided among her heirs in view of the discussion below.

27. It is also important to note that when she passed away during the pendency of this appeal, this Court has to invoke Section 15 of the Hindu Succession Act, 1956 i.e. General Rules of succession in the case of female Hindus: (1) The property of a female Hindu dying intestate shall devolve according to the rules set out in Section 16,- firstly, upon the sons and daughters (including the children of any pre-deceased son or daughter) and the husband.

28. In the case on hand, defendant No.1 get  $\frac{1}{3}$  share as a co-parcener +  $\frac{1}{27}$  share as a legal heir of his wife, in total entitled for  $\frac{10}{27}$ . Defendant No.2 who is also entitled for  $\frac{1}{3}$  share as a co-parcener +  $\frac{1}{27}$  as legal heir of her mother, in total she is entitled for  $\frac{10}{27}$ . Plaintiff No.1 who is the son of pre-deceased son, being the sharer of his father entitled for  $\frac{1}{9}$  share and as a heir of his grand mother entitled for  $\frac{1}{27}$  share, in total he is entitled for  $\frac{4}{27}$  share and plaintiff No.2 who is the wife of the deceased Santhosh is entitled for  $\frac{3}{27}$  share as a heir of her husband and hence, this appeal requires to be allowed as

claimed by the appellant. Hence, I answer both substantial question of law as affirmative.

29. In view of the discussions made above, I pass the following:

**ORDER**

The appeal is allowed.

The judgment and decree of the Trial Court and the First Appellate Court are modified granting 10/27 share each to defendant Nos.1 and 2, 4/27 share to plaintiff No.1 and plaintiff No.2 is entitled for 3/27 share and to draw the decree accordingly.

The Registry is directed to send the Trial Court records to the Trial Court forthwith.

**Sd/-  
JUDGE**

AP