…RESPONDENTS

THIS RFA FILED UNDER SEC.96 R/W ORDER 41 RULE 1 OF CPC., AGAINST THE JUDGMENT AND DECREE DATED18.12.2015 PASSED IN OS.NO.2697/2010 ON THE FILE OF THE 42ND ADDL. CITY CIVIL AND SESSIONS JUDGE, BENGALURU, (CCH NO.43), DECREEING THE PARTITION.

THIS APPEAL COMING ON FOR ADMISSION THIS DAY, **KRISHNA S. DIXIT.J.,** DELIVERED THE FOLLOWING:

JUDGEMENT

This Appeal by Defendant Nos. 1 & 5, father & son seeks to lay a challenge to the judgement & Decree dated 18.12.2015 whereby the partition suit in O.S.No.2697/2010 filed by first Respondent- Smt. Nirmala has been decreed. Their operative portion reads as under:

> *"Suit of the plaintiff is decreed with costs.*
> *The plaintiff is entitled to get 1/6th share in the suit properties by metes and bounds along with mesne profits.*
> *Separate enquiry is to be held regarding mesne profits.*
> *Draw preliminary decree accordingly."*

2. BRIEF FACTS OF THE CASE:

(a) One Smt.Eramma W/o Thimmaiah had bought suit properties vide registered sale deeds dated 10.4.1944, 10.6.1950 and 12.7.1953. Copies of these sale deeds are sought to be produced in the Appeal with leave of the Court vide Appellants' Application filed under Order XLI Rule 27 of the Code of Civil Procedure, 1908 which merits to be allowed for the limited purpose of deciding the nature of property i.e., whether they are ancestral or

otherwise, there being no serious objections from the side of Respondents herein.

(b) Smt.Eramma had two sons namely Mr.Narayana Reddy i.e., the first Defendant (Appellant No.1 herein) and Mr.Ramaiah. She had a daughter too namely Smt.Munithayamma. There was a family partition vide registered deed dated 27.7.1970 (Ex.P.5) whereby, these properties were partitioned between the children, Rs.1,000/- having been given to Smt.Eramma as her share. Suit properties are those that had fallen to the share of Mr.Narayana Reddy.

(c) Mr.Narayana Reddy has one son i.e., Defendant No.5 in the suit who happens to be Appellant No.2 herein and four daughters, as well; 1st Respondent herein who was the Plaintiff is one of them. Other daughters happen to be the Respondents in this Appeal and they were Defendants in the subject suit for partition. Only the 1st Appellant had filed the Written Statement and the learned Trial Judge had framed the following three principal issues:

(i) Whether the plaintiff proves that, the suit schedule property is joint family property?

(ii) Whether the defendants prove that, the plaintiff has taken amount as her share and attested as a witness to the Sale Deed executed by him?

(iii) Whether the plaintiff is entitled for reliefs as sought for?

(d) From the side of Plaintiff, she got herself examined as PW.1 and in her deposition, as many as seven documents came to be marked as exhibits P.1 to P.7. They comprised of undisputed Genealogical Tree, revenue documents, Partition Deed of 1970, Encumbrance Certificates and Sketch. From the side of Defendants, the 2nd Appellant got examined as DW.1; in his deposition, as many as nine documents came to be marked as per Exhibits D1 to D9. These documents comprised of four Gift Deeds, one Sale Deed, one Rectification Deed, one Mortgage Deed and two GPAs.

(e) The learned Trial Judge having considered pleadings of the parties and weighed both the oral and documentary evidence, has entered the subject judgement & decree that are put in challenge by the

Defendant Nos.1 & 5 who happen to be the father and son. The learned Judge in his wisdom treated the subject properties as being ancestral ones and therefore, all the grandchildren of Smt.Eramma are entitled to a share. In the absence of a Counter Claim or the like, 1/6th share has been granted to the Plaintiff alone.

3. SUBMISSION OF APPELLANTS:

(a) Learned counsel appearing for Appellants vehemently argues that the properties having been bought by Smt.Eramma, she was the absolute owner thereof and she was in the exclusive possession. Because of section 14 of the Hindu Succession Act, 1956, she had full ownership over these properties vide ***TULASAMMA vs. SESHA REDDI (DEAD) BY L.Rs***, AIR 1977 SC 1944. Even after the partition of 1970, these properties do not bear the character of ancestral acquisition; the shares allotted to the 1st Appellant Mr.Narayana Reddy being his separate property, the suit for partition would not lie. This aspect having been lost sight of, the impugned judgement

& decree are liable to be voided. The Court below read too much into the stray admission of Appellant No.2 who was examined as DW.1, when there was contra evidentiary material galoring on record and thus, there is a great infirmity warranting interference of this Court. He also highlights the improvements for developments made to the properties in question.

4. CONTENTIONS OF THE RESPONDENTS:

Learned Advocates appearing for the Respondents vehemently contended that there is abundant evidentiary material on record coupled with admission of DW.1 that the properties are ancestral acquisition and therefore, the 1st Appellant who was the Defendant No.1 cannot claim them to be his separate property and thereby, dealt with the same accordingly. Even otherwise, the subject properties having been put into a *common hotchpot*, eventually resulting into joint family property, the assertion of the Appellants that they do not have trappings of ancestral property, pales into insignificance.

Lastly, they contend that the impugned judgement & decree even assuming that they have some arguable infirmity, do not merit interference, their unsustainability having not being demonstrated.

5. Having heard the learned counsel for the parties and having perused the Appeal papers, we decline interference in the matter for the following reasons:

(a) The question whether the subject properties are ancestral properties at the hands of the parties to the suit does not much bother us. There is admission of DW.1 who happens to be the 2nd Appellant herein and who was the 5th Defendant in the suit. In his cross-examination dated 15.4.2015, he has said as under:

> *"The suit property is not purchased by myself or my father. It is true that the suit property is our ancestral property. It is true that the Khatha of suit property was standing in the name of my father. It is true that including old house they were in the name of my father… It is true that my family is running from the income of Mobile shop… It is true that myself, Plaintiff & Defendants are the successors to the suit property."*

(b) The vehement submission of learned counsel for the Appellants that, above is a stray admission and therefore, not entitled to weigh much, is bit difficult to countenance, and reasons for the same are not far to seek: firstly, an admission is treated as a substantive piece of evidence in any civilized jurisdiction. Section 58 of the Indian Evidence Act, 1872 states that the admitted facts need not be proved. Of course, section 31 qualifies that admissions are not a conclusive proof of the matter admitted, is also true. However, this qualification cannot be invoked by the Appellants who did not conduct re-examination of DW.1 for explaining away the effect of admission. Nothing is stated even at the Bar as to why such a right of re-examination was not availed. What the Apex Court said in ***UNITED INDIA INSURANCE COMPANY LIMITED vs. SAMIR CHANDRA CHAUDHARY*** (2005) SCC OnLine SC 1030 at page 387 is worth adverting to:

> *"…Admission is the best piece of evidence against the persons making admission. As was observed by this Court in Avadh Kishore Das v.*

Ram Gopal and Ors., AIR (1979) SC 861 in the backdrop of Section 31 of Indian Evidence Act, 1872 (in short the `Evidence Act') it is true that evidentiary admissions are not conclusive proof of the facts admitted and may be explained or shown to be wrong; but they do raise an estoppel and shift the burden of proof placing it on the person making the admission or his representative-in-interest. Unless shown or explained to be wrong, they are an efficacious proof of the facts admitted. As observed by Phipson in his Law of Evidence (1963 Edition, Para 678) as the weight of an admission depends on the circumstances under which it was made, these circumstances may always be proved to impeach or enhance its credibility. The effect of admission is that it shifts the onus on the person admitting the fact on the principle that what a party himself admits to be true may reasonably be presumed to be so, and until the presumption is rebutted, the fact admitted must be taken to be established. An admission is the best evidence that an opposing party can rely upon, and though not conclusive is decisive of matter, unless successfully withdrawn or proved erroneous…"

(c) Secondly, in all the registered conveyances executed by Mr.Narayana Reddy himself, these properties are described to be ancestral ones, barring one sporadic incident. For instance, in Ex.D4, it is written as under:

"...ಷೆಡ್ಯೂಲಿನಲ್ಲಿ ನಮೂದಿಸಿರುವ ಸ್ವತ್ತು ನಮ್ಮ ಪಿತ್ರಾರ್ಜಿತವಾದ ಸ್ವತ್ತಾಗಿದ್ದು ಇದು ನನ್ನ ಸ್ವಂತ ಸ್ವಾಧೀನಾನುಭವದಲ್ಲಿರುತ್ತದೆ. ಈ ಷೆಡ್ಯೂಲು ಸ್ವತ್ತನ್ನು ತಹಲ್ವರಿಪಿಗೂ ನಾನೇ ಸಾಗುವಳಿ ಮಾಡಿಕೊಂಡಿದ್ದು ನನ್ನ ಅನುಭವದಲ್ಲಿರುತ್ತದೆ..."

Similarly, in Ex.D5, the properties are described:

> *"…Same is Donor's Ancestral Property, having acquired the same through a Family Partition made between the Donor, his mother and brother on 27.7.1970..."*

Further, in Ex.D7, it is written as under:

> *"…The same is Donor's Ancestral Property, having acquired the same by the Donor along with the other parties through a Family Partition Deed made between the Donor and is other family members…"*

In view of these specific recitals that are not disputed nor explained away as being wrong, there is absolutely no scope for employing the adjective 'stray' to the admission given by the 2nd Appellant herein who was examined as DW.2 in the suit. The properties were treated as of joint family, is demonstrated by words, by conduct and by deeds of Defendant No.1 in the suit.

(d) As already observed above, in terms of application under Order XLI Rule 27 of CPC, leave having been granted, the three Sale Deeds of Smt.Eramma dated 10.4.1944, 10.6.1950 and 12.7.1953, having been taken on record, are perused by us. Smt.Eramma became the

owner of these properties, remains undisputed. However, she only had put these properties in the *common hotchpot* parties admittedly being the Hindus governed by Mithakshara and effected partition of the same amongst her two sons and one daughter, herself retaining none vide registered Partition Deed dated 27.7.1970 vide Exhibit P.5. All the parties to the suit have structured their stand in the court below and before this court on the basis of this Partition Deed. It is nobody's case that it was not a joint hindu family. Even the three sale deeds now sought to be placed on record in terms of Order LXI Rule 27 of the Code do not deviate from this substratum.

(e) It hardly needs to be stated that *Mithakshara* is a monumental work of sage Vignaneshwara of Marathur, Kalaburagi District in Karnataka. It is his commentary on Yaajnavalkya Smruti. There is a lot of literature in Hindu Law which recognizes the doctrine of blending of individual's property into joint familys' so that it becomes the family property for enuring to the benefit of all its

members. Mayne's 'Treatise on Hindu Law & Usage', 18th Edition at paragraph 301 says as under:

> *"Property thrown into common stock.- Thirdly, property which was originally self-acquired, may become joint family property, if it has been voluntarily thrown by the owner into the joint stock, with the intention of abandoning all separate claims upon it. This doctrine has been repeatedly recognised by the Privy Council. Perhaps, the strongest case was one, where the owner had actually obtained a statutory title to the property under the Oudh Talukdars Act 1 of 1869. He was held by his conduct to have restored it to the condition of ancestral property…"*

Law relating to blending of separate property with those of joint family is well settled. If a member of a joint hindu family voluntarily throws his self-acquired property into a common stock with the intention of abandoning his separate claim over it and to render it to be of all other members as well, such a property becomes a joint family property. Such an intention can be inferred by the words and if there are no words, then from his conduct.

(f) Admittedly, the martriarch of the family Smt.Eramma having bought several properties by virtue

of 1944, 1950 & 1953 Sale Deeds, was the absolute owner thereof. In fact, that is the case pleaded by the Appellants pressing into service section 14 of the 1956 Act in the light of Tulasamma case *supra*. She had put these properties into *common hotchpot* of the joint family by virtue of registered Partition Deed of 1970. Had she been a limited owner, she could not have put these properties into a *common hotchpot* vide ***MALESSAPPA BANDEPPA vs. DESAI MALLAPPA***, (1962) 2 SCJ 589. Added, to invoke this doctrine, the family need not be shown to have other property, with which blending can logically take place. Thus, the invocation of section 14 of the 1956 Act strengthens the case of the Respondents than that of the Appellants in view of the above discussion.

(g) It hardly needs to be stated that every Hindu family is presumed to be joint although such a presumption does not extend to there being joint family properties. The Partition Deed of 1970 in the first part has the narration of Smt.Eramma who states these properties

to be her own acquisition and that she was in possession. However, in the latter part, there is a recital as to she and her children being in the joint possession and enjoyment of the same. Added, there were proceedings in respect of these properties under the Inams Abolition Acts and both the sides agree that there are Regrant Orders made by the Special Deputy Commissioner. Nobody has set a case contrary to the content, intent & tenor of the Partition Deed or other conveyances by way of registered Gifts, etc. as already mentioned above. Partitioning of the self acquired property amongst all the members of the family by the matriarch raises a very strong presumption as to the subject properties having been put into a *common hotchpot* and that there is nothing on record to rebut the same. That being the position, there is an eminent case for the invocation of the doctrine of *common hotchpot*.

(h) Learned counsel for the Appellants to an extent is right in submitting that the doctrine of blending has not animated the impugned judgement & decree, in so many words. However, if pleadings of the parties coupled with the evidentiary material on record, give scope for the invocation of this doctrine, this Court being the First Appellate Court cannot refrain from pressing into service the said doctrine to save the judgement & decree, which is otherwise vulnerable for challenge, as rightly contended by learned advocates appearing for the Respondents. Even otherwise, our interference that way is eminently needed inasmuch as one of the daughters of the 1st Appellant was not given any share in the property and she was left high & dry in her matrimonial home. This has been duly addressed by the Court below.

(i) Lastly, there is one more aspect that comes in the way of Appellants' laying a challenge to the judgement & decree. Admittedly, under 1970 Partition Deed, Smt.Eramma had given shares in her properties in favour of two sons & one daughter. One of these sons is the

Defendant No.1 in the suit who happens to be the 1st Appellant herein. He having passed away during the pendency of this Appeal, has left the estate for the benefit of parties to the Appeal. All the parties to the 1970 Partition Deed, are estoped from contending to its contra. Ordinarily, a self-acquired property cannot be the subject matter of partition. Mulla on Hindu Law in its 21st Edition at paragraph 302 states:

> *"**Subject of partition**-The only property that can be divided on a partition is coparcenery property. Separate property cannot be the subject matter of partition…"*

If this Rule were to be applied, there could not have been partition of 1970 at all unless that is saved by invoking the doctrine of *common hotchpot*. For the same reason, the question whether the suit properties at the hands of the 1st Defendant Mr.Narayana Reddy assume the character of ancestral properties, pales into insignificance. Even if it is answered in the negative, the other question whether these properties by virtue of blending assumed the character of joint family properties, would arise for

consideration and needs to be answered by us in the affirmative because of the discussion *supra*. Added to this, there is the doctrine of estoppel enacted u/s 115 of the 1872 Act. All the parties to the partition of 1970 having treated the subject property as being joint family property, they cannot contend to the contra, more particularly when others have acted on that premise and altered their position to the detriment. Further, permitting the Appellants to contend to the contrary amounts to permitting them blowing hot and cold at one breath, which the law shuns.

(j) All the above being said, there is force in the submission of learned counsel for the Appellants: after the partition of 1970, the properties fell into the hands of the 1st Appellant who is now dead & gone. Some properties have been given to some daughters; money also have been spent for the marriage of the son & daughters. Some developments have been done by investing huge sums. Equities need to be adjusted. The Respondents in all

fairness have come forward with a Joint Memo filed this day in the Court which reads as under:

> "*Joint memo for acceptance dated 19.02.2024*
>
> *The plaintiffs and the defendants humbly submit that they will seek equitable appointment of their share by taking into account of their receipts & gifts and developments before the final decree proceedings after due enquiry."*

In view of that, all such aspects need to be examined by the FDP Court, if & when initiated. In that connection, all contentions of the parties need to be kept open and accordingly, they are for being treated in the contemplated Final Decree Proceedings.

6. Before parting with this case, we are constrained to observe that there was lot of scope for penning the judgement & decree in question in a far better way, both in terms of language & law. It was Oscar Wilde (1854-1900), an Irish Poet & Dramatist, who had said: "*There is scope for improvement even in heaven*". Does it not apply to our judgement too…? We appreciate the able assistance rendered by learned counsel appearing for the

Appellants and the learned Advocates appearing for the Respondents.

In the above circumstances, this Appeal fails, however subject to observations herein above made.

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