

IN THE HIGH COURT OF KARNATAKA
CITCUIT BENCH AT DHARWAD

DATED 26TH DAY OF MAY 2010

BEFORE

THE HON'BLE MR. JUSTICE N. KUMAR

AND

THE HON'BLE MR. JUSTICE H.S. KEMPANNA

R.F.A. No. 97/2004 c/w R.F.A. No. 178/2004

In R.F.A. No. 97/2004

Between:

Sri Shivarudrappa Ishwarappa Gudashi,
Since deceased by his LR's.

1. Smt. Lalita w/o Shivarudrappa
Ishwarappa Gudashi, Aged about 53 years.
2. Smt. Renuka d/o Shivarudrappa
Ishwarappa Gudashi, aged about 26 years.
3. Smt. Meenaxi, d/o Shivarudrappa
Ishwarappa Gudashi, aged about 25 years.
4. Smt. Vasundara, d/o Shivarudrappa
Ishwarappa Gudashi, aged about 23 years.

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5. Smt. Uma d/o Shivarudrappa
Ishwarappa Gudashi, aged about 18 years.
6. Smt. Puttalaxmi d/o Shivarudrappa
Ishwarappa Gudashi, aged about 16 years.

(LR {6} being minor represented by her
natural guardian LR{1}).

All are residing at P.B. Road,
Sankeshwar, Gudashi Hadde,
Hukkeri Taluk, Belgaum district.

- Appellants

(by Sri G.R. Andanimath, Sri S.S. Niranjana,
Sri K.V. Narasimhan, Sri V.D. Urs, Advocates)

and

1. Smt. Parvati Bai w/o Sampanna Yeshagol,
Since deceased by LR.
- A) Sri Chandrashekar Sampanna Yeshagol,
S/o Sampanna Yeshagol, age 41 years.
- B) Sri Channabasappa Sampanna Yeshagol,
S/o Sampanna Yeshagol, age 38 years,
Since deceased by his LR.
- B1) Sridevi wife of late Channabasappa Yeshagol,
Age about 35 years, occupation: nil,
Residing at Sankeshwar, Taluk Hukkeri,
District Belgaum.



B2) Sampat Channabasappa Yeshagol,
Age about 18 years, occupation student,
Residing at Sankeshwar, Taluk Hukkeri,
District Belgaum.

B3) Sainath Channabasappa Yeshagol,
Age about 16 years, residing at
Sankeshwar, Taluk Hukkeri,
District Belgaum, minor by guardian
Natural mother Sridevi wife of
Late Channabasappa Yeshagol,
Residing at Sankeshwar, Taluk Hukkeri,
District Belgaum.

C) Miss Lalitha d/o Sampanna Yeshagol,
Age 27 years.

All are residents of Sankeshwar,
Hukkeri Taluk, Belgaum District-591 309.

2. Smt. Ratnabai, aged about 60 years,
R/o Ghodageri, Hukkeri Taluk,
Belgaum district.

3. Smt. Avubai, aged about 58 years,
R/o Mugalkhod, Raibag Taluk,
Belgaum district.

- Respondents
(by Sri D.B. Karigar, Advocate for R1A, R1B1, R1B2, R1Bc, R1c,
Sri G. Balakrishna Shastry, Advocate for R1B1, R1B3,
R2 and R3 are served)



This appeal is filed u/S 96 of C.P.C. against the judgment and decree dated 20.12.2003 passed in O.S. No. 42/1997 (old no. 35/1994) on the file of the Civil Judge (Sr. Dn.), Hukkeri, decreeing the suit for partition and separate possession.

In R.F.A. No. 178/2004

Between:

Sri Shivarudrappa Ishwarappa Gudashi,
Since deceased by his LR's.

1. Smt. Lalita w/o Shivarudrappa
Ishwarappa Gudashi, Aged about 53 years.
2. Smt. Renuka d/o Shivarudrappa
Ishwarappa Gudashi, aged about 26 years.
3. Smt. Meenaxi, d/o Shivarudrappa
Ishwarappa Gudashi, aged about 25 years.
4. Smt. Vasundara, d/o Shivarudrappa
Ishwarappa Gudashi, aged about 23 years.
5. Smt. Uma d/o Shivarudrappa
Ishwarappa Gudashi, aged about 18 years.
6. Smt. Puttalaxmi d/o Shivarudrappa
Ishwarappa Gudashi, aged about 16 years.
(LR {6} being minor represented by her
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All are residing at P.B. Road,
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- Appellants



(by Sri G.R. Andanimath, Sri S.S. Niranjan,
Sri K.V. Narasimhan, Sri V.D. Urs, Advocates)

and

1. Smt. Parvati Bai w/o Sampanna Yeshagol,
Since deceased by LRs.
- A) Sri Chandrashekar Sampanna Yeshagol,
S/o Sampanna Yeshagol, age 41 years.
- B) Sri Channabasappa Sampanna Yeshagol,
S/o Sampanna Yeshagol, age 38 years,
Since deceased by his LRs.
- B1) Sridevi wife of late Channabasappa Yeshagol,
Age about 35 years, occupation: nil,
Residing at Sankeshwar, Taluk Hukkeri,
District Belgaum.
- B2) Sampat Channabasappa Yeshagol,
Age about 18 years, occupation student,
Residing at Sankeshwar, Taluk Hukkeri,
District Belgaum.
- B3) Sainath Channabasappa Yeshagol,
Age about 16 years, residing at
Sankeshwar, Taluk Hukkeri,
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Natural mother Sridevi wife of
Late Channabasappa Yeshagol,
Residing at Sankeshwar, Taluk Hukkeri,
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R/o Mugalkhod, Raibag Taluk,
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- Respondents

(by Sri D.B. Karigar, Advocate for R1A, R1B1, R1B2, R1Bc, R1c,
Sri G. Balakrishna Shastry, Advocate for R1B1, R1B3,
R2 and R3 are served)

O.S. No. 99/97 This appeal is filed u/S 96 of C.P.C. against the judgment and
decree dated 20.12.2003 passed in O.S. No. 42/1997 (old no. 35/1994)
on the file of the Civil Judge (Sr. Dn.), Hukkeri, decreeing the suit for
partition and separate possession, *dismissing the suit for*
declaration and perpetual injunction.

These appeals coming on for preliminary hearing, N. Kumar. J,
delivered the following judgment.

Judgment

1. O.S. No. 99/1997 (old O.S. No. 10/94) was filed by Sri
Shivarudrappa Ishwarappa Budashi for the relief of declaration that he
is the absolute owner of suit schedule properties and for a decree of

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permanent injunction. O.S. No. 42/1997 was filed by his sister Smt. Parvati Bai for partition and separate possession of her share in the very same suit schedule properties. The trial Court clubbed both the cases, recorded common evidence and dismissed the suit O.S. No. 99/1997 decreed the suit O.S. No. 42/1997 granting not half share but full share in favour of Smt. Parvati Bai. Aggrieved by the said judgment and decree of the trial Court passed in both the suits, the present two appeals are filed. R.F.A. No. 97/2004 is an appeal preferred against the judgment and decree passed in O.S. No. 42/1997 and R.F.A. No. 178/2004 is an appeal preferred against the judgment and decree passed in O.S. No. 99/1997. Therefore both these appeals are taken up for consideration together and disposed of by a common judgment.

2. As the suit O.S. No. 42/1997 includes all the properties the pleadings in the said case would be suffice for disposal of these two appeals. One Mallappa Satappa Gudashi was the propositor who died

in 1953 leaving behind his widow Ningamma who died in the year 1960. Their son Ishwar had a son by name Shivarudrappa and a daughter by name Parvati Bai. Parvati Bai-plaintiff in O.S. No. 42/1997 contended that suit properties are agricultural properties as well as non-agricultural lands, houses and shops. Originally it belonged to her grandfather Mallappa, his son having predeceased him. On his death the said properties devolved in equal share on his widow, grand daughter and grandson. However, Ningawwa and Krishna Bai have died intestate before commencement of the legal proceedings. Therefore on the date of the suit it is only the Parvati Bai and her brother Shivarudrappa who succeeded to the plaint schedule properties. They are in joint possession, there is no partition by metes and bounds between them. However, Shivarudrappa got his name entered in respect of the suit properties under ME No. 3432 of Sankeshwar behind her back. On coming to know of the same she filed a wardi-application to the authorities to enter her name also. However, it was not considered and came to be rejected. Therefore



she filed an appeal before the Assistant Commissioner who allowed the appeal and directed inclusion of her name. It is thereafter the defendant Shivarudrappa filed a suit in O.S. No. 10/94 claiming declaration to declare him as an absolute owner of the entire properties and for injunction. In those circumstances she was constrained to file suit O.S. No. 42/1997 for partition and separate possession of her legitimate share in the properties. The plaint was amended by adding paragraph no. 5(a) pleading that Shivarudrappa and Parvati Bai applied for grant of occupancy right for grant of suit land before the Land Tribunal, Hukkeri in T.S. No. 65/7. The Land Tribunal passed an order granting occupancy right in favour of both of them. Therefore she is entitled for half share. Shivarudrappa during his lifetime after service of summons entered appearance and filed written statement denying the entire claim of the plaintiff. He specifically pleaded that the plaintiff demanded her separate share in the year 1964. Therefore he transferred a motor car bearing no. BMY 6975 in the name of deceased husband of Parvati Bai and also she was



allotted the portion of TPC No. 2646 situated at Poona Bangalore Highway road in R.S. No. 360 consisting of land and residential portion. The plaintiff insisted on execution of Sale Deed instead of deed of partition in respect of suit properties. Accordingly he executed a registered Sale Deed dated 05.08.1964 in favour of the plaintiff allotting the properties towards her share. Therefore he contended the suit filed by her for partition and separate portion is not maintainable, partition had taken place in the year 1964 and therefore the present suit for partition is not maintainable. The plea of partition was denied by the plaintiff by amending the plaint. An additional written statement was filed denying those allegations. It was contended in the earlier proceedings her husband-power of attorney holder had admitted the partition and therefore it was contended that she is not entitled to a share. On the aforesaid pleadings the following issues and additional issues are framed in O.S. No. 42/1997.

Issues

1. Whether the defendant proves that in 1964 there was partition between him and the original plaintiff (since deceased)?



2. What decree or order?

Additional issues

1. Whether the defendants no. 1C to 1H proves that D-1A and B are not wives of deceased Shivarudrappa?
2. Whether the plaintiffs prove that after the death of Shivarudra who is not survived by any legal heir, his half share is inherited by Parvatibai legal heirs therefore, the plaintiffs are entitled to the entire suit properties?

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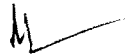
3. The plaintiff in O.S. No. 99/1997 Shivarudrappa contended, in the said suit that there was a partition between them in the year 1964. Instead of partition deed he has executed a registered Sale Deed in favour of his sister, giving share in the suit properties. He has also transferred his car in the name of her husband and the properties remaining after giving her share is the absolute properties of himself in which his sister has no right. During the pendency of the proceedings Parvati Bai died, her LRs were brought on record and they filed a written statement contesting the claim and claiming share in their mother's properties. They also contended Shivarudrappa



married Champa Bai. He had no issues and therefore he married Rathna Bai, the second defendant. Through her also he had no issues and he married third wife Aubai. Again he had no issues and therefore he married Lalitha somewhere in the year 1973. Through her he has got five daughters. Lalitha having married Shivarudrappa during the subsistence of the earlier marriages, it is a void marriage and the children born to her are illegitimate children having no right in the coparcenary properties. Therefore they contended that after the death of Shivarudrappa his illegitimate children and the 4th wife have no right in the properties and the entire properties devolves on them. On the aforesaid pleadings the trial Court framed the following issues.

Issues

1. Whether the plaintiff proves that himself being absolute owner of the suit properties is in exclusive possession of the same as on the date of the suit?
2. Whether the defendants no. 1A to C prove that valuation of the suit made and court fee paid thereon is improper?



3. Whether the said defendants 1A to 1C prove that they are entitled to compensatory costs of Rs. 5,000/-?
4. What order or decree?

Additional issues

1. Whether the plaintiffs no. 1C to H prove that plaintiff no. 1A and B are not the wives of deceased Shivarudrappa?
2. Whether the defendant no.1A to C proves that, Parvatibai and her brother Shivarudra applied for grant of occupancy rights in the suit land before the Land Tribunal, Hukkeri in TNC.SR. No. 6517 and obtained order of granting occupancy rights in favour of both on 17.12.1977?
3. Whether defendant no. 1A to 1C further proves that after the death of said Shivarudra who is not survived by any LRs his half share is inherited by Parvatibai, legal heir and therefore, the said defendants are entitled for the entire suit properties?
4. Whether the plaintiff no. 1C to 1G and 1H, 1D, 1E and 1F prove that, as per the desire of the Parvatibai the deceased Shivarudra has given the properties to the Parvatibai as described in para no. 2 of their joinder?
5. Whether the plaintiff 1C proves that, she is the legally wedded wife of the deceased Shivarudra Gudashi, plaintiff no. 1D to 1H



are the daughters born out of the wedlock, therefore, plaintiff no. 1C to H have succeeded to the properties of Shivarudra?

4. In support of respondents' contention Shivarudrappa was examined as P.W.1. He examined Appa Saheb B. Naik as P.W.2, his second wife Ratnabai as P.W.3 and 4th wife Lalita as P.W.4 and got marked 29 documents as per Ex.P.1 to Ex.P.29. Channabasappa was examined as D.W.1. It appears Rathna Bai was again examined as D.W.1 and Lalita was again examined as D.W.5, Babayya Omkarayya Hiremath was examined as D.W.2, Aubai Shivarudra Gudashi as D.W.3 and Gurulingayya Mathapati was examined as D.W.4. They have produced 54 documents, which are marked as Ex.D.1 to Ex.D.54.

5. On appreciation of the oral and documentary evidence on record the trial Court held the plaintiff-Shivarudrappa has failed to prove that he is the absolute owner of the suit schedule properties and he is in exclusive possession of the same as on the date of the suit. It



held the valuation of the suit is proper and defendants are not entitled to any compensatory costs. It also held the legal heirs of Shivarudrappa have failed to prove that plaintiff no. 1(a) to 1(c) are not the wives of the deceased Shivarudrappa. However, it held defendants 1(a) to 1(c) have proved that Parvati Bai and her brother Shivarudrappa applied for grant of occupancy right in respect of the suit land before the Land Reforms Tribunal, Hukkeri in T.S. No. 65/7 and the Land Tribunal granted occupancy rights equally to Parvati Bai and Shivarudrappa. Though the Tribunal held Lalitha is the wife of Shivarudrappa, the said marriage was void and the children born to them are all illegitimate children who cannot be treated as coparceners and therefore they are not entitled to any share in the coparcenary properties. Therefore on the death of Shivarudrappa his sister Parvati Bai inherited the share of Shivarudrappa and thus she became the absolute owner of the entire properties. The trial Court also recorded a finding that the Sale Deed executed by Shivarudrappa in favour of Parvati Bai is not a partition



but it is an absolute sale deed. Smt. Lalitha is not the legally wedded wife of Shivarudrappa and therefore whether she or her children have any right in the properties of Shivarudrappa and accordingly it dismissed the suit filed by Shivarudrappa and decreed the suit filed by Parvati Bai and granted not only in respect of the half share as claimed in the suit but declared her as entitled to the entire land which is the subject matter of the suit. Aggrieved by the said judgment and decree the LRs of Shivarudrappa have preferred these two appeals.

6. Learned counsel appearing for appellants contended even if the case pleaded by Shivarudrappa that after executing the Sale Deed in favour of his sister he has effected partition and all the schedule properties exclusively belongs to him is held to be not proved. Admittedly Shivarudrappa and Parvati Bai-the sister were entitled to half share in the schedule properties. Though it was an ancestral properties at the hands of Shivarudrappa he was entitled to half share in a notional partition and then it becomes his properties. On his



death his illegitimate children would be entitled to succeed to the estate. Merely because the said properties was a coparcenary properties they cannot be denied their legitimate right in the said properties. The illegitimate children are not claiming the properties as coparcenary properties but they are claiming right in the said properties on the death of their father on which date it had become the properties of their father. Therefore finding recorded by the trial Court in this regard is liable to be set aside and at least these illegitimate children are to be held as entitled to half share of Shivarudrappa in the schedule properties.

7. Per contra, learned counsel appearing for respondents submitted that it is a settled law that illegitimate children though has been given the status of legitimate son or daughter u/S 16 of the Hindu Marriage Act, they have not been conferred the status of coparcener and they are not entitled to a share in the coparcenary properties as the properties in question is a coparcenary properties, it was not divided

during the lifetime of Shivarudrappa. On the death of Shivarudrappa his sister being the only legal heir is entitled to succeed to the estate of Shivarudrappa in preference to the illegitimate children. In that view of the matter the judgment and decree of the trial Court refusing to grant a share to the illegitimate children and declaring his sister as absolute owner of the entire properties is legal and valid and do not call for interference.

8. In the light of the aforesaid submissions and in the light of the material on record the only point that arise for our consideration in these appeals is as under:

1. Whether the illegitimate children of Shivarudrappa are entitled to succeed to the estate of Shivarudrappa on his death as the schedule properties is a coparcenary properties?

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9. The facts are not in dispute. The schedule properties belongs to the propositor Mallappa Satappa Gudashi. He had a son by name Ishwar. Ishwar had a son and a daughter by name Shivarudrappa and

Parvati Bai. Ishwar predeceased his father Mallappa and he died in the year 1959. Mallappa died in the year 1953 leaving behind his widow Ningawwa and the widow of Ishwar- Krishna Bai and grandson Shivarudrappa and grand daughter Parvati Bai. Ningawwa died in the year 1960. Krishna Bai died in the year 1962. There was no partition in the family. The material on record discloses Shivarudrappa transferred his motor car in the name of husband of Parvati Bai. He also executed registered Sale Deeds conveying some items of the properties. It is thereafter he contended that the remaining properties exclusively belong to him and Parvati Bai is not entitled to any share in the said properties. Therefore he filed a suit in O.S. No. 99/1997 for a declaration to that effect and for an injunction. Parvati Bai filed a suit for partition and separate possession of half share or such other legitimate share in the schedule properties of her father against Shivarudrappa, i.e., O.S. No. 42/97. Parvati Bai died leaving behind her husband and children who are brought on record as legal heir. Shivarudrappa had married Champa Bai, the first wife.

Through her he had no issues. He also had no issues through his second wife Ratna Bai and third wife Appu Bai. That it is through his 4th wife-Lalitha, he has got five daughters. On the date of death of Shivarudrappa all the three wives and the children of Smt. Lalitha were brought on record. It is not in dispute that he married these three wives during the subsistence of the marriage with Smt. Champa Bai and during her lifetime all the three marriages are void. Consequently the five daughters born to Lalitha out of a void marriage and they are illegitimate children. The schedule properties is a coparcenary properties in the hands of Shivarudrappa. He was the sole surviving coparcener. Parvati Bai, his sister was not a coparcener. In those circumstances on the death of Shivarudrappa the question of the sister as a coparcener acquiring interest in the entire properties by way of survivorship would not arise. Sister is a class-II heir. She would have succeeded to the estate of her brother if there are no class-I heirs. From the aforesaid evidence on record it is clear Shivarudrappa had no legitimate son or daughter. The legally first wedded wife was no


more on the date of his death. But the fact remains he had married Lalitha and through her he had five daughters. As the marriage between him and Lalitha was void, the daughters born out of the void marriage are illegitimate children. Even if there were a son he could not be treated as a coparcener as the law stood on the date of death of Shivarudrappa.

10. Sec. 16(1) of the Hindu Marriage Act, 1955 declares “notwithstanding that marriage is null and void under Section 11, any child of such marriage who would have been legitimate if the marriage had been valid, shall be legitimate, whether such child is born before or after the commencement of the Marriage Laws (Amendment) Act, 1976.”

11. Sub Sec. 3 of Sec. 16 of the Hindu Marriage Act, 1955 declares that “such children would not have any right in or to the properties of any person, other than the parents, in any case where, but for the passing of this Act, such child would have been incapable of


possessing or acquiring any such rights by reason of his not being the legitimate child of his parents.”

12. Therefore it is clear by virtue of Sec. 16 the illegitimate children have been given the status of legitimacy and also rights in the properties of the parents. But no right is conferred on such illegitimate children in the properties, which does not belong to the parents namely the coparcenary properties or joint family properties in which other members of the family would have interest. However, the properties of the father who is member of the coparcener includes not only self-acquired properties, but his share in the coparcenary properties. Though illegitimate children cannot file a suit for partition against the father in respect of his share in the coparcenary properties on his death, they can file a suit for a share in the coparcenary properties. In that view of the matter when Shivarudrappa's share in the coparcenary properties, they are entitled to equal rights along with the legitimate children. They are claiming right in the said properties



not as a coparcener but as the properties of their father to which they are entitled to by virtue of sub Section 2 of Sec. 16 of the Hindu Marriage Act.

13. The finding that the schedule properties is a coparcenary properties and on the death of Shivarudrappa his sister as a coparcener, acquired the interest of Shivarudrappa also by survivorship; as observed by the trial Court on the face of it is illegal. In the first place on the date of death of Shivarudrappa his sister was not a coparcener as no woman would be a coparcener under Hindu Law. In those circumstances the sister succeeding to the estate of the brother would arise only in the absence of any heir left behind by Shivarudrappa. Admittedly he has five daughters though they are illegitimate children, they are his legal heirs. Such legal heirs have been conferred status of legitimate children by virtue of Sec. 16. Therefore it is not a case where Shivarudrappa died leaving without any class-I legal heirs. Sister is only a class-II legal heir. Class-I legal heir completely excludes class-II heirs. Therefore the question



of sister inheriting late Shivarudrappa's estate in the facts of the case would not arise as he had left behind five daughters. Though they are illegitimate, they are entitled to succeed to the share of the father and they are entitled to the properties left by Shivarudrappa. In that view of the matter, the trial Court is not justified in declining to grant any share to the daughters and in holding that sister has succeeded to the estate of Shivarudrappa and to that extent the judgment of the trial Court requires interference. As rightly held by the trial Court late Shivarudrappa has failed to establish that he is the absolute owner of the entire properties. In that view of the matter the judgment and decree of the trial Court in O.S. No. 99/1997 is affirmed.

14. Judgment and decree of the trial Court in O.S. No. 42/1997 is hereby set aside. The suit in O.S. No. 42/1997 is decreed declaring that Parvati Bai is entitled to $\frac{1}{2}$ share only and on her death her legal heirs are entitled for $\frac{1}{2}$ share. To the remaining $\frac{1}{2}$ share of Shivarudrappa his five daughters succeed. However the fourth wife

Smt. Lalitha would not be entitled to any share ^{1/2} of the properties of Shivarudrappa.

Parties shall bear their own costs.

Sd/-
JUDGE

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