

IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 28TH DAY OF APRIL, 2022

BEFORE

THE HON'BLE MR. JUSTICE SACHIN SHANKAR MAGADUM

RFA NO. 1142 OF 2007(PAR/INJ)

BETWEEN:

SMT P L NANJAMMA
W/O.B M SRINIVASA MURTHY
D/O.LATE P L VENKATASWAMY RAJU
AGED ABOUT 56 YRS
NO.56, 16TH CROSS, VYALIKAVAL,
GDP EXTENSION, BANGALORE-560 003.

...APPELLANT

(BY SRI.L GOVINDARAJ, ADVOCATE)

AND:

1. SRI LAKSHMINARAYANA RAJU P
S/O.LATE P L VENKATASWAMY RAJU
AGED ABOUT 53 YRS
NO.18, I CROSS, VINAYAKA LAYOUT,
BOOPASANDRA, BANGALORE-560 094.

2. SRI. BABJAN
S/O MASTAN SABI
AGED ABOUT 35 YRS
R/AT KELAGINA THOTA GRAMA, KASABA HOBLI,
CHIKKABALLAPUR TALUK, KOLAR DIST-561 301.

3. SRI. N L RAJENDRA
S/O.LAKSHMINARAYANA

M/S.BHAVANI SHOPPING CENTRE
NO.909, BB ROAD,CHIKKABALLAPUR,
KOLAR DIST-561 130.

...RESPONDENTS

(BY SRI.N.BYREGOWDA, ADVOCATE FOR R1;
SRI.G.BALAKRISHNA SHASTRY, ADVOCATE FOR R2;
SRI.VINAYAKA, ADVOCATE BY HARANAHALLI ASSTS.)

THIS RFA IS FILED U/S 96 OF CPC AGAINST THE JUDGEMENT AND DECREE DT.22.02.2007 PASSED IN OS.NO.7033/2002 ON THE FILE OF THE XVIII ADDL.CITY CIVIL JUDGE, CCH.NO.32, BANGALORE CITY, PARTLY DECREETING THE SUIT FOR PARTITION AND SEPARATE POSSESSION.

THIS APPEAL HAVING BEEN HEARD AND RESERVED FOR JUDGMENT ON 12.04.2022, COMING ON FOR PRONOUNCEMENT OF JUDGMENT THIS DAY, THE COURT DELIVERED THE FOLLOWING:

JUDGMENT

The captioned regular first appeal is filed by unsuccessful plaintiff feeling aggrieved by the dismissal of the suit which was filed for partition and separate possession of plaintiff's half share in the plaint schedule properties.

2. The parties are referred to as per their rank before the trial Court for the sake of convenience.

3. The brief facts of the case are as under:

3(a) The plaintiff instituted a suit in OS.No.7033/2002 seeking relief of partition and separate possession and therefore, claimed her legitimate $\frac{1}{2}$ share in the suit schedule properties. The case of the plaintiff is that defendant No.1 is her younger brother. Her parents Venkataswamy Raju and Kamalamma are no more and therefore, plaintiff along with defendant No.1 has succeeded to their estate as surviving legal heirs.

3(b) Plaintiff at para 4 of the plaint has specifically averred that schedule B and C properties are joint family ancestral properties while schedule A property was purchased by plaintiff and first defendant's father out of his self earnings. It is further specifically pleaded that schedule A property is a vacant site which was allotted by Vinayaka Housing Co-Operative Society Limited and sale deed was registered in the name of plaintiff's father on 7.9.1979. Plaintiff further contended that her father constructed a residential house on schedule A property from his independent earnings.

3(c) The grievance of the plaintiff is that the first defendant has been enjoying the income derived from the suit schedule properties which is received in the form of rent and inspite of repeated request he is not willing to part with plaintiff's half share in the said income. It is in background, the first defendant has meddled with the schedule C property on 6.4.2002 in favour of second defendant and the alienation made by first defendant is in respect of entire extent and hence, the present suit.

3(d) The first defendant on receipt of summons, contested the proceedings by filing the written statement. The first defendant stoutly denied the entire averments made in the plaint and the claim made by plaintiff in respect of schedule A property. The allegation that it was purchased by plaintiff and first defendant's father from his independent earnings was also seriously disputed and contended that schedule A property is purchased by him from his independent income, as well as earnings and savings and therefore, the

same is not available for partition. Insofar as alienation pertaining to schedule C property is concerned, the first defendant claimed that it was his mother who alienated the schedule C property and though he is a signatory to the sale deed the entire sale consideration was received by his mother Smt. Kamalamma and the same was in fact utilised towards her medical treatment. At Para 10 of the written statement, the first defendant also contended that plaintiff is not entitled for share in schedule B and C properties as she had given up her right in schedule B and C properties by receiving a sum of Rs.3 Lakhs in cash from her father and silver and gold articles worth Rs.2,50,000/- were given by first defendant. On these set of defences, the first defendant sought for dismissal of the suit.

3(e) The third defendant filed written statement and stoutly denied the entire averments made in the plaint and stoutly contended that he purchased schedule B property from first defendant and his children for valuable sale consideration

and therefore, claimed that the present suit is not at all maintainable against the property which was already alienated by first defendant.

3(f) Based on rival contentions, the Trial Court formulated the following issues:

"1. Whether the plaintiff proves that plaint a schedule property is the self acquired property of her father as pleaded?

2. Whether the first defedant proves that plaint A schedule property is his self acquired property as contended?

3. Whether the sale of the plaint "C" schedule property by the first defendant and his children on 06.04.2002 in favour of the second defendant is null and void?

4. Whether the plaintiff proves that she is in joint possession? If not what is the effect?

5. Whether the plaintiff is entitled for share in respect of the plaint "B" schedule property?

6. To what relief?"

3(g) The plaintiff to substantiate her claim examined herself as P.W.1 and adduced documentary evidence vide

Exs.P1 to 13. The defendants to counter the claim also led in rebuttal evidence. The first defendant examined himself as D.W.1 and defendant No.3 examined himself as D.W.2. The defendants adduced rebuttal documentary evidence vide Exs.D1 to 13.

3(h) The Trial Court having assessed oral and documentary evidence has partly decreed the suit granting 1/4th share in schedule 'B' property. The claim of plaintiff in respect of A and C schedule properties was rejected.

Feeling aggrieved by the same, the plaintiff has preferred the present appeal.

4. Learned counsel appearing for plaintiff re-iterating the grounds urged in the appeal memo would contend that Ex.D1 which is alleged appointment of first defendant as a cashier in Manjunatha Wines is a concocted document. He would further point out that the learned Judge has totally misread Ex.P9 while assessing the income of defendant No.1. He would contend that the learned Judge erred in holding that

defendant No.1 had income of Rs.2,100/- per month whereas in Ex.P9 his income is declared as Rs.2,000/- per annum. It is further alleged that defendant No.1 was a student till March 1977 and the application for allotment of site i.e. suit schedule property was made on 22.11.1977 and on the said day an amount of Rs.3,000/- was deposited and the balance sital value of Rs.4,500/- was deposited on 16.12.1977. It is in this background, the learned counsel appearing for the plaintiff questioning the financial capacity of defendant No.1 would contend that within a span of one month having regard to the income of defendant No.1 way back in 1977, it cannot be presumed that defendant No.1 had a capacity of mobilizing Rs.7,500/-. To counter Ex.D1, plaintiff has placed reliance on Exs.P14 to 16 and under Ex.P15, the proprietor of said Manjunatha Wines had issued an endorsement denying his signature on Ex.D1. He would further point out that in the said document, the proprietor has stated in unequivocal terms that Manjunath Wines was never in existence during 1977.

Therefore, the counsel for the plaintiff would submit that Exs.P14 to 16 are not properly appreciated.

Learned counsel would further contend that in view of 2005 amendment to Hindu Succession Act, the plaintiff being a daughter is conferred coparcenary status and therefore, in terms of principles laid down by the Apex Court in the case of ***VINEETH SHARMA .VS. RAKESH SHARMA AND OTHERS***¹, she is entitled for half share in all the suit schedule properties.

5. Per contra, learned counsel appearing for defendant No.2 would vehemently argue and contend before this Court that defendant No.1 along with his mother alienated schedule C property under registered sale deed dated 6.4.2002 as per Ex.P2. Referring to the amended provisions of Section 6A of Hindu Succession Act, he would contend that alienation was made much prior to amendment to Section 6 and therefore, he would contend that the alienation by defendant No.1 in favour of defendant No.2 is saved and therefore 'C' schedule

¹ AIR 2020 SC 3717

property would not be available for partition and Trial Court has rightly declined to grant any share in schedule 'C' property. Learned counsel appearing for defendant No.2 would also place reliance on the judgment rendered by the Apex Court in **Veenetha Sharma**. Referring to paragraphs 55, 56, 61, 63, 65, 71, 72, 73, 74 and final conclusion at Para 129 II would contend that the rights of daughter has to enlarge with effect from 1.1.2005 with savings as provided in Section 6(1) of Hindu Succession Act, as to the disposition or alienation, partition or testamentary disposessions which had taken place before 20.12.2004. It is in this background, learned counsel for defendant No.2 would strenuously argue and contend that the alienations which is much prior to cut off date is saved and therefore, suit for partition in respect of schedule 'C' property is not at all maintainable.

6. Learned counsel appearing for defendant No.1 arguing in the same vein would also contend that the alienations in respect of schedule 'B' and 'C' properties would

bind the plaintiff and therefore, the same are not available for partition. However, he would fairly submit that schedule 'B' and 'C' properties are ancestral properties. Inviting this Court to para 111 of the judgment rendered by the Apex Court in the case of ***Vineetha Sharma***, the learned counsel would also strenuously argue and contend that the alienations effected prior to 20.4.2004 cannot be reopened. Highlighting the principles laid down by the Apex Court in the judgment stated supra, the learned counsel would contend that Parliament did not intend to upset complete transactions which were concluded and third party rights were created much prior to 20.12.2004. Therefore, he would contend that the Apex Court in the case of ***Vineetha Sharma*** dealt with sub-section (5) of Section 6 and not sub-section(1) of Section 6.

Insofar as plaintiff's claim in respect of Schedule 'A' property is concerned, he would vehemently argue and contend before this Court that plaintiff is not entitled to any share in schedule 'A' property. He would contend that it is the

self acquired property of defendant No.1. The plaintiff's claim that it was built by her father is not at all substantiated and therefore, he would contend that the judgment and decree in denying her share in schedule A and C properties does not warrant any interference. He would further point out that defendant No.1 has succeeded in proving that schedule A property is the self acquired property. Ex.D10 is building plan dated 10.10.1991 and therefore, he would contend that Ex.D10 clearly establishes that defendant No.1 has constructed after the death of his father. On these set of defences, he would contend that the appeal is liable to be dismissed.

7. Similar argument is canvassed by the counsel for defendant No.3. He would contend that defendant No.3 is a bonafide purchaser for valuable consideration and therefore, schedule B property is also not available for partition.

8. Heard the learned counsel appearing for plaintiff, defendant No.1 and counsel appearing for defendants to 3. Perused the pleadings, oral and documentary evidence.

9. The following points would arise for consideration:

(1)Whether the finding of the Trial Court that schedule A property is the self acquired property of defendant No.1 suffers from perversity and contrary to the clinching evidence adduced by plaintiff?

(2)Whether the Trial Court was justified in dismissing the suit in respect of Schedule 'C' properties on the ground that Court fee paid by plaintiff is insufficient?

(3)Whether the alienation made by defendant No.1 and his children in respect of schedule 'C' property under registered sale deed dated 6.4.2002 is saved in terms of proviso to Section 6(1) of the Hindu Succession Act?

4. *Whether plaintiff is entitled for share in schedule C property and if so, what would be her share?"*

10. **Regarding Point No.1:**

The plaintiff asserts that her father P.L. Venkataswamy Raju out of his self earnings purchased schedule A property from Vinayaka Housing Society Limited and got it registered in the name of defendant No.1 and thereafter constructed a residential building in schedule A property out of his self earnings. The plaintiff further claims that her father resided in schedule A residential house till his death. It is not in dispute that plaintiff's father died on 27.5.1991. Defendant No.1 by way of rebuttal evidence has produced allotment order vide Ex.D6 wherein the Housing Society has resolved to allot a site to defendant No.1. Even on perusal of Ex.P6 this Court would find that during the life time of father it was defendant No.1 who has submitted the application seeking allotment of site. The Housing Society has executed registered sale deed vide

Ex.D4 in favour of defendant No.1. Ex.D11 is a grant of house building advance to the tune of Rs.85,000/- and the loan is sanctioned by Accountant General, Bengaluru. The said loan is availed by defendant No.1 on 31.10.1991. As per Ex.D12 defendant No.1 has further availed loan from the Accountant General, Audit, Bengaluru, and the same is sanctioned in a sum of Rs.2,20,000/- for construction of a residential house. This loan is availed on 24.6.2002. Therefore, what emerges from this documentary evidence is defendant No.1 has discharged his burden and has succeeded in proving that schedule A property is his self acquired property. The claim of the plaintiff in regard to schedule A property and pleadings in that regard are found insufficient except bald assertion plaintiff has failed to produce any clinching evidence to demonstrate that schedule A property was purchased by plaintiff's father in the name of defendant No.1. Therefore, the clinching evidence adduced by defendant No.1 is sufficient to shift the burden which initially rested on defendant No.1 to

establish that schedule A property is his self acquired property. In the present case on hand no presumption would arise even otherwise. During the life time of father defendant No.1 had applied for a site and the same was allotted by Vinayaka Housing Society. The contention of the plaintiff that plaintiff's father has constructed a residential house is also factually incorrect and the same is also not at all substantiated by plaintiff by producing cogent evidence. The plaintiff though asserts that schedule A property is also joint family property, but however, she has failed to prove the nucleus with which schedule A property could have been acquired. In fact, this Court is of the view that plaintiff has failed to discharge her initial burden and therefore, this Court is of the view that the onus of proving the fact that schedule A property is the self acquired property of defendant No.1 would not arise in the present case on hand. As stated above, initial burden of joint ness of the family and surplus income is not established by plaintiff. But on the contrary, defendant No.1 has produced

clinching evidence and has succeeded in establishing that he has constructed the residential house in two phase by availing loan of Rs.85,000/- in 1991 and Rs.2,20,000/- in 2002 which is evident from Exs.D11 and 12.

In the light of the discussions made supra, point No.1 is answered in the **negative**.

11. Regarding Point No.2:

The defendant No.2 has purchased schedule C property. However, defendant No.2 has not filed written statement. Defendant No.1 has taken a contention that he has sold schedule C property in favour of defendant No.2 and therefore, plaintiff is not in joint possession of schedule C property. At para 13 of the written statement, defendant No.1 has claimed that it is defendant No.2 who is in exclusive possession of schedule C property. But at para 14 of the written statement defendant No.1 has admitted in unequivocal terms that schedule C and B properties are joint family ancestral properties. Therefore, defendant No.1 cannot

contend that plaintiff is not in joint possession. This Court while considering Point No.3 has held that alienation by defendant No.1 in favour of defendant No.2 in respect of schedule C property would not bind the plaintiff's legitimate share in the schedule C property and this Court has also held that plaintiff is entitled for her 1/4th share in schedule C property. Therefore, this Court is of the view that the Trial Court erred in answering issue No.4 in the affirmative and the said findings suffers from serious infirmities.

Accordingly, Point No.2 is answered in the negative.

12. Regarding points 3 and 4:

The counsel appearing for defendant No.2 while placing reliance on the judgment rendered by the Apex Court in the case of **Veenetha Sharma** would contend that schedule property is sold to defendant No.2 under registered sale deed dated 6.4.2002 therefore, the amended provisions of Section 6(1) would not come to the aid of the plaintiff and invalidate the sale deed in favour of defendant No.2 which has taken

place much prior to the cut off date i.e. 20.12.2004. In the light of question of law raised by learned counsel appearing for defendant No.2, this Court has to examine whether plaintiff is not entitled for share in Schedule 'C' property and whether the proviso to amended Section 6(1) of Hindu Succession Act, 1956 is applicable to the present case on hand.

Right of a daughter under Section 8 of Hindu Succession Act and alienation after death of father and before amendment to Section 6 of Hindu Succession Act:-

In the present case on hand, the plaintiff's father died on 27.5.1991. Therefore, succession opened in the year 1991. The Hindu Succession Act, 1956 came into force on 17.6.1956(hereinafter referred to as "1956 Act"). The 1956 Act brought in codification in respect of law relating to intestate succession among Hindus and brought some fundamental and adequate changes in the law of succession. The 1956 Act conferred new rights of succession for the first

time. The 1956 Act lays down a set of general rules for succession to the property of a male Hindu and a daughter of Hindu male dying intestate would inherit under Section 8 of the 1956 Act. As held in catena of judgments, the outstanding feature of 1956 Act is that the property devolves in equal share among son, daughter, widow and mother of the deceased. Under Section 8 of 1956 Act, male and female heirs are treated as equivalent without distinction. Therefore, 1956 Act brought in fundamental change in Hindu Law of succession without abolishing the joint family and joint family properties. Though it did not interfere with the special rights of the members of the Mitakshara Co-parcenary however Section 6, 8 and 30 introduced extensive and far reaching changes. Section 6 of the Act deals with devolution of interest in a co-parcenary property. The first part of the Section provides that when a Hindu dies having at the time of his death an interest in Mitakshari Co-parcenary property, his interest will devolve by survivorship upon the surviving members and not in

accordance with 1956 Act. But on account of codification the proviso deals with a case where deceased had left him surviving female relative specified in Clause I to the Schedule to the Act. The widow as well as daughters are female relatives of the deceased who are specified in Clause I of Schedule. Consequently, this proviso will apply and inasmuch as plaintiff's father did not leave any Will who died in the year 1991, his interest in the properties will devolve by intestate succession under the 1956 Act and not by survivorship.

Therefore, the plaintiff's right in the present case on hand has to be determined in the context of scheme provided under 1956 Act, in the matter of succession to the property of a Hindu male dying intestate after coming into force of 1956 Act. Plaintiff's father admittedly died on 27.5.1991 whereas defendant No.1 has alienated schedule 'C' property in favour of defendant No.2 under registered sale deed dated 6.4.2002. Though the alienation of schedule 'c' property in favour of defendant No.2 is before 2005 amendment to Section 6 of

1956 Act, the question that needs to be examined by this Court is whether the alienation by the brother i.e. defendant No.1 after death of father is absolutely saved in view of proviso to amended Section 6 of 1956 Act.

The underlined principle and intent of legislature in incorporating a proviso to sub-section(1) of Section 6 is to protect all acts done by the co parceners before conferring co-parcenary status on the daughter. Now, what can be inferred from proviso to sub-section(1) of Section 6 is that if there is any disposition or alienation including any partition before succession opens, the said disposition or alienation stands unaffected. This proviso is incorporated in the light of settled proposition of law that a daughter would get a right in her father's property only on death and therefore, all disposition and alienations made during the life time of father cannot be questioned by daughter. It necessarily implies that if alienation is made during the life time of father, daughter who

has no independent right cannot question the disposition or the alienation after the death of father.

Now, if the said principle is applied to the present case on hand, then I am of the view that the contention of the counsel appearing for defendant No.2 that the sale deed executed by defendant No.1 in favour of defendant No.2 pertaining to schedule 'C' property is absolutely saved cannot be acceded to. As on 2002, when schedule 'C' property was sold, plaintiff being daughter was entitled for a share in the father's share. Therefore, she had an independent right under Section 8 of Hindu Succession Act and therefore, defendant No.1 could not have alienated the entire extent in schedule 'C' property and therefore, the sale deed will not bind the plaintiff insofar as her legitimate share is concerned.

The plaintiff's contention that irrespective of alienation by defendant No.1 in schedule 'C' property would not take away the right of plaintiff in terms of amended provisions of Section 6 to Hindu Succession Act also cannot be acceded to.

Before she could have acquired a co-parcenary status by way of legal fiction, the schedule 'C' property was dealt by defendant No.1 under registered sale deed. The sale deed would be valid to the extent of legitimate share of defendant No.1 as per the prevailing law in the year 2002. Therefore, the rights of the transferee(defendant No.2) which stood crystalized under the registered sale deed cannot be invalidated by extending the benefit of amended provisions of Section 6 of 1956 Act.

The plaintiff and defendant No.1 are sister and brother respectively. On account of alienation of Schedule C property in 2002, though plaintiff is conferred with the status of co-parcener, but however, she is not entitled for the benefit of amended provisions of Section 6 on account of alienation of schedule C property and therefore, she would be entitled for her share notionally in the share of father. Therefore, she would take 1/4th share in schedule C property while defendant

No.1 would independently take $\frac{1}{2}$ share+ $\frac{1}{4}^{\text{th}}$ share= $\frac{3}{4}^{\text{th}}$ share.

In the light of the discussions made supra, the sale deed executed by defendant No.1 and his children in respect of schedule C property would not bind plaintiff's $\frac{1}{4}^{\text{th}}$ share in schedule C property.

Accordingly, point No. 3 is answered in **negative** and point No.4 is answered in the **affirmative**.

13. In the light of the findings recorded on points formulated supra, this Court has arrived at the following conclusions:

(i) The finding recorded by the Trial Court on Issue No.3 and thereby dismissing the suit in respect of schedule C property suffers from serious infirmities and therefore, the finding recorded on Issue No.4 is not at all sustainable.

(ii) Defendant No.1 along with his children has alienated schedule C property in favour of defendant No.2

under registered sale deed dated 6.4.2002. The material on record clearly indicate that plaintiff's father died on 27.5.1991 and therefore, plaintiff was entitled for a share notionally and therefore, the sale deed executed by defendant No.1 would not bind plaintiff to the extent of her 1/4th share and therefore, the Trial Court grossly committed a grave error in not awarding her share in schedule C property.

14. In the light of findings and conclusions recorded by this Court, I proceed to pass the following:

ORDER

The appeal is allowed in part. The judgment and decree dated 22.2.2007 passed in O.S.No.7033/2002 by the XVIII Additional City Civil Judge, Bengaluru City, is modified as follows:

(a) Plaintiff is entitled for her 1/4th share in schedule C property.

(b) The appeal is dismissed insofar as schedule A property is concerned.

(c) The rest of the decree insofar as schedule B property remains undisturbed.

Office to draw the decree accordingly.

Sd/-
JUDGE

*alb/-