

IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 8TH DAY OF DECEMBER 2023

PRESENT

THE HON'BLE MR. JUSTICE P.S.DINESH KUMAR

AND

THE HON'BLE MR. JUSTICE T.G.SHIVASHANKARE GOWDA

RFA NO.1165 OF 2009 (PAR)

BETWEEN:

M/S RAJESH EXPORTS LIMITED
NO.4, BATAVIA CHAMBERS
KUMARA KRUPA ROAD
KUMARA PARK EAST, BANGALORE -1
REP. BY ITS AUTHORISED OFFICER
M.K.NARAG, S/O KIRPARAM NARANG ... APPELLANT

(BY SRI.ROHAN KOTHARI, ADV.)

AND:

1. SRI. B. DEVARAJ, S/O BALASUBRAMANYA
AGED ABOUT 29 YEARS
2. B. YOGESH, S/O BALASUBRAMANYA
AGED MAJOR 21
3. SMT. B. SAROJAMMA @ B. SAROJA
W/O BALASUBRAMANYA, AGED 48 YEARS

RESPONDENTS 1 TO 3 ARE R/AT NO.43
SUBEDAR CHATRAM ROAD, BANGALORE - 9

4. SRI. S. BALASUBRAMANYA .. DELETED
5. M/S VOLGA RESTAURANT
NO.43 (UPSTAIRS),SC ROAD, BANGALORE - 09
REP. BY ITS PROPRIETOR SHRI V.K.ABDULLA
MAJOR ABOUT 50 YEARS

6. M/S HOTEL ADORA
NO.43 (OUTHOUSE), SC ROAD, BANGALORE -09
REP. BY ITS SHRI JANAB AHMED, MAJOR - 55
7. SHRI SRINIVASA SHETTY, 60 YEARS
PROP. OF M/S ARUNA STORES, NO.45
SC ROAD, BANGALORE - 9
AMENDMENT CARRIED OUT IN
PURSUANCE OF ORDER
DATED 27.09.2022
SINCE DECEASED, REP. BY LRS.
- 7(a) SMT. NAGALAKSHMI
AGED ABOUT 80 YEARS
W/O LATE A.SHRI SRINIVASA SHETTY
- 7(b) SRI. S. ARUNA KUMAR
AGED ABOUT 57 YEARS
S/O SRINIVASA SHETTY
BOTH R/AT NO.16/1, 'SUKHI'
5TH CROSS, R.K.PURAM
BENGALURU - 560 009
- 7(c) SRI. S. VENKATESH BABU
AGED ABOUT 52 YEARS
S/O LATE A. SRINIVASA SHETTY
R/AT NO.9, 5TH CROSS
R.K.PURAM, BENGALURU - 560 009 ... RESPONDENTS
- (BY SRI.C. SHANKAR REDDY, ADV. FOR R1 TO R3;
R4 DELETED; SRI. P. USMAN, ADV. FOR
SRI. HEGDE ASSTS. FOR R5 & R6;
SRI. K. R. ASHOK KUMAR, ADV. FOR R7[a TO c])

THIS RFA IS FILED UNDER SECTION 96 OF CPC,
AGAINST THE JUDGMENT AND DECREE DATED 15.09.2009,
PASSED IN OS. NO.914/2005, ON THE FILE OF THE XXXVIII
ADDL. CITY CIVIL JUDGE, BANGALORE DECREETING THE SUIT
FOR PARTITION AND SEPARATE POSSESSION.

THIS RFA HAVING BEEN HEARD AND RESERVED FOR
JUDGMENT ON 23.06.2023 AND COMING ON FOR
PRONOUNCEMENT OF JUDGMENT THIS DAY,
T.G.SHIVASHANKARE GOWDA J., DELIVERED THE
FOLLOWING:

J U D G M E N T

This appeal by the second defendant is directed against the judgment and decree dated September 15, 2009 in O.S No. 914/2005 passed by the XXXVIII Addl.City Civil Judge, Bangalore, decreeing the suit for partition, separate possession, permanent injunction and declaration.

2. For the sake of convenience, parties shall be referred as per their status before the Trial Court.

3. Heard Shri. Rohan Kothari, learned Advocate for the appellant/defendant No.2 and Shri. Shankar Reddy, learned Advocate for the respondents/plaintiffs. The other respondents have been served but remained unrepresented.

4. The plaint schedule property is the building bearing khata Nos.43, 44 and 45 measuring 80 feet x 42 feet situated at Subedar Chatram Road now Natarathnagar Gubbi Veeranna Road, Gandhinagar, Bangalore city.

5. Plaintiffs' case is, Plaintiff No.3/Sarojamma is the wife of Balasubramanya (defendant No.1). Devaraj and Yogesh (plaintiffs No.1 and 2) are their children. Suit property is their joint family property. Plaintiffs are running a business in a portion of the suit property under the name and style 'Subramanya Stores'. Remaining Portion of the suit property has been leased out to defendants No.3 to 5. The family is getting rentals and earning income from the business and it is financially in a comfortable position. There was no legal necessity for the family to sell the suit property. The suit property was acquired by Balasubramanya's father Subbaiah. He was an employee of Binny Mills. As he was not worldly-wise, the joint family transactions were being carried out in the name of Lalithamma, his wife. Subbaiah used to raise money on the suit property as and when required by executing a sale deed as a security document.

6. The suit property was offered as security and after discharge of the liabilities, re-conveyance deed is

obtained in the form of sale deeds in the name of his wife Lalithamma. The suit property was purchased in the name of his wife Smt. Lalithamma. She had no independent source of income.

7. Plaintiffs' further case is, Balasubramaya never took care of the family and the suit property, as he was interested in Cinema and music. His whereabouts were not known since 2007. Plaintiffs had lodged a police complaint in that behalf. During the pendency of suit, he has passed away.

8. Plaintiffs received letter dated 27.12.2004 stating that Balasubramaya had alienated the suit property in favour of Rajesh Exports (defendant No.2/appellant) demanding the rents payable by the tenants. Plaintiffs replied denying the contents of that letter and asserted that Balasubramaya was not the absolute owner of the property. Hence, plaintiffs have filed the instant suit seeking partition, separate possession and for permanent injunction restraining defendants No.1 and 2 from interfering with the

plaintiffs' possession and ousting them from joint possession of the suit schedule property.

9. Plaint was amended on 27.09.2009 and prayer (aa) was added seeking a declaration that the alleged sale deed dated 22.12.2004 executed by the first defendant in favour of second defendant in respect of suit schedule property is not binding on the undivided 1/4th share each of respective plaintiffs and seeking a mandatory injunction directing defendants No.3 to 5 to pay 3/4th share of the rents payable to the plaintiffs.

10. Rajesh Exports (defendant No.2) resisted the suit by filing written statement contending *inter alia* that:

- suit property is not an ancestral property. Lalithamma had acquired a large property from one Chinnappa, which included suit property. She sold a portion of that property to one Lakshmiddevamma under Sale Deed dated 05.08.1963. In that Sale Deed she is described as the absolute owner of the property;

- Lalithamma died on 12.10.1987 and Balasubramanya being the sole surviving class I heir, succeeded to the property;
- Balasubramanya was paying taxes in respect of suit property;
- Lalithamma had also leased a portion of the suit property. The said Lease Deed also bears the name of Lalithamma as the sole and absolute owner of the property.

11. Defendant No.3 has filed written statement stating *inter alia* that he was a tenant in suit property and was paying rents to Balasubramanya.

12. Defendant No.4 has filed written statement contending *inter alia* that Balasubramanya had leased a portion of suit property to him for a period of 22 years commencing from 01.10.1999 with an option to extend the term of lease vide registered lease deed dated 22.03.1990, vacant land was leased and he has constructed a building on the said property. Suit property cannot be partitioned by metes and bounds till the expiry of lease period is over entitling him to enjoy

the property as one compact block till it hands over vacant possession of the property to its owner. The rent was fixed at Rs.600/- per month for 10 years and thereafter rent of Rs.850/- is paid to the first defendant.

13. Defendant No.5 filed the written statement ontending *inter alia* that first defendant's father Subbaiah was the absolute owner of the property. He has leased a portion of the suit property to him on a monthly rent of Rs.500/- in the year 1958. He was paying rents to Subbaiah, after his death paying rents to his wife Lalithamma and after her death, rents were being collected by first defendant on behalf of his family as Karta of Hindu Undivided Family from November 1995 till 12.12.2004. Subbaiah and Lalithamma have not only left the first defendant as legal heirs but also left one Prameela who died in the year 1999 leaving behind her only son by name Mallikarjuna @ Mani. Hence, the first defendant along with the plaintiffs and Prameela being the Class-I heirs are entitled to succeed to the suit schedule property.

14. Based on the pleadings, the Trial Court has framed following issues:

- 1) *Do the plaintiffs prove that suit schedule property is the joint family property belonging to plaintiffs and defendant No.1?*
- 2) *Does defendant No.2 prove that suit property is the self-acquired property of defendant No.2?*
- 3) *Does defendant No.2 prove that suit is not properly valued and Court fee paid is sufficient?*
- 4) *Is plaintiff entitled to 1/6th share in the suit schedule properties?*
- 5) *Do plaintiffs prove that they are entitled for a share in suit property, if so, to what share are they entitled to?*
- 6) *What order or decree?*

In view of amendment to the plaint, seeking relief of declaration, the following additional issue is framed:

Addl.Issue No.1:

"Whether plaintiffs prove that the registered sale deed dated 22.12.2004 executed by defendant No.1 in favour of defendant No.2 in respect of suit properties

is not binding on their share in the suit property?"

15. On behalf of plaintiffs, three witnesses were examined as P.W.1 to P.W.3 and Exs. P1 to P59 were marked. On behalf of Defendants, one witness was examined as D.W.1 and Exs. D1 to D13 were marked. Answering issues No.1, 3, 5 and additional issue No.1 in the affirmative; and issue No.2 in the negative, the Trial Court has decreed the suit.

16. It is the contention of the learned counsel for defendant No.2 (Rajesh Exports) that suit property was purchased by Smt. Lalithama. Lalithamma died intestate leaving Balasubramanya as the sole surviving coparcener. Lalithamma had sold a portion of composite property to Lakshmiddevamma vide sale deed dated 05.08.1963 and the same has not been challenged. Balasubramanya died during the pendency of suit. With his death the cause of action did not survive.

17. Learned counsel for the plaintiffs while arguing in support of the impugned judgment and decree contended *inter alia* that the suit property was purchased by Subbaiah. Therefore, it is a joint family property and plaintiffs are entitled for their share.

18. Plaintiffs have filed I.A.No.1/2013 with a prayer to produce additional evidence and I.A. No.2/2013 with a prayer to amend the plaint and I.A. No.2/2017 to produce additional documents.

19. In the affidavit filed in support of I.A. No.2/2013, it is stated that one of the tenants, Srinivasa Setty (defendant No.5) had taken up a contention in the written statement that Lalithamma had a daughter by name Prameela. Plaintiffs have entered into a partition deed dated 05.07.2012 wherein, Prameela's son Mallikarjuna has given up his rights in plaintiffs' favour for a consideration of Rs.5 Lakhs.

20. By I.A.No.2/2013, the plaint is sought to be amended by adding paragraph No.4(a), (b) and (c) in

the plaint. In the proposed pleading, it is stated that whereabouts of Pameela was known only to Balasubramanya. Plaintiffs did not know the whereabouts of Pameela. Balasubramanya had also absconded. It is also stated that plaintiffs noticed presence of Pameela's son in a family function and obtained his relinquishment in respect of suit property.

21. In substance, plaintiffs' present case is that Lalithamma had two children namely Balasubramanya and Pameela. Pameela's whereabouts were not known at the time of filing the suit. They learnt about Pameela when one of the tenants urged this contention in the written statement. Accordingly, they have sought to amend the plaint.

22. With the filing of this application, the entire dimension of the case has changed. Suit has progressed on the premise that Subbaiah and Lalithamma had only one issue namely Balasubramanya.

23. Srinivasa Setty has come into possession of the portion of suit property in 1958 whilst Subbaiah was alive. He has contended that Subbaiah had a daughter by name Prameela. It would have been appropriate for the plaintiffs to seek amendment once they received the copy of the written statement filed by Srinivasa Setty. For reasons best known, suit has proceeded without any amendment. This appeal has been filed in 2009. I.A. No.2/2013 has surfaced in 2013. It has been ordered by this Court on 21.08.2015 that the said application would be considered at the time of final hearing. Learned Advocate for the appellant has filed objections to the said I.A.2/2013 on 31.05.2023.

24. We have carefully considered rival contentions and perused the records.

25. The points that arise for our consideration in this appeal are:

- i. Whether the suit property is the joint family property or not?*
- ii. Whether the impugned judgment and decree requires any interference?*

Re. Point No.(i):

26. The undisputed facts of the case are, Subbaiah, father of defendant No.1 was the owner of the suit schedule property. He was raising loan by pledging the suit schedule property. After discharging the loan, he has obtained the re-conveyance deed in the name of his wife in the form of sale deeds. During his life time, Subbaiah has leased a portion of the property to the tenants and some of the tenants were inducted by the first defendant. Third plaintiff is the wife, plaintiffs No.1 and 2 are the children of Balasubramanya.

27. It is the contention of the learned counsel for the appellant/defendant No.2 that Lalithamma is the absolute owner of the suit schedule property. According to him, Lalithamma purchased the suit property under Ex.P12 and by virtue of Section 14 of the Hindu Succession Act, it inures to her benefit exclusively. Therefore, Balasubramanya having succeeded to his mother's property becomes its absolute owner.

28. It is the contention of the learned counsel for the plaintiffs that the suit property was purchased by Subbaiah as per Ex.P57. He has mortgaged the said property to Siddalinga Swamigalu, Bellimutt as per Ex.P53. Later, he sold the suit property in favour of Gangappa as per Ex. P55. Subsequently, property was re-purchased in the name of his wife Lalithamma as per Ex.P12. Lalithamma is only a name lender, she had no independent source of income and therefore, the property is a joint family property. It is further contended that Subbaiah and Lalithamma had a daughter by name Prameela. She died leaving behind her son Mallikarjuna. Irrespective of the fact whether the suit property is the joint family property or self-acquired property of Lalithamma, Prameela is entitled for equal share with the first defendant. First defendant had no absolute right of alienation in favour of the second defendant.

29. In view of the rival contentions, we are required to consider whether Prameela is the daughter

of Subbaiah and Lalithamma. If the argument of the second defendant that the suit schedule property is the self-acquired property of Lalithamma is to be accepted, under Section 8 of the Hindu Succession Act, Prameela gets equal share on par with the first defendant.

30. As we notice from the written statement filed by defendant No.5, he has taken a specific contention that Prameela is the daughter of Subbaiah and Lalithamma. She died in the year 1999 leaving behind her son Mallikarjuna. When the legal heir of Lalithamma was alive, whether the first defendant had an absolute right to alienate the suit schedule property without joining Prameela's heir. In this regard, plaintiffs have filed I.A.No.1/2013 under Order XLI Rule 27(1) read with Section 151 of CPC and I.A.No.2/2017 under Order XLI Rule 27(aa) and (b) read with Section 151 of CPC seeking permission to produce additional documents and also filed I.A.No.2/2013 under Order VI Rule 17 read with Section 151 of CPC seeking amendment to the plaint. The proposed amendment

sought for by the plaintiffs in I.A.No.2/2013 reads as follows:

"1. To add paragraph no.4(a) after paragraph no.4 of the plaint.

"4(a) The plaintiffs submit that as stated earlier Smt. Lalithamma is the grand mother of the plaintiffs 1 and 2 and mother in law of the 3rd plaintiff and the grand father plaintiffs 1 and 2 was one Sri.D.M.Subbaiah now both D.M.Subbaiah and Lalithamma are no more. Smt.Lalithamma and D.M.Subbaiah had a son namely S.Balasubramanya who is impleaded as the first defendant in the above suit and they had also a daughter by name Smt.Pramila who was married to Sri.T.N.Shivashankar. Both Smt.Pramila and Sri.T.N.Shivashankar during their lifetime were residing at no.19, Bhadraiahana playa, Magadi Taluk, Ramanagara District and prior to that they were residing in the suit schedule property along with the plaintiffs 1 to 3 and defendant no.1, late D.M.Subbaiah and late Smt.Lalithamma. The said Smt.Pramila and late Shivashankar are no more and they have left behind a son by name T.S.Mallikarjuna @ Malikarjunaiah. The said T.S.Mallikarjuna has since been married to Smt.Somalatha and out of the wed lock they have begot a daughter and a son by name Kumari M.Jamuna and Master M.Lokesh respectively."

2. To add paragraph no.4(b) after paragraph no.(a) in the original suit:

"4(b). The plaintiff submit that the whereabouts of Smt.Pramila, the sister of the first defendant was only to known the first

defendant. Subsequent to the family being shifted to magadi Taluk at the time of filing of the suit the first defendant was absconding and he was not co-operating with the plaintiffs and the plaintiffs were never aware regarding the actual whereabouts of the said Smt.Pramila. The plaintiffs submit that during the pendency of the suit efforts were made to trace the said Smt.Pramila but inspite of the best efforts the plaintiffs were not able to trace out the exact place of the residence of Smt.Pramila and her family members. The plaintiffs submit that all efforts made by them to trace the said Smt.Pramila proved futile. The 5th defendant in the above suit is one of the tenants in the suit schedule property had taken up a contention regarding the existence of the Smt. Pramila. However, during one of the family functions the plaintiffs had noticed the presence of the son of Smt.Pramila and on enquiry it was found that he has been residing at Bhadraiahnapalya Magadi Taluk along with his family members. Since Smt. Lalithamma left behind a son and a daughter to succeed her estate the said T.S.Mallikarjuna is also a proper and necessary party and he had also subsisting right, title, interest and his exclusive and independent share in the suit property and in order to safeguard the interest of the said T.S.Mallikarjuna since he was not in a position to travel all over to Bangalore and participate in the above proceedings he agreed to relinquish his share pertaining to the suit schedule property. In this behalf a mutual consultation and agreement the share of the said T.S.Mallikarjuna was fixed at Rs.5,00,000=00 [Rs.Five Lakhs Only]. Accordingly, a registered partition deed dated 05.07.2012 came to be executed by the said T.S.Mallikarjuna along with his wife and children and the entire amount payable to the said Mallikarjuna was paid under cheques. The certified

copy of the registered partition deed dated 05.07.2012 is produced herewith for kind reference of this hon'ble court alongwith a separate application. Thus, it is clear that even life of the 1st defendant he was not the absolute owner he could not have allegedly convey the schedule property all by himself to the exclusion of his sister share. On this instance also this hon'ble court be please to be declare that alleged share of the 1st defendant in favour of the second defendant is not binding on the share of Smt.Pramila and since son of Smt. Pramila, T.S.mallikarjuna had a share and on this ground also the said alleged sale deed dated 21.02.2004 is required to be declared as not binding on the plaintiffs' share and further/additional share is to be granted to the plaintiffs".

3. To add paragraph no.4(c) after paragraph no.4(b) in the original suit:

"4(c). The plaintiffs submit that in fact the grand father of the plaintiffs 1 and 2 Sri.D.M.Subbaiah and the fore fathers of the plaintiffs 1 and 2 were originally hailing from a village near Denkanikote, Hosur Taluk, State of Tamil Nadu and the said Sri.D.M.Subbaiah had two brothers and Sri.D.M.Subbaiah left all the family properties to his brothers and accepted money consideration by entering into a oral partition amongst themselves and out of the amount the said Sri.D.M.Subbaiah received towards his share he invested the said amount for purchasing the suit schedule property in the name of his wife Smt.Lalithamma and Smt.Lalithamma had no self earned Source of income as she was a housewife and it is ancestral income that was invested in purchasing the suit property and hence the suit

property is to be treated as ancestral\joint family property and hence the plaintiffs are also entitled for a share therein."

31. According to the plaintiffs, amendment is necessitated for the reason that they have traced Prameela's son, who has executed a Relinquishment Deed to the extent of Prameela's share in the suit schedule property by taking consideration. In view of the same, the plaintiffs want to plead and demonstrate that the suit schedule property is the joint family property. The contention of the second defendant is that the suit schedule property is the self-acquired property of the first defendant. Before commencement of the trial, defendant No.5 has specifically pointed out existence of Prameela and that she had died leaving behind her sole son and that he was a necessary party to the proceedings. But the trial has proceeded ignoring the said aspect and in the impugned judgment, there is no finding by the Trial Court with regard to Prameela. Hence, for the first time in this appeal, we cannot decide whether Prameela is one of the heirs of Subbaiah

and Lalithamma and what is her right in the suit schedule property. As seen from the material on record, plaintiffs do not deny alienation by defendant No.1 in favour of defendant No.2. They claim share in the property as it is a joint family consists of themselves and first defendant. The existence of Prameela is pleaded contending that she is the necessary party to the suit.

32. DW-2/A.Srinivasa Setty is the defendant No.5. In the witness box, he has reiterated the existence of Prameela as one of the legal representatives of Subbaiah and Lalithamma. Hence, the proposed amendment narrating about Prameela, and Mallikarjuna executing a relinquishment deed in favour of the plaintiffs requires consideration on merits. The proposed amendment will not change the nature of the suit, irrespective whether the suit property is a joint family property or self-acquired property, the legal representatives of Prameela shall have a share in the suit property. Admittedly, the legal representative of

Prameela has not joined execution of the sale deed/Ex.D2 in favour of defendant No.2. Hence, the additional evidence as suggested by the plaintiffs under Order XLI Rule 27 of CPC necessarily merits consideration, which can only be done by the Trial Court and not for the first time before the appellate court. Hence, the plaintiffs have made out grounds for permitting amendment of the pleadings and to produce the additional evidence.

33. The contention of the second defendant that the suit schedule property is the self-acquired property of first defendant cannot be considered in the changed circumstances of existence of another heir of Subbaiah and Lalithamma. Hence, the matter requires reconsideration by the Trial Court. Accordingly, we answer point No.1.

Reg. Point No.(ii):

34. We have carefully perused the impugned judgment. As we have referred supra, defendant No.5 has taken a specific plea about the existence of

Prameela. But the Trial Court did not frame any issue in this regard, but in para-17 of its judgment, the Trial Court has noted that whereabouts of Prameela were not known. Taking into consideration that there was no pleading in the plaint or any evidence placed by the plaintiffs about existence of Prameela, who died leaving behind her son Mallikarjuna as her legal heir, the Trial Court has proceeded on an assumption that for more than 10 years, the whereabouts of Mallikarjuna and Prameela were not known. When one of the defendants has raised a point regarding existence of Prameela and she being a necessary party, the Trial Court has committed an error in not framing necessary issue in this regard. In a suit for partition, all the members of the joint family are necessary parties. The Trial Court ought to have deferred the judgment and direct impleadment of all necessary parties and then to proceed on merits. As we notice from the impugned judgment, the finding recorded by the Trial Court about non-existence of Prameela without there being any

issue, is not sustainable. Hence, the finding recorded by the Trial Court is one-sided, without considering pleadings and evidence on record. Hence, we are persuaded to hold that the finding recorded by the Trial Court is erroneous and calls for interference.

35. In view of our finding on points No.(i) and (ii), we find that it is a fit case for remand rather than deciding the case on merits relying upon the proposed amendment without bringing the additional evidence before the Court. Hence, the appeal merits consideration. In the result, the following;

ORDER

- (i) Appeal is allowed;
- (ii) The impugned judgment and decree is set aside;
- (iii) I.A.No.1/2013 filed under Order XLI Rule 27(1) read with Section 151 of CPC and I.A.No.2/2017 filed under Order XLI Rule 27(aa) and (b) read with Section 151 of CPC by the plaintiffs are hereby allowed permitting the plaintiffs to adduce additional evidence;
- (iv) I.A.No.2/2013 filed by the plaintiffs under Order VI Rule 17 read with Section 151 of CPC is hereby

allowed. Plaintiffs are permitted to amend the
plaint;

- (v) Suit in O.S.No.914/2005 is restored to the file of
XXXVIII Addl.City Civil Judge, Bangalore, with a
direction to complete the amendment and to
frame necessary issues, permit both the parties to
adduce additional evidence by impleading the legal
representatives of Prameela and to decide the
case on merits without being influenced by any of
the observations made hereinabove;
- (vi) Without further notice, parties are directed to
appear before the Trial Court on **22.12.2023**;
- (vii) Since the suit is of the year 2005, the Trial Court
is requested to dispose of the suit at the earliest;
- (viii) The court fee shall be refunded to the
appellant in accordance with law.

Parties to bear their own costs.

**Sd/-
JUDGE**

**Sd/-
JUDGE**

KNM/-