

IN THE HIGH COURT OF KARNATAKA AT BANGALORE

DATED THIS THE 27<sup>TH</sup> DAY OF MAY, 2011

BEFORE

THE HON'BLE MR. JUSTICE JAWAD RAHIM

RSA No.1740 OF 2006 AND  
RSA.CROB No.2/2008 IN RSA No.1740 OF 2006

IN RSA No.1740/2006

BETWEEN

N.M.MAHADEVIAIAH DEAD BY LRs

1. BASAVARAJAMMA  
W.O N.M.MAHADEVIAIAH,  
AGED ABOUT 65 YEARS
2. NATARAJU  
S/O N.M.MAHADEVIAIAH  
AGED ABOUT 44 YEARS
3. RAJASHEKARA,  
S/O N.M.MAHADEVIAIAH  
AGED ABOUT 38 YEARS
4. VASANTHA,  
D/O N.M.MAHADEVIAIAH,  
AGED ABOUT 40 YEARS

ALL ARE RESIDING AT  
BASAVANAPURA VILLAGE,  
CHATRA HOBLI,  
NANJANGUD TALUK – 571 301

... APPELLANTS

(BY SRI M.SHIVAPPA AND SRI A.S.MAHADEVASWAMY.,  
ADVs.,)

AND:

M.MUTHU RAJU,  
S/O MADAPPA,  
AGED ABOUT 62 YEARS,  
R/AT THAMMADAGERI,  
NANJANGUD TOWN – 571 301

... RESPONDENT

(BY SRI P.MAHESHA AND SRI B.J.KRISHNA, ADV.,)

THIS RSA FILED U/S 100 OF CPC AGAINST THE  
JUDGMENT AND DECREE DATED 06-03-2006 PASSED IN  
R.A.NO.138/1999 ON THE FILE OF THE CIVIL JUDGE  
(SR.DN) & JMFC, NANJANGUD, PARTLY ALLOWING THE  
APPEAL AND SETTING ASIDE AND MODIFYING THE  
JUDGMENT AND DECREE DATED 30-10-1999 PASSED IN  
OS.NO.228/1999 ON THE FILE OF THE PRL.CIVIL JUDGE  
(JR.DN) & AJMFC, NANJANGUD.

IN RSA.CROB No.2/2008

BETWEEN:

M.MUTHU RAJU  
AGED ABOUT 61 YEARS,  
S/O LATE MADAPPA,  
R/O THAMADAGERI,  
NANJANGUD TOWN,  
MYSORE DISTRICT

...CROSS OBJECTOR

(BY SRI P.MAHESHA AND SRI B.J.KRISHNA., ADVs.,)

AND:

NATARAJU,  
S/O N.M.MAHADEVAIAH,  
MAJOR,  
R/O BASAVANAPURA VILLAGE,  
CJATRA HOBLI,  
NANJANGUD TALUK,- 571 301

... RESPONDENT

(BY SRI M.SHIVAPPA ASSOCIATES, ADV.,)

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CROSS-OBJECTION NO. 2/2008 IN RSA 1740/2006 FILED U/O 41 RULE 22 OF CPC AGAINST THE JUDGMENT AND DECREE DATED 06-03-2006 PASSED IN R.A.NO.138/1999 ON THE FILE OF THE CIVIL JUDGE (SR.DN) & JMFC, NANJANGUD, PARTLY ALLOWING THE APPEAL AND SETTING ASIDE AND MODIFYING THE JUDGMENT AND DECREE DATED 30-10-1999 PASSED IN OS.NO.228/1999 ON THE FILE OF THE PRL. CIVIL JUDGE (JR.DN) & JMFC, NANJANGUD AND THE CROSS OBJECTIONS HEREIN PRAYS TO SETASIDE THE JUDGMENT AND DECREE OF IN R.A.138/1999 DATED 06-03-2006 ONLY IN RESPECT OF GRANTING 1/3<sup>RD</sup> SHARE IN FAVOUR OF THIRD PLAINTIFF / RESPONDENT 1(B).

THE APPEAL AND CROSS-OBJECTIONS COMING ON FOR HEARING THIS DAY, THE COURT DELIVERED THE FOLLOWING:-

### JUDGMENT

RSA.1740/06 is by the legal heirs of the plaintiff- N.M.Mahadevaiah against the judgment in R.A.138/99 dated 6.3.2006 on the file of Civil Judge (Sr.Divn.) & JMFC, Nanjangud, whereby the judgment and decree in

O.S.228/99 decreeing the suit has been set aside to modify the decree.

2. Cross Objections 2/08 in RSA.1740/06 is by the 2<sup>nd</sup> defendant-Muthuraj against the judgment in regular appeal.

3. Heard learned counsel for the appellant and cross-objector and perused records in supplementation thereto. The contextual facts are:

a) Madappa had three sons, viz., N.M.Mahadevaiah (plaintiff), Nagaraju and Muthuraju. He owned several properties including the property bearing Survey No.BL.146/228 situate in Nanjangud Taluk. Upon his death, Mahadevaiah filed suit in the year 1990 seeking division of the properties described in the schedule to grant unto him 1/3<sup>rd</sup> share therein.

b) In support of the relief sought, he averred, his father-Madappa was the owner of the property in question and after his demise his estate devolves upon his 3 sons namely, himself and defendants 1 and 2. It is alleged he requested the defendants to partition the property but they

kept on postponing on one reason or the other. Therefore he had no choice but to file the suit.

c) His brothers-Nagaraju and Muthuraju entered contest and filed written statement in which they denied that the property was joint family property. They contended, it was the property owned by their father-Madappa. During his lifetime, Madappa had borrowed money from Venkatesh Gupta and Sharadamma; as the loan was to be cleared, Madappa requested all his sons to contribute for discharge of the loan, but Mahadevaiah refused. Instead of contributing money to discharge the liability created by Madappa for family necessities, plaintiff-Mahadevaiah demanded that he be given his share in the property and in consideration of Rs.100/-, he executed a release deed on 19.8.1959. It is their say that he has thus relinquished all his right, title and interest in the property. Thus having no subsisting right after the demise of their father Madappa, the suit was not maintainable.

d) Defendants further contended, Sharadamma and Venkatesh Gupta had filed suits in O.S.539/70 and

O.S.430/73 seeking recovery of the amount due by Madappa; the decretal amount was satisfied by them and therefore the property described in the schedule is now owned by them jointly and the plaintiff has no share.

e) Based on the material propositions in the pleadings, learned trial judge framed relevant issues for consideration. During the pendency of the suit, Nagaraju-1<sup>st</sup> defendant filed a memo on 4.3.1998 seeking to decree the suit granting 1/3<sup>rd</sup> share to the plaintiff. The memo made it clear that he did not want to defend the suit, but 2<sup>nd</sup> defendant-Muthuraju continued to defend the suit.

f) In the subsequent events, Nagaraju died and his legal heirs had to be brought on record. At that juncture, 3<sup>rd</sup> plaintiff-Nataraju, s/o Mahadevaiah filed an application, I.A.VII under Order XXII Rule 10, C.P.C. to permit him to come on record as transferee in title from Nagaraju-1<sup>st</sup> defendant. The surviving defendant-Muthuraju filed objections to the application denying his claim that he had acquired title to the property in question.

g) Learned trial judge considering the claim in the

application and objections raised by the surviving defendant, passed an order on 6.1.1999 disposing of the application with the following order:

'I.A.VII is disposed of accordingly in the following manner:

i) Since they are already on record, only they can be transposed;

ii) The 3<sup>rd</sup> plaintiff to prove that the will dated 20.2.1998 is the last will.'

4. Learned counsel for the appellant would submit, even though the appellate court rightly held 3<sup>rd</sup> plaintiff-Nataraju had proved the will and granted him 1/3<sup>rd</sup> share in the property in question, court seriously erred in believing the defendant's contention that Mahadevaiah had executed the release deed only on the basis Ex.D1 is a thirty-year old document. He submits, Ex.D1 was not proved in the manner known to law and therefore the appellate court should have held Ex.D1 was not proved. He further submits, excluding Ex.D1-alleged release deed, upon death of Madappa, the property was divisible amongst Mahadevaiah and his two brothers, viz., Nagaraju and Muthuraju. As Nagaraju died executing the will, 1/3<sup>rd</sup> was

bequeathed to the 3<sup>rd</sup> plaintiff-Nataraju and remaining 2/3<sup>rd</sup> was divisible amongst Mahadevaiah and Muthuraju. Since Mahadevaiah had died, his 1/3<sup>rd</sup> was divisible amongst the legal heirs who are appellants herein. In other words, he submits only 1/3<sup>rd</sup> should have been given to Muthuraju, appellant in R.A.138/99, but the appellate judge has erroneously given him 2/3<sup>rd</sup> share.

5. The 2<sup>nd</sup> plaintiff-Muthuraju has filed cross objections in CroB.2/08 against the judgment of the appellate court giving 1/3<sup>rd</sup> share to the 3<sup>rd</sup> plaintiff-Nataraju, accepting the will propounded by him (Nataraju). Learned counsel for the cross-objector submits, the trial court and appellate court have seriously erred in ignoring the fact that Mahadevaiah had executed the release deed relinquishing his right, title and interest in favour of Mahadevaiah and his brothers-Nagaraju and Muthuraju. Upon death of Mahadevaiah, the property was divisible amongst Nagaraju and Muthuraju. Nagaraju had executed the will in favour of Muthuraju on 20.9.1998 and therefore Muthuraju gets half share in the property by virtue of being

legal heirs of Madappa and the remaining half share of Nagaraju devolves upon him by virtue of the will dated 28.2.1998. In the resultant position, Muthuraju should have been declared as owner of the entire property.

6. I have heard learned counsel on both sides substantially.

7. The appeal has been admitted to consider the following substantial question of law:

“Whether the Lower Appellate Court was justified in holding that the plaintiff has no right to a share in the property in view of Ex.D.1, the deed of relinquishment”?

8. From the submissions of both sides, it could be seen Mahadevaiah denied having executed the release deed in favor of his father-Madappa and two brothers-Nagaraju and Muthuraju. The release deed is produced by the defendants marked as Ex.D1 wherein the signature of Mahadevaiah is marked as Ex.D1(a) to (c). They also produced Ex.D2-assessment extract to show in terms of the

deed, his name was deleted. Besides, 2<sup>nd</sup> defendant-Muthuraju has produced the will said to have been executed by 1<sup>st</sup> defendant-Nagaraju in his favour at Ex.D3. On behalf of the plaintiff, PW1 has produced assessment extract of the property in question at Ex.P1.

9. On a perusal of the documents produced along with the evidence led in support of I.A.VII, the date of the wills and the memo filed on 4.3.1998 assumes importance. The trial court has recorded as follows:

‘D1 present. He files memo consenting for decree of 1/3<sup>rd</sup> share . Memo accepted.

PW1 present. DNN for CPM prays time for cross-examination by 11.3.1998.’

The memo was filed by Nagaraju consenting to give 1/3<sup>rd</sup> share. The memo is dated 4.3.1998, the will propounded by the 3<sup>rd</sup> plaintiff-Nataraju is dated 28.2.1998. If the 1<sup>st</sup> defendant had executed the will on 28.2.1998 in favour of the 3<sup>rd</sup> plaintiff as contended by him, he would not have consented for decreeing the suit granting him 1/3<sup>rd</sup> share. This had created a suspicion in the mind of the court about the genuineness of the will dated 28.2.1998. Therefore 3<sup>rd</sup>

plaintiff-Nataraju had to explain why he did not bring to the notice of the court existence of the will. The 2<sup>nd</sup> defendant-Muthuraju has also produced a will at Ex.D3 dated 28.9.1998 to show 1<sup>st</sup> defendant had bequeathed his 1/3<sup>rd</sup> share to him. The question therefore is, whether the will has been proved in the manner known to law.

10. PW1-Nataraju has also examined two attesters as his witnesses to prove the will which is notarized but not registered. The doctor who treated the executant-Nagaraju is not examined, nor the scribe to the will. Thus learned judge relied on the decision of the apex court. In the said decision, the apex court dealing with the genuineness of the will, opined that the conscience of the court must be satisfied that the will in question was not only executed and attested in the manner required under the Indian Succession Act, but it should be found to have been made by the executant voluntarily. Applying the dictum of the apex court, the learned trial judge opined, it requires all suspicious circumstances to be removed and since the doctor was not examined to prove that the executant was

conscious and fully in control of all his faculties, it was not safe to rely on it. Similarly learned judge noticed Ex.D3-will relied by the 2<sup>nd</sup> defendant-Muthuraju was not proved, noting that RW2-Nagendra had not vouched the fact that Nagaraju had executed the will, and the evidence of Puttaswamy (PW1) was inconsistent with regard to execution of the will. Therefore learned judge has negated both the wills and proceeded to decide the validity of the release deed and held that was also not proved merely because it was a thirty-year old document and could not be taken as a true version. Ultimately it was held Mahadevaiah was entitled to 1/3<sup>rd</sup> share and as he had died, his legal heirs would get his share.

11. The judgment of the learned appellate judge would show he has believed the will propounded by the 3<sup>rd</sup> plaintiff-Nataraju and disbelieved the will advanced by Muthuraju-2<sup>nd</sup> defendant. This approach is wholly erroneous. The evidence led by the 3<sup>rd</sup> plaintiff dated 28.2.1998 and 2<sup>nd</sup> defendant dated 28.9.1998 in support of the wills canvassed by them being the same, learned

appellate judge could not have believed one and disbelieved the other.

12. Be that as it may, no material evidence is on record to prove that either the will dated 28.2.1998 or 28.9.1998 was executed by Nagaraju out of free will and consent and that he had consciously bequeathed the property to them. Therefore both the wills have to be eschewed. So far as the release deed is concerned, it is in favour of his father and two brothers receiving Rs.100/- as consideration. Therefore it has to be held that the property was divisible amongst the three legal heirs of Madappa. Since during the pendency of the suit, Nagaraju died, it becomes divisible amongst Mahadevaiah and Muthuraju. As Mahadevaiah is dead, his legal heirs would be entitled to half and the remaining half will devolve upon Muthuraju-2<sup>nd</sup> defendant.

13. In the circumstances, the substantial questions of law are answered in favour of the appellant and against the respondents. The judgment in R.A.138/99 is set aside. The judgment of the trial court in O.S.228/99 on other file of

Principal Civil Judge (Junior Divn.) & JMFC, Nanjangud, is restored. In the circumstances, there shall be no order as to costs.

14. For the reasons discussed above, R.S.A.1740/06 is allowed. RSA.Crob.2/08 is dismissed.

Sd/-  
JUDGE

VK