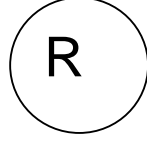




**IN THE HIGH COURT OF KARNATAKA,
DHARWAD BENCH**

DATED THIS THE 22ND DAY OF MARCH, 2024



BEFORE

**THE HON'BLE MR JUSTICE SURAJ GOVINDARAJ
WRIT PETITION NO. 105400 OF 2023 (GM-CPC)**

BETWEEN

KADAPPA
S/O. GIRIMALLAPPA MADAGOUDA,
SINCE DECEASED BY HIS LR'S

1. MALAGOUDA
S/O. KADAPPA MADAGOUDA,
AGE. 69 YEARS, OCC: AGRICULTURE,
2. BHIMAGOUDA
S/O. KADAPPA MADAGOUDA,
AGE. 59 YEARS, OCC: AGRICULTURE,
3. BASAVARAJ
S/O. KADAPPA MADAGOUDA,
AGE. 56 YEARS, OCC: AGRICULTURE,
4. SHANKARAGOUDA
S/O. KADAPPA MADAGOUDA,
AGE. MAJOR, OCC: AGRICULTURE
5. SONAWWA
W/O. BHIMAPPA SHIRAHATTI,
AGE. 64 YEARS, OCC: AGRICULTURE & HOUSEHOLD,
6. GOURAWWA
W/O. SHANKAR MAGADUM,
AGE. 62 YEARS, OCC: AGRICULTURE,





ALL ARE R/O. SHIRAGAV, TQ. HUKKERI,
DIST. BELAGAVI. - 591309

...PETITIONERS

(BY SRI: MANJUNATH A KARIGANNAVAR &
SRI. M.B. HIREMATH., ADVOCATE)

AND

LAXMIBAI
W/O. SIDRAYA CHOUGALA
SINCE DECEASED BY HER LRS.

1. SIDRAM
S/O. RATNAPPA CHOUGALA,
AGE 81 YEARS, OCC: AGRICULTURE,
R/O. SHIRAGAV, TQ. HUKKERI,
DIST. BELAGAVI. - 591309
2. GAJANAN
S/O. SIDRAM CHOUGALA,
AGE 50 YEARS, OCC: AGRICULTURE,
R/O. SHIRAGAV, TQ. HUKKERI,
DIST. BELAGAVI. -591309
3. SUVARNA
W/O. SHIVANAND CHOUGALA,
AGE 46 YEARS, OCC: AGRICULTURE,
R/O. NIRVANHATTI, TQ. HUKKERI,
DIST. BELAGAVI. -591309'
4. SHANKAR
S/O. SIDRAM CHOUGALA,
AGE 44 YEARS, OCC: AGRICULTURE,
R/O. SHIRAGAV, TQ. HUKKERI,
DIST. BELAGAVI. - 591309
5. ANUSUYA
W/O. BASAVANNI ISLAMPURE,



AGE. 56. YEARS, OCC: HOUSEHOLD,
R/O. HATTARAGI, TQ. HUKKERI,
DIST. BELAGAVI. 591243.

BASAVANNI
S/O. SIDDAPPA CHOUGALA,
SINCE DECEASED BY HIS LR'S

6. SUSHILA
W/O. BASAVANNI CHOUGALA,
AGE: 74 YEARS, OCC: HOUSEHOLD,
R/O. CHANNAMMA NAGAR, 2ND CROSS,
KRISHNA COLONY, PLOT NO. 897 (RAJATGIRI),
BELAGAVI. 590006.
7. SHRISHAIL
S/O. BASAVANNI CHOUGALA,
AGE: 46 YEARS, OCC: SERVICE,
R/O. CHANNAMMA NAGAR, 2ND CROSS,
KRISHNA COLONY, PLOT NO. 897 (RAJATGIRI),
BELAGAVI. - 590006
8. BALAVVA
W/O. BASAVARAJ KOTRABAAGI,
AGE: 44 YEARS, OCC: SERVICE,
R/O. CHANNAMMA NAGAR, 2ND CROSS,
KRISHNA COLONY, PLOT NO. 897 (RAJATGIRI),
BELAGAVI. -590006-
9. SIDDAPPA
S/O. BASAVANNI CHOUGALA,
AGE: 42 YEARS, OCC: SERVICE,
R/O. CHANNAMMA NAGAR, 2ND CROSS,
KRISHNA COLONY, PLOT NO. 897 (RAJATGIRI),
BELAGAVI. 590006.

SHIVALINGA
S/O. SIDDAPPA CHOUGALA,
SINCE DECEASED BY HIS LR'S



10. KASTURI
W/O. SHIVALINGAPPA CHOUGALA,
AGE. 72 YEARS, OCC: AGRICULTURE,
R/O. SHIRAGAV, TQ. HUKKERI,
DIST. BELAGAVI. 591309
11. MALLIKARJUN
S/O. SHIVALINGAPPA CHOUGALA,
AGE. 48 YEARS, OCC: AGRICULTURE,
R/O. SHIRAGAV, TQ. HUKKERI,
DIST. BELAGAVI. 591309
12. SIDDAPPA S/O. SHIVALINGAPPA CHOUGALA
AGE. 27 YEARS, OCC: AGRICULTURE,
R/O. SHIRAGAV, TQ. HUKKERI,
DIST. BELAGAVI. -591309.
13. RUDRAPPA @ SHIVARUDRA
S/O. SIDDAPPA CHOUGALA,
AGE. 56 YEARS, OCC: AGRICULTURE
R/O. SHIRAGAV, TQ. HUKKERI,
DIST. BELAGAVI. -591309
14. CHAMPAVVA
W/O. REVAPPA NESARAGI,
AGE. 71 YEARS, OCC: AGRICULTURE,
R/O. SHIRAGAV, TQ. HUKKERI,
DIST. BELAGAVI. -591309.
15. GANGAWWA
W/O. RUDRAPPA CHOUGALA,
AGE. 84 YEARS, OCC: AGRICULTURE
R/O. SHIRAGAV, TQ. HUKKERI,
DIST. BELAGAVI. - 591309

...RESPONDENTS

(BY SRI. S M KALWAD., ADVOCATE R11-R13;
SRI. PRASHANT MATHAPATHI., ADVOCATE FOR R3, R5 & R14;
V/O/DTD. 03.01.2014 R1, R2, R4, R6-R10 & R15-
NOTICE DISPENSED WITH)



THIS WRIT PETITION IS FILED UNDER ARTICLES 226 & 227 OF THE CONSTITUTION OF INDIA PRAYING TO ISSUE A WRIT OF CERTIORARI QUASHING THE ORDER DATED 02.08.2023 ON IA.NO.XX PASSED BY THE COURT OF THE CIVIL JUDGE & JMFC AT HUKKERI IN FDP NO.3 OF 2004 AS PER ANNEXURE-T, AND DISMISS THE IA NO.XX AND ETC.

THIS WRIT PETITION COMING ON FOR ORDERS AND HAVING BEEN RESERVED FOR ORDERS ON 22.02.2024, THIS DAY, THE COURT PRONOUNCED THE FOLLOWING:

ORDER

1. The petitioners are before this Court seeking for the following reliefs.

a. Issue a writ of certiorari quashing the order dated 02.08.2023 on I.A.No.XX passed by the Court of the Civil Judge & JMFC at Hukkeri in FDP NO.3 of 2004 as per Annexure-T, and dismiss the IA No.XX;

b. Issue such other writ/order/direction as deemed fit, in the interest of justice.

2. The suit in OS No.368/1989 came to be filed by deceased plaintiff No.1 i.e., the wife of respondent No.1 and the mother of respondents No.2 to 4 herein, seeking for the partition and separate possession before the Principal Munsiff Court and JMFC, Hukkeri which came to be decreed on



10.3.1993 by granting a notional share. Regular appeal in RA No.44/1997 (old RA No.22/1993) filed before the Civil Judge (Sr.Dn.) at Hukkeri, was partly allowed. Another regular appeal filed by respondent No.15 who is the brother of deceased Sri.Kadappa, in RA No.45/1997 (old RA No.23/1993) came to be dismissed vide common judgment dated 27.9.1997.

3. The Respondent No.15 having filed RSA No.30/1998, vide order dated 11-06-2002 the decree came to be modified, directing equity to be given to the purchaser who had purchased a portion of the property belonging to the coparcener.
4. Respondents No. 1 to 5 filed FDP No.3/2004 before the Civil Judge & JMFC, Hukkeri, an issue having been framed **"Whether the respondents/Defendants No.5A to 5F are entitled schedule-B property to their share as averred in objection para No.5?"** came to be answered in the affirmative, and it was held that the defendant No.5 to the suit namely the father of the



petitioners herein, would be entitled to the property in Block No.393 measuring 3 acres 33 guntas.

5. It is challenging the same, a writ petition came to be filed in WP No.62814/2010 which came to be disposed of on 7.6.2016 reaffirming the petitioners to be the purchasers of and entitled to Block No.393 measuring 3 acres 33 guntas.
6. Respondents No.1 to 5 filed IA No.XI for modification of decree in terms of the judgment of the Hon'ble Apex Court in ***Vineeta Sharma vs. Rakesh Sharma***¹, the said application came to be rejected by the Executing Court on 8.10.2021, challenging the same a writ petition in WP No.102629/2022 came to be filed. When this Court vide order dated 1.12.2022 held that, the partition will confined in respect of other suit properties and plaintiffs were not entitled to any share in property covered under Block No.393.

¹(2020) 9 SCC 1



7. Respondents No.1 to 5 filed another IA No.XIX requesting re-allotment of equity, respondents No.11 to 13 filed IA No.XX seeking an equal share in terms of the ***Vineeta Sharma Case (supra)*** alleging that defendant No.1 had sold more than his share to defendant No.5 (sold excess land after notional partition).
8. Vide order dated 2.8.2023 IA No.XIX, is partly allowed and shares of the plaintiff in suit property were directed to be re-determined. IA No.XX also came to be allowed holding that the respondents No.11 to 13 were also entitled for an equal share in property, it is challenging the said order the petitioners are before this Court seeking for the aforesaid reliefs.
9. Sri.Mallikarjunaswami B. Hiremath., learned counsel for the petitioners, would submit that;
 - 9.1. The petitioner, whose father was arrayed as defendant No.5, purchased property covered under Block No.393 from defendant No.1,



contends that, in the judgment and decree passed in OS No.368/1989 dated 10.03.1993, it is categorically observed that the share of defendant No.1 in Block No.393 would be allotted to the legal representatives of defendant No.5. In the common order dated 27.9.1997 in RA No.44/1997 and RA No.45/1997, the First Appellate Court has again reiterated the same, which has been confirmed in RSA No.30/1998, and as such he submits that the entire property in Block No.393 measuring 3 acres 33 guntas fell to the share of defendant No.5. This right and possession of defendant No.5 and now his legal representatives, who are the petitioners herein cannot be disturbed.

9.2. His submission is that on FDP proceedings in FDP No.3/2004 having been filed, the FDP Court has also categorically held that the petitioners would be entitled for allotment of



Schedule-B property i.e., Block No.393 to their share, in furtherance of which the Court Commissioner was directed to draw the second preliminary decree. This order dated 22.1.2010 passed in FDP No.3/2004 has attained finality, and as such the impugned orders could not have been passed, since by virtue of the said impugned orders the property in Block No.393 would be partitioned affecting the rights of the petitioners which is not permissible when same has been allotted to the petitioners. On these grounds he submit that the order passed in IA No.XX is required to set aside.

10. Sri.S.M.Kalawad., learned counsel appearing for respondents No.11 to 13 would submit that;

10.1. What has been allotted to Defendant No. 5 is the share of defendant No.1 in Block No.393, the entire Block No.393 has not been allotted to defendant No.5-the father of the petitioners herein. It is only the share of the defendant



No.1 in Block No.393, which can be said to be allotted to defendant No.5 in terms of the judgment in OS No.368/1989, and it is the said share, which has been upheld in RA No.44/1997 and RA No.45/1997.

10.2.In RSA No.30/1998 this Court had come to a categorical conclusion that, the first appellate Court has committed an error in directing the schedule property bearing Block No.393, allotted to defendant No.1, who has sold the same to defendant No.5, and as such observed that, in a partition suit equity could be adjusted but a Court cannot direct that the entire property alienated by a coparcener is to be allotted to the purchaser even if the coparcener was not entitled to it towards his share and as such left the matter to the discretion of Executing Court and the Final Decree Proceeding for adjustment of equity on the basis of the entitlement of the parties.



10.3.His submission is that the order passed on Issue No.5 in FDP No.3/2004 was prior to the judgment in ***Vineeta Sharma case (supra)***, if the entire property in Block No.393 measuring 3 acres 33 guntas were allotted to the share of defendant No.1 and consequently defendant No.5-the father of the petitioners herein, the share of the respondents No.11 to 13 who are the other brothers would get reduced which is not permissible.

10.4.Hence, the finding on issue No.5 is always subject to the judgment of the Hon'ble Apex Court in ***Vineeta Sharma case (supra)***, since the said findings on issue No.5 has not been given effect to by the property being divided by metes and bounds and the FDP proceedings have not come to an end.

10.5.Thus, he submits that the order passed by the trial Court cannot be found fault with and the above writ petition is required to be dismissed.



11. Sri.Prashanth Mathapati., learned counsel appearing for legal representatives of plaintiffs No.1, 2 and 3 daughters would submit that;

11.1. In view of the judgment of the Hon'ble Apex Court in ***Vineeta Sharma case (supra)***, the entitlement of all the parties would have to be re-determined wherein, both the sons and daughters have equal share in all the properties. The trial Court ought to have allowed both IA No.XIX and IA No.XX and re-determine the shares in respect of all the parties and ought not to have dismissed IA No.XIX.

11.2. Insofar as the order passed in IA No.XX, he submits that the said order being proper and correct does not require any interference in the hands of this Court.

12. Heard Sri.Mallikarjunaswami B.Hiremath., learned counsel appearing for the petitioner, Sri.S.M.Kalawad., learned counsel appearing for



respondents No.11 to 13 and Sri.Prashanth Mathapati., learned counsel appearing for respondents No.3, 4 and 14. Perused papers.

13. The points that would arise for consideration are;

1. **Whether in view of the judgment passed by the Hon'ble Apex Court in *Vineeta Sharma case (supra)*, the shares of all parties to the suit are required to be re-determined?**
2. **Whether re-determination required of in terms of the decision of the Hon'ble Apex Court in *Vineeta Sharma case (supra)* would also apply to an alienation of the property made prior to 20.12.2004?**
3. **Whether the order passed by the trial Court suffers from legal infirmity requiring interference of hands of this Court?**
4. **What order?**

14. I answer above points as under;

15. **Answer to point No.1: Whether in view of the judgment passed by the Hon'ble Apex Court in *Vineeta Sharma case (supra)*, the shares of all parties to the suit are required to be re-determined?**



15.1. In terms of the decision of the Hon'ble Apex Court in ***Vineeta Sharma case*** (*supra*) a daughter has been held to be entitled to share in the coparcenary property/joint family property in the same manner as sons would be entitled. The said decision would be applicable to all claims made by daughters. Any such claim filed by the daughter could, on the date of order passed in ***Vineeta Sharma case*** (*supra*) be at different stages.

1. Where a claim has been made and the notice issued by the daughter, in such a situation the decision in ***Vineeta Sharma case***(*supra*) would directly be applicable.
2. A situation, where suit has been filed by the daughter claiming for equal right. Since, the suit is yet to be adjudicated while adjudicating the matter, Court would necessarily have to take into consideration the decision of the Hon'ble



Apex Court in ***Vineeta Sharma Case (supra)***.

3. A suit having been dismissed or allowed, now pending in an appeal, in such a situation since, the First Appellate Court or Second Appellate Court or even if Specially Leave Petition is pending before the Hon'ble Apex Court, all the Courts would have to apply the judgment in ***Vineeta Sharma Case (supra)*** at the time of adjudication.

15.2. Apart from the above a situation could arise where, the matter is pending in the Final Decree stage.

15.3. Until the final decree is drawn and the property is distributed among the family members by metes and bounds, a partition suit could not come to an end. Any judgment passed by the Original Court, First Appellate Court and Second Appellate Court or even the Apex Court for that



matter would be a preliminary decree, on which basis Final Decree Proceeding would have to be taken.

15.4. Thus, Final Decree Proceeding is in essence for the implementation of the preliminary decree which occurs in a Final Decree Proceeding. In a Final Decree Proceeding any change in circumstances, re-working of shares in the event of some of parties having expired can be done. Similarly, if the properties are not divided by metes and bounds then the shares would have to be reworked on the basis of the judgment of the Hon'ble Apex Court in ***Vineeta Sharma Case*** giving the full share to the daughter. Irrespective of whether a share had been granted to her or not on the basis of a notional partition in the preliminary decree.

15.5. Thus, I answer point No.1 by holding subsequent to the decision of the Hon'ble Apex Court in ***Vineeta Sharma Case (supra)***



recognizing a full share of the daughter in the joint family/coparcener property. Even in an Appellate Proceeding or a Final Decree Proceeding the shares and entitlement of the parties even if determined earlier would have to be redetermined in terms of the decision and principles laid down by the Hon'ble Apex Court in ***Vineeta Sharma Case.***

16. **Answer to point Nos.2 and 3: Whether re-determination required of in terms of the decision of the Hon'ble Apex Court in Vineeta Sharma case (supra) would also apply to an alienation of the property made prior to 20.12.2004?**

And

Whether the order passed by the trial Court suffers from legal infirmity requiring interference of hands of this Court?

16.1. It is not in dispute that the plaintiffs and defendant No.4 are sisters, defendants No.1 to 3 are the brothers and all of them are the



children of one Sri.Siddappa. The present dispute is one relating to Block No.393 measuring 3 acres 33 guntas, out of entire property subject matter of the suit which was 13 acres 25 guntas.

16.2.Defendant No.1-brother had sold item No.5 property to the suit namely Block No.393 measuring 3 acres 33 guntas to a third party purchaser namely defendant No.5 on 22.7.1993, needless to say, that other brothers and sisters were not parties to the said sale deed.

16.3.A suit came to be filed on 10.3.1993 by two daughters against the brothers the other sister and the purchaser seeking for partition and separate possession in OS No.368/1989 which came to be decreed with cost, the operative portion reads as under;



Order

The plaintiffs' suit is decreed with cost.

Plaintiffs shall entitled to 1/3rd share in Para No. 1A, C and D properties and 1/12th share in para No. 1b property. Defendants 1 to 3 shall entitled to each 1/6th share in plaint para No. 1A, C and D properties and each 7/24th share in Para No. 1B property. Defendant No.4 shall entitled to 1/6th share in para no. 1A, C and D properties and 1/24th share in para No. 1B property.

The share of defendant No.1 in para No. 1A and 1B shall be allotted to the L.R's of defendants No. 5 in block No.393.

For partition and separate possession of para No. 1A and B properties, the plaintiffs shall proceed under Section 54 CPC., 1908.

For Division of para No.1C and D properties, a Commissioner shall be appointed.

16.4.A perusal of the above would indicate that by way of this preliminary decree share of each of the parties has been quantified, defendant No.1 was entitled to 1/6th share in plaint 1A, C and D properties and 7/24th share in plaint-item 1B property. The share of defendant No.1 in item 1A and 1B property was to allotted to the legal



representatives of defendant No.5 in Block No.393. Thus, the above would make it clear that, it is not the entire Block No.393 which came to allotted to defendant No.1 and consequently to defendant No.5, but it was only the share of defendant No.1 which was to be allotted to defendant No.5. This was confirmed in RA No.44/1997 and RA No.45/1997 the operative portion of the order passed in RA reads as under;

Order

RA No. 44/97 (22/93) filed by the appellants under order 41 Rule 1 r/w Section 96 of CPC is partly allowed. The judgment and decree passed by the trial court in O.S.No.368/89 dated 10-3-193 is modified as under.

The plaintiffs and defendant No.4 are entitled to 5/12th share each in para nos. 1A and 1B landed properties and the defendants 1 to 3 each are entitled to 2/3rd share in para nos. 1A and 1B landed properties and 7/12th share each in the house properties shown in para nos. 1C and D.

The share of the defendant no.1 in para no. 1A and B shall be allotted to the L.R's of defendant No.5 in block no.393.



For partition and separate possession of para no.1A and B properties the plaintiffs shall proceed u/s 54 of CPC & Defendants 1 to 3 can get the partition in para no.1C & D house properties by appointment of the court commissioner.

Draw the preliminary decree accordingly.

Further RA No.45/97 (23/93) filed by the appellant is dismissed. Both parties are directed to bear their own costs.

The copy of judgment is ordered to be kept in RA No.45/97(23/93).

Office to send back the records to the trial court along with copy of judgment and decree passed in this appeal without loss of time.

16.5.The First Appellate Court has also held that the share of defendant No.1 in para 1A and B shall be allotted to the legal representatives of defendant No.5 in Block No.393. Thus, it is only the share of defendant No.1 in Block No.393 which was allotted to defendant No.5.

16.6.In RSA No.30/1998, where similar contentions as that raised in the present matter was raised, this Court came to a conclusion that, in a partition suit equity could be adjusted but Court



cannot direct that the entire property alienated by the coparcener is to be allotted to the coparcener, if he is not entitled to it towards his share the relevant portion is reproduced hereunder for easy reference;

... in a partition suit, equity could be adjusted but the Court cannot direct that the entire property alienated by a coparcener to be allotted to the coparcener if he is not entitled to it towards his share. The Court below ought to have left the matter to the discretion of the executing Court in the final decree proceedings directing the said Court for adjustment of the equity and while dividing the property by metes and bounds to allow Block No.3 to the first defendant if he is entitled to and not direct the same to be allotted to the first defendant even if he is not entitled. Whether he is entitled or not is to be found out during the final decree proceedings. With this further modification in the decree passed by the Court below, this appeal is partly allowed and in all other aspects, the decree passed by the lower appellate Court stands. No order as to costs.

16.7.A reading of the above would indicate that Block No.393 was not entirely allotted to defendant No.1 and this aspect was left open for the final decree court to consider.



16.8. Issue No.5 which had been framed in FDP No.3/2004 and findings in FDP No.3/2004, read as under;

5. *Whether the Respondent-defendants Nos. 5A to 5F are entitle for schedule B property to their share as averred in objections para no.5?*

Order

*Issue No.5 is answered in the Affirmative. The legal heirs of defendant No.5 are entitle for suit schedule B property i.e., **3As-33Gs** of land in Block No. 393. The remaining properties are to be divided between the parties as per the share allotted in the second preliminary decree. Hence Tahsildar, Hukkeri is appointed as a Court Commissioner to divide the properties as per Second Preliminary Decree. Tahsildar is entitle to take the assistance of Taluka Surveyor to measure the property, to divide the same and to submit report before the Court.*

Issue Commission Warrant after payment of process fee.

16.9. The order passed on issue No.5 during the pendency of the matter is contrary to the findings rendered by this Court in RSA N0.30/1998. The FDP Court went to the extent of saying that legal heirs of the defendant No.5 would be entitled for suit Schedule-B property



i.e., 3 acres 33 guntas in Block No.393 and remaining properties are to be divided between the parties as per the share allotted.

16.10.It is this order which is sought to be pressed into service by Sri.Mallikarjunaswami B. Hiremath to contend that the entire property in Block No.393 has been allotted to the defendant No.5 and therefore the rights of the petitioners who are the legal representatives of defendant No.5 cannot be disturbed.

16.11.In order to apportion these contentions, the shares of each of the parties have to be appreciated. The entire property subject matter of the litigation is 13 acres 25 guntas. If 3 acres 33 guntas are allotted to defendant No.1 and consequently to defendant No.5-the deceased father of the petitioners herein, which would leave a balance of 9 acres 32 guntas.

16.12.There being 3 sons and 3 daughters, the said 9 acres 32 guntas would have to be divided into 6



shares thereby each one would get 1 acre 25 guntas i.e., each of the three sons would get 1 acre 25 guntas and each of the three daughters would get 1 acre 25 guntas.

16.13. Defendant No.1 has sold 3 acres 32 guntas in the year 1982 by way of a Registered sale deed prior to the amendment of Section 6 of the Hindu Succession Act, 1956 as amended in the year 2005 coming into force, the said transaction is thus saved by proviso to sub-Section (1) of Section 6 of the Act, which provides for, that nothing contained in the said Section shall effect any dispossession or alienation made before 20.12.2004.

16.14. Prior to the amendment of Section 6 of the Act, a women did not have an individual right to the property and it was only the sons who had a share.

16.15. In view of the saving of a sale prior to the year 20.12.2004, it is only the sons who would have



a share in the said 3 acres 33 guntas. Thus, each of defendants No.1, 2 and 3 would have a right over 1 acre 11 guntas. Thus, in all defendants No.1, 2 and 3 would have an individual share of 1 acre 25 guntas each in the unsold extent of 9 acres 32 guntas and 1 acre 11 guntas in sold area of 3 acres 33 guntas. Thus, in the entire property each of the sons would have a right over 2 acres 36 guntas.

16.16. If the above calculation is taken into account, if 3 acres 33 guntas in Block No.393 were to be allotted to defendant No.1 and consequently defendant No.5. Defendant No.1 being entitled to only 2 acres 36 guntas would end up with 37 guntas more which is not permissible and cannot be countenanced either in law or facts.

16.17. The judgement and decree in the suit affirmed by the First Appeal and Second Appeal is only as regards the extent of the share of the defendant No.1 which would have to be allotted



in equity to defendant No.5 and not what has been purchased by defendant No.5. Since, defendant No.5 cannot purchase from defendant No.1 more than the share of the defendant No.1, the other parties i.e., plaintiff and other defendants not having executed any sale deed in favour of Defendant no.5.

16.18. Thus, I am of the considered opinion that the defendant No.1 would be entitled only to 2 acres 26 guntas and in order to do equity it is 2 acres 26 guntas out of 3 acres 33 guntas in Block No.393 which can be allotted to the share of defendant No.1 and consequently defendant No.5.

16.19. As a corollary, I am of the considered opinion that the entire land covered under Block No.393 measuring 3 acres 33 guntas alleged to have been purchased by defendant No.5 is not the share of defendant No.1 and as such



defendant No.5 cannot claim right over the entire property.

16.20. The trial Court, had not taken all these factors into consideration, and as such the order passed on IA No.XX suffers from the above infirmity. Having considered these aspects, I am of the opinion that;

16.21. When partition has not been affected by metes and bounds, and the partition is not complete, the decision of the Hon'ble Apex Court in ***Vineeta Sharam's case (supra)*** would have to be applied taking into consideration the statutory requirements of Section 6 of the Hindu Succession Act.

16.22. In the present case the sale of 3 acres 33 guntas having occurred by a registered sale deed prior to amendment coming into force, a notional partition is to be effected as on the date of the sale deed to determine the share of defendant No.1. The sale having occurred in



the year 1982, the daughters not having any right, only the sons would have a right on the said 3 acres 33 guntas. There being three sons each one of them are entitled to 1 acre 11 guntas.

16.23. The balance land not having been sold or partitioned amounting to 9 acres 32 gutnas both the sons and daughters would have equal share i.e., 9 acres 32 guntas would have to be made over into six shares amounting to 1 acre 25 guntas each. Which is what comes to the share of daughters and the sons.

16.24. The daughters not having any share in the property sold in the year 1982 i.e., prior to 20.12.2004. Thus, defendants No.1, 2 and 3 sons would be entitled to 1 acre 11 guntas + 1 acres 25 guntas totally 2 acres 36 guntas. Plaintiffs No.1 and 2 and defendant No.4 being daughters would be entitled to 1 acre 25 guntas.



- 16.25. In view of the above discussion, I answer the above points by holding that the redetermination required in terms of the decision of the Hon'ble Apex Court in ***Vineeta Sharma Case (supra)*** would not apply to an alienation of the property made prior to 20.12.2004, since they are saved by the proviso to sub-Section (1) of the Section 6 of the Hindu Succession Act, 1956 as amended. Any dispossession or alienation made prior to 20.12.2004 cannot be called into question even after judgement of the Hon'ble Apex Court in ***Vineeta Sharma Case (supra)***.
- 16.26. The trial Court not having taken into consideration all the above aspects the said orders suffer from legal infirmity requiring interference of the hands of this Court as detailed supra.
17. **Answer to point No.4; What order?** in view of the above, I pass the following:



ORDER

1. The writ petition is ***partly allowed***.
2. It is declared that defendant No.5 can only claim a right of 2 acres 36 guntas in Block No.393 and not the entire land covered under Block No.393, the remaining 37 guntas would have to be distributed among the other sons/brothers as per the report to be submitted by the Commissioner in that regard.
3. In view of the above, the Jurisdictional ADLR is appointed as a Commissioner to take into consideration the above aspect, measure the properties and submit the same to the Jurisdictional Assistant Commissioner who shall submit a scheme of partition taking into account the aforesaid aspects.
4. Impugned order passed by the trial Court stands modified in terms of the above observation.

Sd/-
JUDGE