

IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 31ST DAY OF JANUARY, 2015

BEFORE

THE HON'BLE MR. JUSTICE A.V.CHANDRASHEKARA

M.S.A. NO.66/2012

BETWEEN:

HASMATH BE
D/O MOHAMED KHASIM SAB
AGED ABOUT 61 YEARS
R/O DOOR NO.212,
RAJAULLA MUSTHAP NAGAR
MAGANAHALLI ROAD,
DAVANGERE TALUK AND DISTRICT-577001.

... APPELLANT

(By Sri: R GOPAL, ADV.)

AND:

1. HUSANE SAB
S/O MOHAMMED KHASIM SAB
AGED ABOUT 61 YEARS
R/O DODDALAGHATTA
CHITRADURGA TALUK-577501

2. NASEEMA BANU
W/O. DADAPEER
AGED ABOUT 51 YEARS
R/O KURUBARAHALLI VILLAGE
CHITRADURGA TALUK-577501

3. NAHEEMA BANU
W/O AKBAR ALI

AGED ABOUT 49 YEARS
R/O KURUBARAHALLI VILLAGE
CHITRADURGA TALUK-577501

4. JAMSHEER BANU
W/O. M.S. BASHA
AGED ABOUT 47 YEARS
R/O. T.B. CIRCLE
HIRIYUR
CHITRADURGA DISTRICT-577501.
5. MUBEENA BANU
W/O NASEER
AGED ABOUT 46 YEARS
R/O. DODDALAGATTA VILLAGE
CHITRADURGA TALUK-577501
6. NAZEEMA BANU
W/O AREEF SHAVALI
AGED ABOUT 44 YEARS
R/O. KURUBARAHALLI VILLAGE
CHITRADURGA TALUK-577501
7. RATHNAMMA
W/O SIDDAPPA
AGED ABOUT 61 YEARS
8. NAGAPPA
S/O. SIDDAPPA
AGED ABOUT 41 YEARS
9. VARADARAJ
S/O. SIDDAPPA
AGED ABOUT 31 YEARS

RESPONDENTS 7 TO 9 ARE
R/O. DODDALAGATTA VILLAGE
CHITRADURGA TALUK-577501

10. V.C. DEVENDRAPPAA
S/O ESHWARAPPAA
AGED MAJOR

11. CHANNAPPA
S/O SIDDAPPA
AGED MAJOR

12. V.S. SIDDAPPA
S/O SIDDAPPA
AGED MAJOR

13. SUMITRAMMA
W/O SHADAKSHARAPPAA
AGED MAJOR

14. SIDDAMMA
W/O THIPPESWAMY @ THIPPANNA
AGED MAJOR

15. RAJU
S/O THIPPANNA @ THIPPESWAMY
AGED ABOUT 24 YEARS

16. D. NAGESHAPPA
S/O DURUGAPPA
AGED MAJOR

RESPONDENTS 10 TO 16 ARE
R/O. DODDALAGATTA VILLAGE
CHITRADURGA TALUK-577501

... RESPONDENTS

(By Sri: M T JAGANMOHAN, ADV. FOR R1,
R7 TO R16 ABSENT
R2 TO R6 ARE SERVED)

MSA FILED U/S 43, RULE-1(u) OF CPC, AGAINST THE
JUDGMENT AND DECREE DATED:09.03.2012 PASSED IN

R.A.NO.71/2011 ON THE FILE OF THE PRL. DISTRICT AND SESSIONS JUDGE, CHITRADURGA, PARTLY ALLOWING THE APPEAL SETTING ASIDE THE JUDGMENT AND DECREE DATED 24.08.2011 PASSED IN O.S.35/2005 ON THE FILE OF THE I-ADDL. SENIOR CIVIL JUDGE, CHITRADURGA, PARTLY DECREEEING THE REMANDING SUIT THE TRIAL COURT FOR REDECISION.

THIS APPEAL COMING ON FOR FINAL HEARING THIS DAY, THE COURT DELIVERED THE FOLLOWING:

JUDGMENT

Heard learned counsel for the appellant.

Respondent's counsel is absent. Respondents 2 to 6 are duly served and unrepresented. Respondents 1, 7 to 16 are absent. Perused records.

2. The matter has been admitted on 12.1.2015 to consider the following substantial question of law:

Whether the first appellate court is justified in framing additional issues as found in paragraph 17 and thereafter remanding the matter to the trial court and it has committed serious illegality and perversity?

3. Appellant is the sole plaintiff in O.S.35/05 which was pending on the file of I Additional Senior Civil Judge, Chitradurga. Respondents are defendants in the said suit. The suit was filed for the relief of partition and separate possession of the suit schedule premises as described in the schedule. The suit came to be decreed in part by a considered order dated 24.8.2011 as against which the defendants filed R.A.71/11 before the district court, Chitradurga. The said appeal filed under Section 96, C.P.C. has been allowed condoning the delay in filing the appeal. The appeal is allowed with a direction to the trial court to record additional evidence on the two issues framed by the first appellate court and to dispose of the suit. It is this order dated 9.3.2012 passed in R.A.71/11 which is called in question in this appeal on various grounds as set out in the appeal memo.

4. The first appellate court dealing with an appeal under Section 96, C.P.C. is a regular civil court dealing

with original suits and has all the trappings of a civil court. The First Appellate Court has got power to frame additional issues or re-cast issues and record additional evidence. Instead of recording evidence on the two issues proposed by the first appellate court, the matter has been remanded to the trial court which is contrary to the provisions of Order XLI Rule 23A, C.P.C.

5. In the case of **SHANTHAVEERAPPA .v. JANARDHANACHARI (ILR 2007 KAR 1127)**, this court has specifically held that there cannot be a limited remand, remand has to be open. No grounds are set out as to why a considered judgment passed in O.S.35/05 is set aside. Unless the impugned judgment is considered on merits and the same is set aside, the first appellate court could not have remanded the matter. In the light of the principles laid down in the case of SHANTHAVEERAPPA and in the light of remand being contrary to the provisions of Order XLI Rule 23A, C.P.C., the approach of the first appellate court is not in

accordance with law. Hence the impugned order is liable to be set aside and the matter is remanded to the first appellate court to deal with the appeal in accordance with law keeping in mind the observations made in this judgment.

6. In the result, I pass the following order:

O R D E R

The appeal is allowed. Parties to bear their own costs. The order dated 9.3.2012 passed in R.A.71/11 is set aside. The matter is remitted to the Principal District and Sessions Judge, Chitradurga, to consider the appeal afresh and dispose it in accordance with law. Parties to appear before the first appellate court on **17.3.2015** and thereafter the appeal shall be disposed of within six months thereafter. Parties to co-operate with the court.

Sd/-
JUDGE

vgh*