R

IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 25TH DAY OF OCTOBER 2018

PRESENT

THE HON'BLE MR. JUSTICE A.S.BOPANNA

AND

THE HON'BLE MR. JUSTICE SREENIVAS HARISH KUMAR

REGULAR FIRST APPEAL No. 326 OF 2004

BETWEEN

Pushpalatha N.V.,
W/o. Sri. Nemraj,
Aged about 42 years,
R/a. U-75, 5th Main,
Jabbar Block, Vyalikaval,
Bangalore-560003.

...Appellant

(By Sri. Ajay Govindraj, Advocate)

AND

1. V.Padma,
   Widow of Vasanta Kumar D.N.,
   Aged about 65 years,
   Now R/at C/o. N.V.Bahubali (Appi),
   Taj Stores, No.52,
   II Main Road, Palace Guttahalli,
   Bangalore-560003.

2. Asha N.V.,
   W/o. Shantharaj,
   Aged about 40 years,
   R/at No.52, II Main Road,
   Palace Guttahalli,
   Bangalore-560003.

3. N.V.Tejkumar,
Aged about 40 years,
Door No.646, 12th Main Road,
1st Block, 3rd Stage,
Basaveshwar Nagar,
Bangalore-560003.

4. N.V.Bahubali (Appi),
Aged about 36 years,
No.52/4, 4th Cross,
Najundeswara Nilaya,
Lakshminagar, Kamal Nagar,
Bangalore.

...Respondents

(By Sri. G.B.Nandish Gowda, Advocate, for R1 & R2;
Sri. S.V.Giridhar, Advocate, for R3 & R4)

This RFA is filed under Section 96 of CPC., against the judgment and decree dated 17.01.2004 passed in O.S.No.16271/2001 on the file of the XXVIII Additional City Civil Judge, Mayohall unit, Bangalore, partly decreeing the suit for declaration and possession.

This RFA having been heard and reserved on 11.10.2018 coming on for pronouncement of judgment this day, **Sreenivas Harish Kumar J.,** pronounced the following :

JUDGMENT

This appeal is from the Judgment and Decree dated 17.01.2004 in O.S.No.16271/2001 on the file of XXVIII Additional City Civil and Sessions Judge, Bengaluru. The plaintiff is the appellant and the defendants are the respondents in this appeal. In fact, by judgment dated

19.03.2010, this appeal had been decided by this court; and the said judgment being set aside by the Hon'ble Supreme Court, and the appeal remanded to this court for decision afresh, we have heard the arguments of the learned counsel appearing for the parties. Before dealing with evidence on record and the legal issues involved, the pleadings, with respect to position of the parties in the suit, briefly stated, are as follows:

2. D.N. Vasanta Kumar, father of the plaintiff and the defendants 2 to 4 and husband of defendant no.1, during his lifetime owned the suit properties. He got them in a partition that took place on 29.03.1967. Vasanta Kumar died intestate on 31.12.1984. The plaintiff claims 1/5th share in the suit properties.

3. The defendants, in their written statement admit the relationship and the intestate death of Vasanta Kumar on 31.12.1984. But according to them, the suit properties did not belong to Vasanta Kumar absolutely; they have pleaded that the properties belong to Hindu Undivided Family of

which Vasanta Kumar was a Karta. The properties belonged to D.K. Nabhirajaiah, the father of Vasanta Kumar and they are the ancestral properties of the joint family. In the partition that was effected on 29.03.1967, Vasanta Kumar received his share in the joint family property and therefore the plaintiff is entitled to 1/5th share in the 1/3rd share of Vasanta Kumar. The plaintiff is not ready to accept the actual share she is entitled to, and that the defendants are ever ready to give her actual share.

4. Based on the pleadings, the trial court struck five issues, of which the relevant issue for discussion here is issue No.2 which is as follows:

> "Whether the plaintiff proves that she is entitled to 1/5th share in the schedule properties?"

5. On appreciation of oral evidence of two witnesses, PW-1 and DW-1 and three documents produced by the plaintiff as per Ex.P.1 to P.3, the trial court held that the suit properties devolved on Vasanta Kumar through a partition

deed dated 29.03.1967 between Nabhirajaiah and his sons, that the properties were ancestral and that the plaintiff was entitled to 1/20th share.

6. Assailing the findings of the trial court, the learned counsel for the plaintiff-appellant, Sri. Ajay Govindraj, has mainly raised two points. The first point is that the trial court should not have held that suit properties were ancestral as there was no issue to be answered like that. His second point of argument is that the properties that Vasanta Kumar got to his share under Ex.P.1, the partition deed, were held by him exclusively and absolutely or in other words they were his separate properties. After his death, succession to the properties should be in accordance with Section 8 of the Hindu Succession Act. The plaintiff being a Class I heir is entitled to 1/5th equal share. He has garnered support for his arguments by placing reliance on three judgments of the Supreme Court in ***(1). Commissioner of Wealth Tax, Kanpur and others Vs. Chander Sen and others [(1986) 3 SCC 567)], (2). Hardeo Rai Vs. Shakuntala Devi and others [(AIR 2008 SC 2489)],***

(3). Ramesh Verma (Dead) through Legal Representatives Vs. Lajesh Saxena (Dead) by Legal Representatives [(2017) 1 SCC 257)] and a Division Bench judgment of this Court in ***Smt. Shakuntala and others Vs. Basavaraj and others [ILR 2016 Kar 3604].***

7. The learned counsel for the respondents, Sri. Giridhar countered the argument of Sri. Ajay Govindaraj by arguing that the trial Court has not committed any error in giving a finding with regard to ancestral nature of the suit property, as while answering issue no.2, the evidence adduced by the witnesses has been considered. Issue No.2 was properly framed by the court; the burden was on the plaintiff to establish her right to claim 1/5th share and there was no need to raise an issue with regard to specific defence taken by the defendants.

8. His next point of argument is that even according to plaintiff (PW-1), the properties were ancestral and therefore when a partition took place as per Ex.P.1, Vasanta Kumar got a share in the ancestral property. He did not hold suit

property as his absolute separate property. Moreover, the sons of Vasanta Kumar, defendants 3 and 4 were born much before partition as per Ex. P1 took place. In a situation like this, the plaintiff cannot claim equal share, her entitlement is to the extent of 1/5th share in the notional 1/3rd share of Vasanta Kumar, the father. Succession opened on 31.12.1984. Therefore division must be effected in accordance with Section 6 of Hindu Succession Act as it stood before amendment and Section 8 does not emerge into consideration at all. In addition to placing reliance on the four decisions cited by the appellant's counsel, Sri. Giridhar referred to three more decisions viz., ***(1). N.V.Narendranath Vs. Commissioner of Wealth-Tax, A.P [1969(1) SCC 748]; (2). M.Yogendra and Others Vs. Leelamma N. and Others [2009 (15) SCC 184] and Rohit Chauhan Vs. Surinder Singh and Others [2013 (9) SCC 419].***

9. Lastly he raised one legal issue that the Hon'ble Supreme Court in its decision in ***Prakash and Others Vs. Phulavati and Others [(2016) 2 SCC 36]*** has not decided the question as regards the right of a daughter to seek

partition in the ancestral property if the marriage had taken place before the commencement of central amendment brought to Section 6 of Hindu Succession Act, and this requires to be answered.

10. We have considered the points of arguments put forward by learned counsel for parties and perused the records. The following points do arise for discussion:-

(i) Has the trial court committed an error in giving a finding with regard to ancestral character of the suit property without framing an issue in that regard?

(ii) Did the properties that D.N.Vasanta Kumar received to his share in the partition dated 29.03.1967 constitute his separate property in order that the plaintiff can claim equal share in them?

(iii) What order?

POINT NO.(i):

11. Issue no.2 is already extracted above. The trial court framed the said issue based on the plaintiff's plea that her father owned the schedule property absolutely following registered partition deed dated 29.03.1967 and that she is entitled to one fifth share in the joint estate left behind by her father. No doubt the defendants have contended in the written statement that the properties were ancestral and therefore she cannot claim equal share, but the burden of proving the facts asserted by plaintiff is on her. Notwithstanding the defence, if the plaintiff provides no evidence in support of her pleas, her suit to the extent of claiming 1/5th share fails as envisaged in Sections 101 and 102 of the Indian Evidence Act. An issue regarding ancestral character of the property was not necessary to be raised in this circumstance. Moreover if the parties led evidence in the background of the material facts pleaded by them, it cannot be said that the trial court committed an error even if it is assumed for arguments sake that an issue as regards ancestral character of the properties was necessary. The

argument of Sri. Ajay Govindaraj is not acceptable, and point no.1 is answered in negative.

POINT No. (ii):

12. Before adverting to legal issues raised by both the counsel, it is necessary to assess the evidence and examine the findings of the trial court on facts since this is a first appeal. The plaintiff in her affidavit filed in lieu of examination-in-chief, has stated that her father Vasanta Kumar got the suit properties in the partition that took place on 29.03.1967 and that he held them as his separate property. Ex.P.1 is the certified copy of the partition deed. When questioned in the cross-examination, she admitted that the suit properties were acquired by her grand father D.K.Nabhirajaiah and that her father did not acquire the suit properties. DW-1 is the third defendant, who in his examination-in-chief has reiterated the contents of written statement. If the answers given by DW-1 in his cross examination are perused, it becomes very evident that he has not at all been questioned with regard to specific plea of

the defendants; all the questions posed to him pertain to rents being collected from the tenants, who are in occupation of suit properties. Therefore the defendants' stand that the suit properties are ancestral has remained unassailed. For this reason alone, an inference cannot be drawn that suit properties are ancestral for, DW-1 in Para 3 of his examination-in-chief has stated that his paternal grand father, late D.K.Nabhirajaiah, acquired lot of immovable properties during his life time. If this assertion is accepted, the finding of the trial court can be said to be incorrect, because if really D.K.Nabhirajaiah had acquired the properties, whatever D.N.Vasanta Kumar got under Ex.P.1 becomes his separate property as has been pleaded by the plaintiff. But this inference cannot be drawn without examining Ex.P.1, the partition deed. In civil cases, more than the oral evidence, documentary evidence plays vital role and therefore appreciation of oral evidence must be in the light of recitals found in the document. Ex.P.1 is a certified copy of the registered partition deed dated 29.03.1967 evidencing division of properties between D.K.Nabhirajaiah

and his children. D.N.Vasanta Kumar is also one of the sons of Nabhirajaih. It is clearly stated in this partition deed that on 25.12.1944, there had taken place a partition of joint family properties among Nabhirajaiah, the sons of his elder brother Shantarajaiah and one Anantamma, the widow of Adirajaiah, another brother of Nabhirajaiah; and in that partition, certain properties including suit properties had been allotted to Nabhirajaiah. These properties were once again partitioned on 29.03.1967. If DW-1 has stated that his grand father had acquired the properties, it was through the partition of the joint family properties that took place on 25.12.1944; that means even the properties that Nabhirajaih received to his share were not his self acquisition. Therefore the conclusion that can be arrived at is that whatever share that D.N.Vasanta Kumar got under Ex.P.1 was from the ancestral joint family property and thus the suit properties are also ancestral. This is the inference that can be drawn on re-appreciation of evidence and therefore we concur with the factual findings given by the trial court.

13. Now reference may be made to the rulings cited by learned counsel for the parties. In the case of ***Chandersen*** *(supra)* the facts are that Rangilal and his son Chander had a division between them of the family business. Thereafter Rangilal and Chandersen started a partnership business, which was assessed to income tax. The father and the son were also assessed to income tax for their individual income. Rangilal died on July 17, 1965. At that time Chandersen was the only class I heir of Rangilal as the latter's wife and mother were not alive. This being the factual position, an amount of Rs.1,85,043/- which had been credited to the individual account of Rangilal from the partnership business passed on to Rangilal's son, Chandersen. Since this amount was assessed to tax treating it as income to the joint family consisting of Chandersen and his son, Chandersen took objection to treating that amount as income to joint family. The matter reached Supreme Court ultimately in view of conflicting decisions by other appellate authorities. The Hon'ble Supreme Court held that whatever the amount that was available to the credit of Rangilal's account was his

separate property and on his death, nobody other than Chandersen could succeed; even Chandersen's son could not be considered as class-I heir, as son of a predeceased son and not son of a living son, is recognized as class I heir according to Section 8 of Hindu Succession Act. The conclusion, in this background, given by the Hon'ble Supreme Court is that the amount that passed on to Chandersen was according to Section 8 of Hindu Succession Act.

14. ***Hardeo Rai*** (supra) is a case of specific performance. The appellant was the defendant in the suit. He executed an agreement of sale in favour of plaintiff and contended in his written statement that the suit property was joint family property, although in the agreement there was a recital that the property agreed to be sold had been allotted to him in a family partition. In this context, the Hon'ble Supreme Court, while distinguishing the concepts of Mithakshara coparcenary property and joint family property held that if a coparcener takes a definite share in the

property, he becomes the owner of the share that he gets and that he can alienate or dispose of his share.

15. What is forthcoming in the case of ***Ramesh Verma*** *(supra)* is that in accordance with Section 82 of the Madhya Bharat Land Code, after the death of Bhagavan Das in 1952, a notional partition took place among Jayadevi, Jagan Verma and Ramesh Verma, the widow, son and grandson of Bhagawan Das respectively and each of them took 1/3rd share. After such partition and before commencement of Hindu Succession Act 1956, Jagan Verma held his share as his exclusive property without incidents of coparcenary. But when Jagan Verma's daughter Lajesh Saxena filed a suit for partition, it was held that devolution of Jagan Verma's property was in accordance with Section 6 of the Hindu Succession Act. Therefore it can be seen from this decision that the share that Jagan Verma got even in the notional partition according to Section 82 of Madhya Bharat Land Code, was also considered as coparcenery property when his daughter sought partition.

16. In ***K.V.Narendranath*** *(supra),* a question akin to the facts of the case on hand arose, and therefore the principle enunciated in this judgment is extracted here.

> *"9. In the present case the property which is sought to be taxed in the hands of the appellant originally belonged to the Hindu Undivided Family belonging to the appellant, his father and his brothers. There were joint family properties of that Hindu Undivided Family when the partition took place between the appellant, his father and his brothers and these properties came to the share of the appellant and the question presented for determination is whether they ceased to bear the character of joint family properties and became the absolute properties of the appellant. As pointed out by the Judicial Committee in Arunachalam's case 1957 AC 540 - It is only by analysing the nature of the rights of the members of the undivided family, both those in being and those yet to be born, that it can be determined whether the family property can properly be described as "joint property of the undivided family". Applying this test it is clear that, though in the absence of male issue the dividing coparcener may be properly described in a sense as the owner of the properties, that upon*

the adoption of a son or birth of a son to him, it would assume a different quality. It continues to be ancestral property in his hands as regards his male issue for their rights had already attached upon it and the partition only cuts off the claims of the dividing coparceners. The father and his male issue still remain joint. The same rule would apply even when a partition had been made before the birth of the male issue or before a son is adopted, for the share which is taken at a partition by one of the coparceners is taken by him as representing his branch……".

(emphasis supplied)

17. Case of ***Yogendra Kumar*** (supra) also deals with same aspect. It is held in this case that a property allotted to a sole coparcener in a partition will be held by him as his separate property, and if a son is born to him subsequently, the coparcenary character revives.

18. In ***Rohit Chauhan's*** *c*ase (supra) also, the Supreme Court considered the same aspect and reiterated that so long as, on partition, an ancestral property remains in the hands of a single person, it has to be treated as separate property and such person shall be entitled to

dispose it of. If a son is subsequently born, the alienation made before the birth of the son cannot be questioned, but the moment son is born, the property acquires coparcenary characteristics and the son acquires interest in it by birth and becomes a coparcener.

19. The Supreme Court, in its recent decision, in the case of ***Shyam Narayan Prasad Vs. Krishna Prasad and others [(2018) 7 SCC 646],*** has taken the same view which is as follows:

> *"12. It is settled that the property inherited by a male Hindu from his father, father's father or father's father's father is an ancestral property. The essential feature of ancestral property, according to Mitakshara Law, is that the sons, grandsons, and great grandsons of the person who inherits it, acquire an interest and the rights attached to such property at the moment of their birth. The share which a coparcener obtains on partition of ancestral property is ancestral property as regards his male issue. After partition, the property in the hands of the son will continue to be the ancestral property and the*

natural or adopted son of that son will take interest in it and is entitled to it by survivorship".

20. In the decision of the co-ordinate bench of this Court in ***Smt. Shakuntala and others Vs. Basavaraj and others*** (supra) the question dealt with was about devolution of self acquired property of a male Hindu. One Basavenappa during his lifetime purchased some property which was his self acquisition. He died intestate in the year 1972 and in a partition that was effected on 20.4.2004, certain property fell to the share of Basavaraj, the son of Basavanappa and father of the plaintiffs. It was contented that the first defendant Basavaraj succeeded to ancestral property. In this circumstance, it was held that succession to self acquired property of male was in accordance with Section 8 of the Hindu Succession Act, not Section 6.

21. Therefore from the above referred decisions, it becomes quite clear that whenever a partition of ancestral property takes place, the share that a coparcener gets continues to be ancestral if on the date of partition he has a son. He holds such property as his absolute property if no

son exists on the date of partition, but if a son is born subsequently, the ancestral character revives. After commencement of Hindu Succession (Amendment) Act of 2005, the presence of a daughter or birth of a daughter subsequently has the same effect, but her entitlement to a share being a coparcener is subject to the riders found in the amended Section 6 and the ratio laid down by the Supreme Court in ***Prakash and Others vs Phulavati and Others [(2016) 2 SCC 36].*** If succession to self acquired property of a male Hindu takes place among his heirs in accordance with Section 8 of the Hindu Succession Act, the share that every member takes will be held by each of them as his or her separate property.

22. Harking back to the instant case, since the factual conclusion is that plaintiff's father received his share in the ancestral property in the division that took place in the year 1967, and that partition opened on 31.12.1984, the date of death of D.N.Vasanta Kumar, succession to suit properties must be according to Section 6 of Hindu Secession Act as it stood before amendment. Section 8 of the Hindu Succession

is not applicable in a circumstance like this. Point no.(ii) is answered in negative.

Point No.(iii):-

23. The trial court has awarded 1/20th share. This we find to be incorrect; probably the trial court has awarded equal share to first defendant, the widow of Vasanta Kumar while effecting notional partition. Since the parties are not governed by Bombay School of Mithakshara, such calculation of share is not permissible. The plaintiff is entitled to 1/5th share in the 1/3rd share that her father takes if notional partition is effected. The plaintiff, in her memorandum of appeal, has clearly stated that she is entitled to 1/15th share if not equal share. Therefore the judgment of the trial Court needs modification to this extent, and its findings on facts cannot be interfered with.

24. Before concluding, as regards the legal point that Sri.Giridhar, learned counsel, raised by referring to decision of Supreme court in ***Prakash Vs. Phulavati***, we opine that the marriage of the plaintiff much before commencement of

central amendment to Section 6 of Hindu Succession Act has no relevance to the actual issue urged in this appeal.

25. The above discussion takes us to pass the following order:-

(i) The appeal is allowed in part.

(ii) The judgment of the trial court stands modified to the extent that the plaintiff is entitled to 1/15th share in the suit property and preliminary decree be drawn accordingly.

(iii) Rest of the judgment of trial court is confirmed.

(iv) There is no order as to costs.

Sd/-
JUDGE

Sd/-
JUDGE

ckl/sd