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IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 16TH DAY OF JANUARY, 2025

BEFORE

THE HON'BLE MR JUSTICE C M JOSHI

REGULAR FIRST APPEAL NO.515 OF 2009 (PAR)

BETWEEN:

1. SMT. A.N.LEELANAGARAJA,
W/O A S NAGARAJA,
AGED ABOUT 59 YEARS,
R/AT BEHIND KEB,
OPP. HOUSE OF MINERVA
NAGANNA, NR. EXTENSION,
CHINTAMANI-563 125.

2. SRI A N SHARATHRAJ @
[WRONGLY DESCRIBED AS
A N SHANTARAJ @ SHARATHBABU]
S/O A S NAGARAJA,
AGED ABOUT 34 YEARS,
R/AT BEHIND KEB,
OPP. HOUSE OF MINERVA
NAGANNA, NR. EXTENSION,
CHINTAMANI-563 125.

3. SRI A S VENKATAKRISHNAIAH,
S/O LATE AKULASRINIVASAIAH,
AGED ABOUT 46 YEARS.
R/AT N R. EXTENSION,
CHINTAMANI-563 125.

4. SRI A NAGESHBABU,
S/O LATE KODANDARAMAIAH,
AGED ABOUT 49 YEARS.

SINCE DEAD BY HIS LRS.,

A4(a) SMT. M.V RADHA,
W/O NAGESHBABU,
AGED ABOUT 45 YEARS.

A4(b) N NAGASHREE,
D/O NAGESHBABU,
AGED ABOUT 19 YEARS.

BOTH ARE R/AT VENKATESHWARA NILAYA,
N.R EXTENSION, CHINTAMANI,
CHIKKABALLAPURA DIST.563 125.
[AMENDMENT CARRIED AS PER COURT
ORDER DATED 03.03.2016]

...APPELLANTS

(BY SRI G BALAKRISHNA SHASTRY, ADVOCATE FOR A1 TO A3
& A4 (a) & (b))

AND:

1. SMT. NAGARATHNAMMA,
D/O LATE AKULA VENKATARAYAPPA,
W/O B N RAMAIAH,
AGED ABOUT 71 YEARS,

SINCE DEAD BY HER LRS.

R1(a) SRI B.R. JAYAPRAKASH,
S/O LATE B N RAMAIAH,
AGED ABOUT 50 YEARS,
R/AT OPP. KARNATAKA STATE SEEDS
CORP. OFF. VINAYAKAM STREET,
N.R. EXTENSION, CHINTAMANI-568 125.
[AMENDED VIDE ORDER DATED 23.06.2023]

2. A.N KUSUMA,

D/O A.S NAGARAJA,
AGED ABOUT 34 YEARS,
R/AT BEHIND KEB,
OPP: HOUSE OF MINERVA,
NAGANNA, N.R. EXTENSION,
CHITAMANI-563 125.

3. SMT. A V NAGAVENAMMA,
D/O AKULA VENKATARAYAPPA,
W/O SRINIVASAIAH,
AGED MAJOR.

SINCE DEAD BY LRS.

3(a) K VENUGOPAL,
S/O SMT. A.V NAGAVENAMMA,
AGED ABOUT 53 YEARS,
S/O KAIWARA VILLAGE,
CHINTAMANI TQ,
CHICKBALLAPUR DIST.
(AMENDED AS PER ORDER OF COURT DATED
09.03.2023)

4. SMT. ASWATHAMMA,
W/O LATE AKULA NARAYANASWAMY,
AGED MAJOR,
R/AT C/O BAGGULA,
KRISHNAPPA PROVISION STORES,
OPP: HOUSE OF LAWYER,
LAKSHMIKANTHAM,
DODDA BHAJANE ROAD,
CHICKBALLAPUR-563 115.
(SINCE DEAD BY LRS APPELLANT NOS.2, 3 AND 4(B))

5. SMT. A.V VENKATANARASAMMA,
W/O VENKATARAYAPPA,
D/O AKULA VENKATARAYAPPA,
AGED MAJOR,
OCC: RETIRED KEB ENGINEER,
NO.90, VAPASANDRA,
CHICKBALLAPUR-563 115.

6. SMT. A.S KASTURAMMA,
W/O K.T VENKATACHALAPATHI,
D/O AKULASRINIVASAIAH,
AGED MAJOR,
OCC: RETIRED SBM MANAGER,
R/AT AGARAM PALACE ROAD,
N.R. EXTENSION,
CHINTAMANI-563 125.

7. SMT. A.S UMA,
W/O SRINIVASA (KUKKULA FAMILY),
D/O AKULASRINIVASAIAH,
AGED MAJOR,
R/AT ANDAWARAHALLI,
CHICKBALLAPUR-563 115.

8. SMT. A.S MANJULA,
W/O S. RAMACHANDRAPPA (DEPOT),
AGED MAJOR,
R/AT VAPASANDRA,
CHICKBALLAPURA-563 115.

9. SMT. A.S GEETHA,
W/O K.C KRISHNAMURTHY,
[KUKKULA FAMILY],
AGED MAJOR,
R/AT OLD POST OFFICE ROAD,
CHICKBALLAPUR-563 115.

10. SMT. A.S PADMA,
W/O K.T SUKUMAR,
AGED MAJOR,
R/AT: C/O H.B KRISHNAPPA,
NO.552, NTM SCHOOL, HEBBAL,
BANGALORE-560 024.

11. SMT. A NIRMALA @ RANI,
W/O T.ANAND,
D/O AKULA KODANDARAMAIAH,
AGED MAJOR,
R/AT NEAR CHURCH,
SIDLAGHATTA ROAD,

CHINTAMANI-563 125.

12. A.SUKANYA (KUNNI),
D/O AKULA KODANDARAMAIAH,
AGED MAJOR,
OCC: RETIRED TEACHER,
R/AT C/O MANGANTI VENKATARAMAPPA,
VAPASANDRA, CHICKBALLAPUR-563 115.

…RESPONDENTS

(BY SRI T. RAJARAM, ADVOCATE FOR R1(A);
SMT. G.R. SUJATHA, ADVOCATE FOR R3;
SRI K.N. NITISH, ADVOCATE FOR
SRI K.V. NARASIMHAN, ADVOCATE FOR R4(A) & R5;
SRI K.A. NAGESH, ADVOCATE FOR R7;
NOTICE TO R2, R8 & R12 SERVED, BUT UNREPRESENTED;
NOTICE TO R9 & R10 HELD SUFFICIENT V/O DATED 22.11.2011;
NOTICE TO R11 DISPENSED WITH V/O DATED 22.11.2011)

THIS RFA IS FILED U/S 96 OF CPC, AGAINST THE JUDGMENT AND DECREE DATED 31.01.2009 PASSED IN OS.NO.21/1993 ON THE FILE OF THE CIVIL JUDGE (SR. DN.) & JMFC, CHINTHAMANI, DECREEING THE SUIT FOR PARTITION.

THIS APPEAL HAVING BEEN HEARD AND RESERVED FOR JUDGMENT ON 22.10.2024 AND COMING ON FOR 'PRONOUNCEMENT OF JUDGMENT', THIS DAY, THE COURT DELIVERED THE FOLLOWING:

CORAM: HON'BLE MR. JUSTICE C M JOSHI

CAV JUDGMENT

(PER: HON'BLE MR. JUSTICE C M JOSHI)

Being aggrieved by the judgment and decree dated 31.01.2009 passed in OS No.21/1993 by the learned Civil Judge (Sr.Dn.) and JMFC, Chintamani, defendant Nos. 1(a),1(c), 2, 3 have filed this appeal.

2. The parties would be referred to as per their ranks before the trial Court for the sake of convenience.

3. Respondent Nos.1, 3 to 5 herein are the plaintiffs and respondent Nos.2, 6 to 12 herein are the defendants before the trial Court.

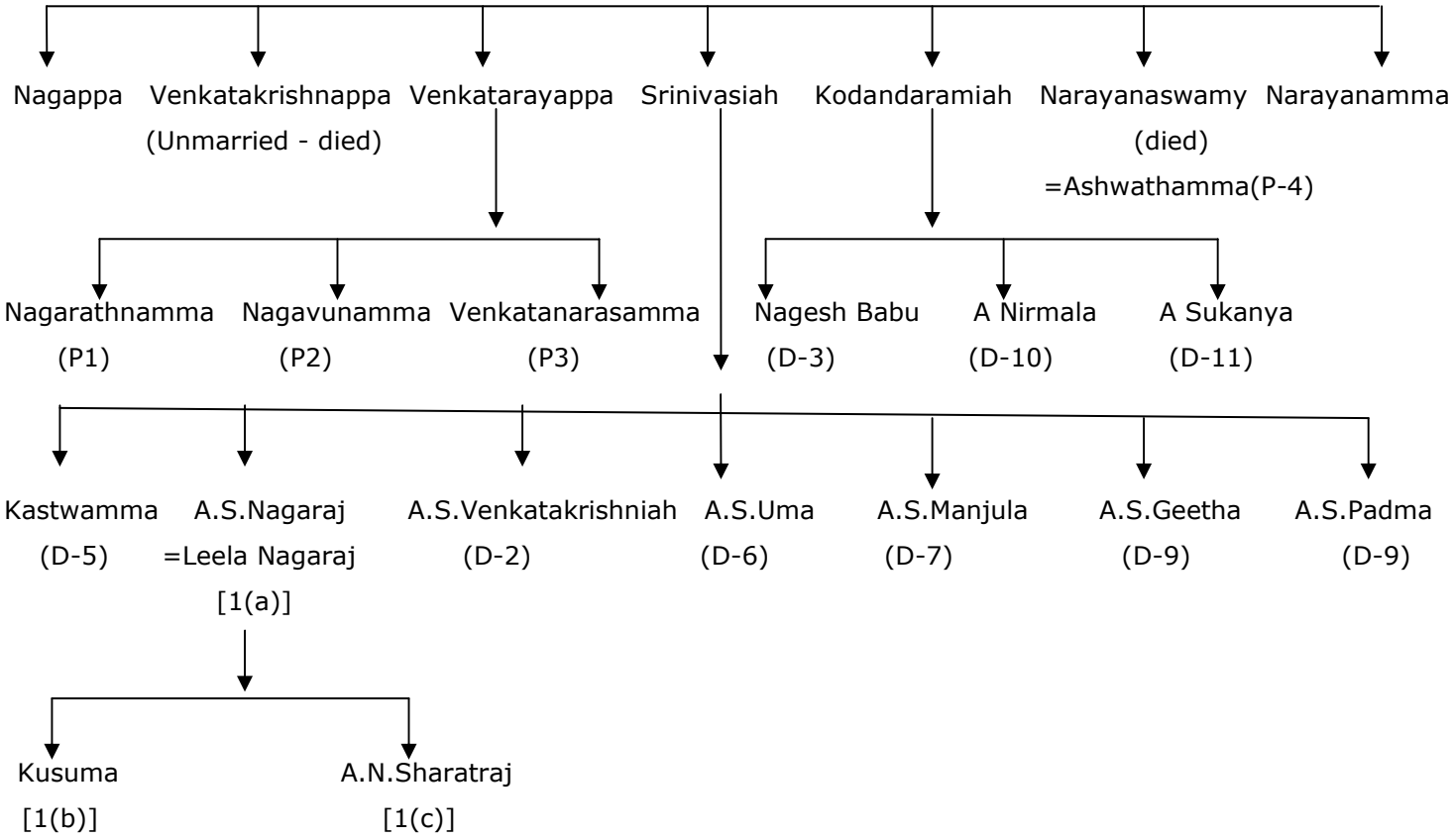
4. Brief facts of the case are as below:

The propositus Nagappa had six sons and a daughter. The first son, who was also Nagappa, had separated from the family more than 50 years back. The rest of the sons of Propositus Nagappa constituted a joint Hindu family. The father of plaintiff Nos.1 to 3, namely,

Venkatarayappa, was manager of the family. The family had ancestral and joint family properties, which are described in the suit schedule. The pedigree of the family of the plaintiffs and defendants is as below:

GENEALOGICAL TREE

NAGAPPA



5. It was further contended that Venkatakrishnappa, who was the son of Nagappa died unmarried. Plaintiff Nos.3 and 4, who were arrayed as the defendants, were transposed as plaintiffs during the pendency of the suit. Plaintiff No.4 happens to be the wife of Narayanaswamy, who was another son of Nagappa. Defendant Nos.1, 2, 5 to 9 represent the branch of Srinivasaiah; defendant Nos.3, 10 and 11 represent the branch of Kodandaramaiah. During pendency of the suit, defendant No.1, A.S. Nagaraj died and his LRs are brought on record. Since the death of the father of plaintiff Nos. 1 to 3, Venkatarayappa about 20 years back, the plaintiffs were demanding their respective shares. It was contended that defendants on one or the other pretext, postponed the partition. Therefore, the plaintiffs were constrained to file this suit for partition.

6. On being served with summons, defendant Nos. 1 to 4 and 6 appeared through their counsel and defendant Nos. 5, 7 to 10 were placed exparte.

7. The LRs of defendant No.1 and defendant No.2 filed their written statement. The same was adopted by defendant Nos.3 and 6. Later, defendant No.3 also filed his separate written statement, taking up exactly similar contentions as earlier. Defendant No.4 filed a separate written statement.

8. Defendant Nos.1 and 2 admitted the relationship of the parties but denied that they still constitute a Hindu undivided family. They further contended that during the life time of father of the plaintiffs i.e., Venkatarayappa, plaintiff Nos.1 to 3 were extracting more conveniences from their father and other family members by threatening that their father had no male issues. It was contended that in the year 1970, the joint family properties were divided orally among the then joint family members. The father of plaintiff Nos.1 to 3 i.e., Venkatarayappa, refused to take any share in the joint family properties as he had no male issues and consented other joint family members to partition the joint

family properties by excluding him and accordingly, a Palupatti was also prepared. They further contended that plaintiff Nos.1 to 3 having learnt about the oral partition and the stand taken by their father Venkatarayappa, demanded for their respective shares even though Venkatarayappa had refused to take any share in the joint family property. During 1972, after death of Venkatarayappa, plaintiff Nos.1 to 3 again claimed their share, which was refused by the defendants. Thereafter, these plaintiffs lost all their connection with the family of the defendants until the filing of the suit. Therefore, they contended that plaintiff Nos.1 to 3 had been ousted from the joint family and the joint family property on account of the wish of their father. Thereafter, defendant Nos.1 and 2, father of defendant Nos.3, 10 and 11 i.e., Kodandaramaiah and the husband of plaintiff No.4 Narayanaswamy entered into a registered Partition Deed dated 23-06-1983 on the same lines as per the Palupatti dated 31-03-1970. By way of amendment to the Written Statement, it was also contended that the after oral

partition of the year 1970, it was also reduced in the form of an agreement dated 31-03-1976. It was alleged that plaintiff No.4, who was earlier arrayed as defendant No.4 colluded with plaintiff Nos.1 to 3 on account of the enmity with defendant Nos.1 and 2 and joined the plaintiffs in claiming share. The husband of plaintiff No.4 was also a party to the partition deed dated 23-06-1983. Therefore, it was contended that the suit is not maintainable unless the registered partition deed dated 23-06-1983 is declared to be void. On these grounds, they sought dismissal of the suit.

9. Defendant No.4, though admitted the relationship, contended that after death of Venkatarayappa, the shop which was run by him in rented premises, was closed and defendant Nos.1 to 3 vacated the shop by receiving sum of Rs.3,00,000/- from the owner of the shop. Therefore, she contended that defendant Nos.1 to 3 are not giving proper accounts and she supported the claim of the plaintiffs seeking partition

of the property. She contends that she has no worldly knowledge, and she is illiterate and therefore, she being unaware of any partition deeds, her 1/4th share may be divided and given to her.

10. On the basis of the above pleadings, the trial Court framed the issues as below:

Issues

1. Whether the 4th defendant proves that Venaktarayappa refused to take any share in oral partition dt.13.1.70 as such the plaintiffs are not entitle to any share in suit property?

2. Whether the 3rd defendant proves that Venkatarayappa was ousted from share in joint family property as alleged in paras 6 and 7 of written statement?

3. If not, whether the plaintiff proves that they are entitled to 1/4th share jointly with Venkatanarasamma being the legal heirs of deceased Venaktarayappa?

4. Whether the suit is bad for non-joinder of necessary parties?

5. What decree or order?

Additional Issues (Dated: 28.8.2000)

1) Whether the defendants prove that the suit is not maintainable unless the registered partition deed, dt.23.6.1983 is set aside?

2) Whether the defendants prove that the valuation made by the plaintiffs is incorrect and court fee paid is insufficient?

Additional Issue (Dated: 26.6.2001)

1) Is suit not maintainable for partial partition for not including the properties of propositus Akula Nagappa fell to his share under the partition deed, Dt.13.8.1921?

11. The second plaintiff was examined as PW1 and Exhibits P1 to P12 were marked. The second defendant was examined as DW1, third defendant as DW2 and Exhibits D1 to 9 were marked. Since the settlement efforts did not fructify, the sides were closed and the arguments were heard. The trial Court felt that the issues need to be recasted and therefore, the following recasted issues were framed:

1) Whether the plaintiffs prove that the plaintiffs and the defendants are still the members of joint

family and the suit properties are in joint possession and enjoyment of the plaintiffs and the defendants?

2) Whether the defendants prove that they have ousted the plaintiffs from the joint family and hence, the plaintiffs are not entitled for any share?

3) Whether the suit is bad for non-joinder of necessary parties?

4) Whether the defendants prove that suit is not maintainable without seeking the relief of cancellation of partition deed, dt.23.6.1983 as null and void and not binding on the plaintiffs?

5) Whether the plaintiffs are entitled for the relief claimed?

6) What order or decree?

12. After hearing both sides, the trial Court held issue Nos.1 and 5 in the affirmative; issue Nos. 2 to 4 in the negative and proceeded to decree the suit awarding 1/4th share together to plaintiff Nos.1 to 3 and 1/4th share to plaintiff No.4.

13. The said judgment and decree is challenged in this appeal by the defendant Nos. 1(a), (c), 2 and 3.

14. On issuance of notice, respondents/defendants appeared before this Court through their counsel.

15. On admitting the appeal, the trial Court records have been secured.

16. During pendency of this appeal, respondent No.1 (plaintiff No.1) Nagarathnamma, died and her LRs are brought on record. When respondent No.4 (plaintiff No.4) Aswathamma died, one V.V. Vijayaprasad (who is the son of plaintiff No.3 Venkatanarasamma) filed applications in IA Nos. 2,3 and 4 of 2017 seeking to come on record claiming to have inherited rights under the Will dated 28-06-2014 by Aswathamma. Appellant Nos.2, 3 and 4(b) (who are the defendant No.1(a), defendant No.2 and daughter of defendant No.3) also filed IA No.1/2017 under order 22 Rule 10 CPC contending that by virtue of the Will dated 15-03-2016, they have inherited rights from Aswathamma.

17. Since there was a rival claim to succeed to the estate of Aswathamma, this Court by order dated

17-7-2018, referred the matter to trial Court to hold an enquiry for the purpose of determining as to who could be declared to be the legal representatives in terms of Order 22 Rule 5 CPC and to give a report to this Court. Accordingly, the trial Court, after holding an enquiry, has given its report holding that the second Will dated 15-03-2016 is established and Appellant Nos.2, 3 and 4(b) (who are the defendant No.1(a), defendant No.2 and daughter of defendant No.3) are the legal representatives of Aswathamma.

18. After receipt of the Report from the trial Court, IA No.1/2023 was filed by respondent No.3- K. Venugopal who was the LR of Smt. A.V. Nagavenamma on 13.1.2023 under Section 151 of CPC seeking orders as the appellants have violated the stay order by erecting constructions over some portion of the schedule property. Thereafter, by order dated 09-03-2023, this Court ordered that IA No.1/2017 to 4/2017 and IA No.1/2023 be heard along with the main matter.

19. The arguments by learned counsel Sri G. Balakrishna Shastry for appellants; Sri T. Rajaram for Respodnent No.1(a) and Sri Nitish for Sri K.V. Narasimhan, for respondent No. 4(a) and 5 were heard.

20. The learned counsel Sri G. Balakrishna Shastry for appellants would urge that the defendants contend ouster of the plaintiffs prior to the partition and that there was an oral partition which later was reduced into writing. In view of the father of plaintiff Nos. 1 to 3 having refused to receive the share, they were not entitled for any share. It is contended that the claim of the plaintiffs is hit by the prior ouster and the prior partition. Apart from this, the first son of propositus Nagappa is not made a party to the suit and that there is no evidence to show that he had separated from the joint family. Lastly, he contends that the trial Court erred in holding that plaintiff No.4 is also entitled for share in view of the registered Partition Deed, for which plaintiff No.4 was a party and he has not sought declaration of Partition Deed as void.

21. He also submits that during the pendency of the suit, plaintiff No.4 died leaving behind her the two Wills dated 28-06-2014 in favour of Vijaya Prasad; and dated 15-03-2016 in favour of appellant Nos.2, 3 and 4(b). He submits that the opinion of the trial Court on this aspect need not be interfered with. In conclusion, he submits that plaintiff No.4 is not entitled for any relief and there being a prior partition, the suit deserves to be dismissed.

22. Regarding scope of Order 22 Rule 5 of CPC, he has relied on the following decisions:

1. Mary Joyce Poonacha Vs. K.T Plantations Private Limited, Bangalore[1]
2. Jaladi Suguna (Deceased) Through LRS. Vs. Satya Sai Central Trust and Others[2]
3. Dashrath Rao Kate Vs. Brij Mohan Srivastava[3]
4. Varadarajan Vs. Kanakavalli[4]
5. Daya Ram and Others Vs. Shyam Sundari and Others[5]
6. P.S Sairam Vs. P.S Rama Rao Pisey[6]

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[1] ILR 1996 (KAR) 833
[2] (2008) 8 SCC 521
[3] (2010) 1 SCC 277
[4] (2020) 11 SCC 598
[5] AIR 1965 SC 1049
[6] AIR (SC)-2004-0-1619

7. Seth Beni Chand Vs. Kamla Kunwar[7]
8. Pentakota Satyanarayana Vs Pentakota Seetharatnam[8]
9. Suresh Kumar Bansal Vs. Krishna Bansal[9]

23. *Per contra*, learned counsel Sri Nitish, submits that the trial Court should not have given a finding on the Wills since it is only a report which is contemplated under order 22 Rule 5 CPC. He submits that the deceased Aswathamma, was suffering from health issues and on 15-03-2016, she was admitted to Deepashri Old Age Rehabilitation Centre and therefore, the testimony of CW1 and the case sheet would clearly show that she was not of sound and disposable state of mind on the date of the execution of the second Will. Therefore, the first Will, will hold the field since it has been proved by Vijaya Prasad through the attesting witness Srinivasarao (AW2). Hence, he submits that the testatrix Aswathamma, was being looked after by Vijaya Prasad and as such, she bequeathed her estate to him. The Will propounded by the appellants

[7] (1976) 4 SCC 554
[8] AIR(SC)-2005-4-4362
[9] AIR(SC)-2010-0-344

dated 15-03-2016 is shrouded with mysterious circumstances and Aswathamma died on 27-08-2016 and therefore, the conclusions of the trial Court in this regard cannot be accepted.

24. Regarding scope of the enquiry under Order 22 of CPC, he also relied on the following decisions:

1. Jaladi Suguna (Deceased) Through LRS. Vs. Satya Sai Central Trust and Others[10]
2. Dashrath Rao Kate Vs. Brij Mohan Srivastava[11]
3. Varadarajan Vs. Kanakavalli[12]
4. Parwatibai W/o Namdeo (Since deceased through LR. Anna S/o Sheku Chavan) Vs. Ramrao Barikrao Lahane[13]

25. Learned counsel Sri Rajaram, would submit that both the Wills are not believable and, in such event, the share of Aswathamma would revert to all the heirs of Nagappa under the provisions of Hindu Succession Act. In other words, there shall be partition in respect of the

[10] AIR 2008 SC 2866
[11] AIR 2010 SC 897
[12] AIR 2020 SC 740
[13] 2002(5) Mh.L.J 515

shares of Narayanaswamy, which was inherited by Aswathamma.

26. Having heard the above submissions, the points that arise for consideration are:

1. Who are the legal representatives of plaintiff No.4 Aswathamma, who can represent her estate?

2. Whether the defendants have proved the ouster of plaintiff Nos. 1 to 3 and have established the prior partition?

3. Whether a suit for partition without seeking voidance of registered partition deed would be maintainable?

Re.Point No.1:

27. Since plaintiff No.4- Aswathamma died during the pendency of this appeal, there being rival claims to represent her estate, based on two Wills dated 28-06-2014 and 15-03-2016, the same has to be decided by this Court by following the procedure laid down under Order 22 of CPC. In that background, the matter was

referred to trial Court to hold an enquiry and the report along with the evidence is before this Court.

28. It is pertinent to note that the scope of the enquiry under Order 22 Rule 5 CPC is limited. The Court has to decide as to who would be entitled to represent the estate and interest of Aswathamma. Order 22 Rule 5 CPC reads as below:

> ***"5. Determination of question as to legal representative.—****Where a question arises as to whether any person is or is not the legal representative of a deceased plaintiff or a deceased defendant, such question shall be* ***determined*** *by the Court:*
>
> *Provided that where such question arises before an Appellate Court, that Court may, before determining the question, direct any subordinate Court to* ***try*** *the question and to return the records together with evidence, if any, recorded at such* ***trial****, its* ***findings*** *and reasons therefor, and the Appellate Court may take the same* into consideration in determining the question."

(emphasis added)

29. The enquiry contemplated under order 22 Rule 5 CPC is not based on pleadings and issues in that regard. It is not in the nature of a suit. Though the principles of *Audi Alterem Partem* are applicable and the trappings of the suit are envisaged under Rule 5 of Order 22, it cannot partake the character of a trial where the suspicious circumstances involved in execution of the Will can be addressed to in a comprehensive manner. Absence of pleadings and issues on which the evidence is to be adduced would restrict the scope of the enquiry. It is to be noted that the purpose of the enquiry is circumscribed by Rule 5 of Order 22. Keeping in mind the above scope, this Court proceeds to examine the propositions of law in this regard.

30. In the case of **Rajamma Vs. Chandrasekhariah** i.e., short note No.39, (CRP 602/1974 DD 1-7-1974), it was held that *"any decision given under Order XXII Rule 5 of CPC does not operate as res-judicata or is not conclusive and such decision is only for limited*

purpose of continuing the suit". It was held that "*the High Court can interfere in revision against an order passed under Order XXII Rules 4 and 5 of CPC only where the Court does not hold an enquiry. When an enquiry is held and an order is made, such an order cannot be questioned under Section 115 of CPC".*

31. In the judgment in the case of **Mary Joyce Poonacha Vs. K.T Plantations Private Limited, Bangalore** referred supra a Co-ordinate Bench of this Court held in para 14 as below:

> "14. It is well-settled that the enquiry contemplated under order 22, Rule 5, is only summary in nature and an order under the Rule does not finally determine the rights of parties. An order under order 22, Rule 5, will only enable a person to represent the estate in the suit and to make the adjudication therein binding on the estate. The mere appointment of a person as a legal representative for the purpose of further prosecution of the suit will not conclusively establish his right to the property. It is also clear that an order appointing a person as the legal representative for the suit will not have the effect of deciding that he is the heir of the deceased party or that his title to the property is declared."

32. Further, the judgment in the case of **Jaladi Suguna (Deceased) Through LRS. Vs. Satya Sai Central Trust and others**, referred supra, which is relied by both the sides, the Apex Court in para 16 and 17 has observed as below:

> "16. The provisions of Rules 4 and 5 of Order 22 are mandatory. When a respondent in an appeal dies, the court cannot simply say that it will hear all rival claimants to the estate of the deceased respondent and proceed to dispose of the appeal. Nor can it implead all persons claiming to be legal representatives, as parties to the appeal without deciding who will represent the estate of the deceased, and proceed to hear the appeal on merits. The court cannot also postpone the decision as to who is the legal representative of the deceased respondent, for being decided along with the appeal on merits. The Code clearly provides that where a question arises as to whether any person is or is not the legal representative of a deceased respondent, such question shall be determined by the court. The Code also provides that where one of the respondents dies and the right to sue does not survive against the surviving respondents, the court shall, on an application made in that behalf, cause the legal representatives of the deceased respondent to be made parties, and then proceed with the case. *Though Rule 5 does not specifically provide that determination of*

legal representative should precede the hearing of the appeal on merits, Rule 4 read with Rule 11 makes it clear that the appeal can be heard only after the legal representatives are brought on record.

17. ……The appeal could be heard on merits only after the legal representatives of the deceased first respondent were brought on record. But in this case, on the dates when the appeal was heard and disposed of, the first respondent therein was dead, and though rival claimants to her estate had put forth their claim to represent her estate, the dispute as to who should be the legal representative was left undecided, and as a result the estate of the deceased had remained unrepresented. The third respondent was added as the legal representative of the deceased first respondent only after the final judgment was rendered allowing the appeal. That amounts to the appeal being heard against a dead person. That is clearly impermissible in law. We, therefore, hold that the entire judgment is a nullity and inoperative."

Though the order dated 9-3-2023 to hear all the applications filed under order 22 Rule 4 and 5 of CPC appears to be hit by the principles laid down in the above decision, it is not of any consequence as this Court is allowing the IA Nos. 2/2017 to 4/2017 and the

applicants are appellants 2, 3 and 4(b) who are already on record.

33. Then in the case of **Dasharath Rao Kate Vs. Brij Mohan Srivastava**, referred supra, the Apex Court has observed as below:

> "10. The Full Bench of the Punjab and Haryana High Court in a judgment reported as Mohinder Kaur Anr. v. Piara Singh & Ors., (AIR 1981 P&H 130) examined the question as to whether a decision under Order XXII Rule 5 of the Code would act as res judicata in a subsequent suit between the same parties or persons claiming through them. The Court held as under.
>
> > "5. So far as the first argument of Mr. Bindra, noticed above is concerned, we find that in addition to the judgments of the Lahore High Court and of this Court, referred to in the earlier part of this judgment, he is supported by a string of judgments of other High Courts as well wherein it has repeatedly been held on varied reasons, that, a decision under Order 22, Rule 5, Civil Procedure Code, would not operate as res judicata in a subsequent suit between the same parties or persons claiming through them wherein the question of succession or heirship to the deceased

party in the earlier proceedings is directly raised. Some of these reasons are as follows:--

(i) Such a decision is not on an issue arising in the suit itself, but is really a matter collateral to the suit and has to be decided before the suit itself can be proceeded with. The decision does not lead to the determination of any issue in the suit.

(ii) The legal representative is appointed for orderly conduct of the suit only. Such a decision could not take away, for all times to come, the rights of a rightful heir of the deceased in all matters.

(iii) The decision is the result of a summary enquiry against which no appeal has been provided for.

(iv) The concepts of legal representative and heirship of a deceased party are entirely different. In order to constitute one as a legal representative, it is unnecessary that he should have a beneficial interest in the estate. The executors and administrators are legal representatives though they may have no beneficial interest. Trespasser into the property of the deceased claiming title in himself independently of the deceased will not be a legal representative. On the other hand the heirs on

beneficial interest devolved under the law whether statute or other, governing the parties will be legal representatives.

xx xx xx

9. We are, therefore, of the opinion that in essence a decision under Order 22, Rule 5, Civil Procedure Code, is only directed to answer an orderly conduct of the proceedings with a view to avoid the delay in the final decision of the suit till the persons claiming to be the representatives of the deceased party get the question of succession settled through a different suit and such a decision does not put an end to the litigation in that regard. It also does not determine any of the issues in controversy in the suit. Besides this it is obvious that such a proceeding is of a very summary nature against the result of which no appeal is provided for. The grant of an opportunity to lead some sort of evidence in support of the claim of being a legal representative of the deceased party would not in any manner change the nature of the proceedings. In the instant case the brevity of the order (reproduced above) with which the report submitted by the trial Court after enquiry into the matter was accepted, is a clear pointer to the fact that the proceedings resorted to were treated to be of a very summary nature. It is thus manifest that the Civil Procedure Code proceeds upon the view of not imparting any

finality to the determination of the question of succession or heirship of the deceased party."

34. After observing as above and also by relying on the judgment in the case of **Suresh Kumar Bansal vs. Krishna Bansal** referred supra**,** it was observed that the finding under Order XXII Rule 5 of CPC does not operate as a *res-judicata* and the *inter se* dispute between the rival legal representatives has to be independently tried and decided in probate proceedings.

35. In the judgment in the case of **Daya Ram and Others Vs. Shyam Sundari and Others**, referred supra, it was again held that the finding on Order XXII Rule 22 of CPC would not amount to *res-judicata*.

36. In the case of **P.S.Sairam Vs. P.S.Ramrao Pisey** referred supra also a similar view was adopted by the Apex Court. It was held that *the devolution of the interest of the coparcenary property will be on the kartha of the family.* It was further observed that the judgment in the case of **Seth Beni Chand Vs. Kamla Kunwar** *supra*

deals with the manner in which a *Will* has to be proved. It was held that the burden in the testamentary cases is of a different order than in other cases in the *sans* that an attesting witness must be called wherever possible to prove the execution, the propounder must remove the suspicion, if any, attaching the execution of the *Will* and if there be any doubt regarding the due execution, he must satisfy the conscious of the Court that the testator had a sound and a disposing state of mind and memory when he made the *Will.*

37. Lastly, the learned counsel for the appellants relied on the judgment in the case of **Suresh Kumar Bansal** supra**,** which has been considered above.

38. *Per contra*, the learned counsel appearing for the respondents Sri Nitish, relied on the judgment in the case of **Parwatibai W/o Namdeo (since deceased through LR Anna s/o Sheku Chavan Vs. Ramrao Barikrao Lahane** (2002 (5) MHLJ 515) rendered by Bombay High Court, where again, it was held that *even in*

execution proceedings an application filed under Order XXII Rules 5 and 10 of the CPC, a full-fledged enquiry with regard to the genuineness of the Will and its due execution in the light of the mandate of Section 68 of the Evidence Act is not necessary and the Court has only to prima facie satisfied for exercising its discretion in granting leave for continuing the execution proceedings. In para 16 and 17, it was held as below:

> "16. In my view, the question which was raised before the Executing Court on account of presentation of application by legatee under the Will Exh.77, squarely falls within the mischief of Order 22, Rules 5 Civil Procedure Code. Where a question arises as to whether any person is or is not the legal representative of the deceased, such question is required to be determined by the Court. The enquiry contemplated under Order 22, Rule 5, Civil Procedure Code is also summary in nature. In a summary enquiry contemplated under Order 22, Rule 5, Civil Procedure Code, the Court should refrain from going into the question of genuineness of the Will in such type of enquiry. Because the question of validity of Will is not in issue in such type of summary enquiry. The issue is who is the legal representative of the deceased for the purpose of proceeding with the pending matter, In this behalf, I would like to refer a decision of Single

Judge of this Court in the case of Shivaji Ramaji Paul-Shete vs. Prayagbai Mahadu Shete (1994 Mh.L.295).

17. The scope of enquiry under Order 22, Rule 5, Civil Procedure Code was examined by the Single Judge of this Court in case of Shivraj Ramaji Paul Shete (supra). In the said case, more than two persons put forth their claims as the sole heir of deceased plaintiff and, therefore, scope of enquiry under Order 22, Rule 5. Civil Procedure Code was raised for determination. While dealing with this issue the Single Judge of this Court has held that when Wills making claims contrary to each other are produced before the Court to form the basis of right of claimant as a legal representative of the deceased plaintiff, the Court in a summary enquiry under Order 22, Rule 5, Civil Procedure Code should, as far as possible, refrain from going into the question of genuineness of the Will in such an enquiry. This Court further held that after summary enquiry, the party having the better right to be the legal representative of the deceased, should be substituted in the place of deceased plaintiff and the other claimants should be directed to be added as defendants and leave the final adjudication of rival claims for the trial. This Court has also incidently held that the order passed by the Court under Order 22, Rule 5 of Civil Procedure code Will not operate as a res-judicata in a subsequent proceedings."

(emphasis supplied)

39. The learned counsel Sri Nitesh, also relied on the judgment in the case of **Varadarajan Vs. Kanakavalli and others** supra, wherein, the provisions of Order XXII were discussed in detail. Apart from the above decisions which are relied by both the sides, the judgment in the case of **Mangaluram Devangan Vs. Surendra Singh and others**[14] supra also deals with the provisions of Order XXII Rule 5 of CPC. In Para 8, the following questions were raised by the Apex Court and the questions were answered in paragraph 31 which were reproduced as below:

> "8. The following questions arise for consideration on the contentions urged:
>
> (i) Whether an order of the trial court rejecting an application filed under Order 22 Rule 3 of the Code, by a person claiming to be the legatee under the will of the plaintiff and consequently dismissing the suit in the absence of any legal heir, is an appealable decree?
>
> (ii) Whether the High Court was justified in upholding the decision of the trial court that the will was not

[14] (2011) 12 SCC 773

proved and rejecting the application under Order 22 Rule 3 of the Code?"

"31. In view of the above, the finding of the High Court that the order dated 31-8-1996 passed by the trial court, was not appealable is upheld. The finding of the High Court that the will was not proved and therefore, the appellant was not a legal representative is set aside as the said finding was not warranted without consideration of the entire evidence. As a consequence, it will be open to the appellant to challenge the order dated 31-8-1996 in a revision petition before the High Court and if such a revision is filed, the period spent till now in bona fide litigation, shall have to be excluded for purposes of limitation."

40. Further, in a recent judgment in the case of **Swami Vedavyasa Nandaji Maharaj Vs. Shyamlal Chauhan**,[15] the Apex Court in para 17 has observed as below:

"17. Proviso to Rule 5 does not say that the Appellate Court can direct the subordinate court to decide the question as to who would be the legal representative, it only provides that the Appellate Court can direct the subordinate court to try the question and return the

[15] 2024 SCC ONLINE SC 683

records to the Appellate Court, along with the evidence and the subordinate court has then to send a report in the form of a reasoned opinion based on evidence recorded, upon which the final decision has to be made ultimately by the Appellate Court, after considering all relevant material. While dealing with the report sent by the subordinate court under Order 22 Rule 5 of CPC, the Appellate Court may consider the findings of the subordinate court and then give its reasons before reaching any conclusion. The words 'the Appellate Court may take the same into consideration in determining the question' used in the proviso to Rule 5 gives discretion to the Appellate Court to make its own separate opinion notwithstanding the opinion of the subordinate court. The proviso cannot be construed to be a delegation of the powers of the Appellate Court to substitute the deceased party, but is merely to assist it in ultimately deciding the issue of substitution. Thus, the Appellate Court 'may' take into consideration the material referred by the subordinate court under Rule 5 of Order 22, CPC along with the objections, if any, against the report while deciding on the substitution of the appellant."

41. Lastly, the Punjab and Haryana High Court in the case of **Lakwinder Singh (deceased) through his LRs., Vs. Gurucharan Singh and another**[16] has

[16] 2018 SCC ONLINE P & H 7548

squarely relied on the judgment of the Apex Court in the case of **Mohinder Kaur and another Vs. Para Singh and others**[17] referred Supra.

42. In the light of the above decisions, it is relevant to note that even though the provisions of Order XXII Rule 5 of CPC refer to the word 'try' and 'trial' twice, it has to be construed as an inquiry only. It should be clarified that the principle of *res-judicata* is not applicable to the parties to the proceeding, and non-parties as well. It is pertinent to note that the findings of the trial Court are not separately appealable in view of the fact that it is part and parcel of the present appeal. Under these circumstances, when the proviso uses the word 'try' and 'trial' twice, it cannot be said that the conclusions reached by the trial Court in its opinion and finally decided by this Court in this appeal in respect of the two *Wills* would bind the parties herein and it will not act as a *res-judicata* to the parties who are before this Court.

[17] AIR 1981 Punjab and Haryana 130

43. In the light of the above decisions, the principles that emerge may be summarized as below:

(1) The principle of *res judicata* is inapplicable to the parties to the proceedings i.e., the enquiry or trial under order 22 Rule 5 CPC.

(2) The findings of the First Appellate Court on such 'finding' is binding on the parties to the *lis* in that proceeding, only to represent the estate of the deceased;

(3) The coinage of the word summary enquiry have emanated from the fact that (a) there is no pleadings, issue concerning the questions involved in the enquiry; (b) that there should not be delay in adjudication of the main matter.

(4) The proviso to Rule 5 do not indicate a summary enquiry as is done under Order 37 of CPC but uses the word 'try' and 'trial' twice indicating that the evidence recorded has trappings of trial.

44. This would lead us to conclude that though the evidence recorded is having the trappings of the trial, it is

not *res-judicata* for the parties in as much as it is not preceded or supported by pleadings and issues.

45. In many cases where the enquiry is conducted under Order XXII Rule 5 of CPC, the parties venture into letting in all evidence as if it is in a suit where the Will is in challenge. But in fact such a venture is unnecessary. Therefore, whenever such voluminous evidence is recorded and let in during the enquiry, it may be of significance, if imported in the subsequent proceedings between same parties. However, the reasoning of the trial Court or the Appellate Court cannot be of any significance as it is only for the purpose of ascertaining the Legal Representative.

46. When we examine the evidence collected by the trial Court in the enquiry under Rule 5 of Order 22 in the case on hand, it is evident that voluminous evidence has been let-in in respect of both the Wills.

47. The son of plaintiff No.3, Vijaya Prasad filed IA Nos. 2,3 and 4 of 2017 seeking to come on record based

on the Will dated 28-06-2014. Appellant Nos. 2, 3 and 4(b), who represent the branch of Srinivasaiah and Kodandaramaiah filed IA No.1/2017 seeking to come on record based on the Will dated 15-03-2016.

48. The son of plaintiff No.3, Vijaya Prasad was examined as AW1 and a witness was examined as AW2. The Will propounded by him was marked as Ex.A1. Appellant Nos.2, 3 and 4(b) (who are the defendant No.1(a), defendant No.2 and daughter of defendant No.3) examined appellant No.2 Venkatakrishnaiah, as BW1, three witnesses were examined on their behalf as BWs. 2 to 4 and Exhibits B1 to B8 were marked on their behalf. Plaintiff No.2- Nagavenamma, now represented by her son respondent No.3(a), K. Venugopal, was examined as BW5 and Exhibits B9 to 16 were marked on his behalf. The Doctor of Deepashri Old Age Rehabilitation Center is examined as CW1 and Ex. C1 was marked.

49. The trial Court after hearing the submissions of both the parties, raised the following points for consideration and answered them as below:

1.	Whether the applicant by name V.V Vijayaprasad proves that he is the legal representative of deceased plaintiff No.4/ Aswathamma under the Will dated 28-06-2014 executed by her in his favor?	Negative
2.	Whether the defendant No.1(c), defendant No.2 and legal representative of defendant No.3(i.e., Nagashree) prove that they are the legal representatives of deceased plaintiff No.4/ Aswathamma under the Will dated 15-03-2016 executed by her in their favor?	Affirmative
3.	Who could be declared as to be the legal representative/s of deceased plaintiff No.4/Aswathamma?	In favour of defendant No. 1(c), defendant No.2 and legal representative of defendant No.3 (Nagashree)
4.	What order?	As per the final order

50. While coming to such conclusions, in para 45 it was observed as below:

> "45. In the background of these principles and dictum laid down in the above decisions it is to

be seen in the instant case whether Ex.B.2/will is duly executed. In the case on hand defendant No.1(c), defendant No.2 and legal representative of defendant No.3(Nagashree) examined attesting witness to Ex.B.2 as Bw.2 and also scribe as Bw.4 and also examined Sub-registrar as Bw.3. They deposed about the due execution of will by testator Aswathamma and about testator putting her Signature in their presence. Therefore, it is quite natural for the Smt. Aswathamma to execute will in favour of Defendant No.2 and others by canceling the earlier registered will/ExA.1 executed in favour of applicant Vijayaprasad, who has not at all taken care of Smt. Aswathamma. As Defendant No.2 admitted Said Aswathamma to the Depashree old age rehabilitation center and who is looking after all the affair of deceased Aswathamma so it is quite natural to execute Ex.B.2 in favour of defendant No.2 and others. Furthermore, it is significant to note the ExB2 was executed on 15.03.2016 and Smt.Ashwathamma is died on 27.08.2016 at Depashree old age and rehabilitation Center at Bangalore, that means to say after execution of ExB2 said Ashwathamma lived almost five months, during the said period apart from defendant no.2, neither the applicant nor plaintiff no.2 or others have taken care of the deceased Smt.Ashwathamma and said Ashwathamma also

not made any attempt to cancel the ExB2. If, really said Ashwathamma has not executed will in favour of defendant no.2 and others as per ExB2 as per her own will and wish and if she is having any love and affection towards defendant no.2 and if she is not happy with defendant no.2, certainly she would have canceled the said Will. But, she has not made any such efforts. Hence, this also makes it clear that deceased Ashwathamma executed ExB2 as per her own wish and will. Wherefore, there are no suspicious Circumstances surrounding Ex.B.2/will. All the mandatory requirements in proof of the Ex.B.2 were complied with by the defendant No.1(c), defendant No.2 and legal representative of defendant No.3(Nagashree). The applicant and plaintiff No.2 have failed to prove before this court that deceased Aswathamma was not in sound disposing state of mind when Ex.B.2 came into existence. The attestation of Will and even execution of the will is also proved by the defendant No.2 in accordance with law. As such, the applicant Vijayaprasad utterly failed to establish that he is the legal representatives of deceased Aswathamma under the registered Will dated 28-06-2014 and defendant No.1(c), defendant No.2 and legal representative of defendant No.3(Nagashree) established that they are the legal representatives of deceased Aswathamma under

the Will dated 15-03-2016 executed by her in their favor."

51. So far as the Will executed by Aswathamma in favour of Vijaya Prasad dated 28-06-2014 is concerned, his *Will* being the first *Will* and it having been superseded by the last *Will* dated 15-03-2016, was held to be ineffective.

52. This Court also has gone through the evidence recorded during the enquiry. It is pertinent to note that if the Will dated 15-03-2016 is proved, then the question of considering the Will dated 28-06-2014 would not arise inasmuch as the said Will was cancelled by the Cancellation Deed dated 09-03-2016 and the Will dated 15-03-2016 being the last Will of the Testatrix. Therefore, the evidence in respect of the second Will gains importance.

53. It is in the light of the above propositions of law that the evidence recorded by the trial Court during enquiry and its opinion is to be considered.

54. The records show that Aswathamma had executed the cancellation deed dated 9-3-2016 as per Ex.B1 and then on 15-3-2016, she executed the last Will and Testament as per Ex.B2. It is categorically mentioned in Ex.B2 that it is the said Sharathraj, Venkatakrishnaiah and Nagashree, who are looking after her in a proper way and therefore, she is bequeathing the properties in their favour. Ex.B2 is signed by Aswathamma and is also signed by the witnesses D.V.Prabhakar Murthy**,** G.T. Venugopal S/o G.Thippanna and Bharath Kumar and is registered.

55. On a bare perusal of Ex.B2, there is no reason to hold that Aswathamma was not capable of signing the same. She has signed the *Will* clearly. Similarly, the signatures are tallying with the Cancellation Deed which is at Ex.B1. A comparison of the signature has been made by the trial Court and found that they slightly differ with the Ex.A1. In fact, comparing the signatures of Aswathamma

to Ex.B1, B2 and Ex.A1 was unwarranted in view of the deposition of the attesting witnesses.

56. The perusal of testimony of CW.1- Dr K.C Shridhar who is a Medical Officer of the said Deepashri Nursing and Re-habiltation Center with Old age Home managed by CAD MS (Care At Door Medical Service) Trust at Ex.C1 would disclose that Aswathamma was admitted to Deepashri Hospital on 15.03.2016. The case sheet discloses that the said Aswathamma is hypertensive suffering from ischemic heart disease, epilepsy and she is conscious, oriented but drowsy and is admitted in the center for a rehabilitation care. It was found that there was a poor prognosis and possible risk of cardiac and respiratory failure. It is pertinent to note that after her admission to the hospital on 15.03.2016, she survived till 26.08.2016. In other words, she survived for about 05 months after her admission to the said hospital and rehabilitation center.

57. The testimony of CW.1-Dr.Shridhar K.C., would show that the deceased Aswathamma was aged 77 years when she was admitted to the rehabilitation centre and two days prior to death, she was unconscious. In para No.6 of the cross-examination he admits that on 15.06.2016 she was unconscious and she was so unconscious for about 06 days and thereafter, she regained the consciousness. He later states that on 15.03.2016 when Aswathamma was admitted, she was drowsy but not unconscious. He denies that it was not drowsiness but it was unconsciousness. It is pertinent to note that the alleged admission of CW.1 in para No.6 that she was unconscious for about 06 days from the date of her admission do not get any support from the case sheet which is at Ex.C1. Evidently, Ex.C1 bears not only the notes of the Medical Officer but also the notes by the other officials of the hospital. However, the notes at Ex.C1 which were recorded at about 06.00 pm would show that there was poor prognosis, but she had complained only about the general illness. Thereafter, she was shifted to other

hospital for higher care. Under these circumstances, the testimony of the CW.1 coupled with the case sheet at Ex.C1 would show that she was capable of understanding what she is doing.

58. The testimony of BW.3-H.B.Prabhakar Naik who was the Sub-Registrar discloses that Aswathamma had signed the registered *Will* at Ex.B2 in his presence. He denies in the cross-examination that the contents of the *Will* was not read over to the testatrix.

59. The attesting witness to the said *Will* is examined as BW.2. He states that on 15.03.2016, the testatrix Aswathamma was conscious, and she had executed the said *Will.* He states that Aswathamma had brought certain orders and records of the High Court where the litigation was pending. He states that one Lakshmipathy was also present.

60. On a careful perusal of the above evidence on record, it is clear that Aswathamma became unconscious only after about 09.30 pm on 15.03.2016. It is important

to note that prior to executing the Will on 15.3.2016 she had executed the cancellation of the earlier Will on 9.3.2016. There is no such allegation that on 9.3.2016 she was suffering any ill-health. The very fact that she survived for about 5 months after the *Will*, is indicative of the fact that she was conscious. Under these circumstances, the trial Court having come to the opinion that she had executed the *Will* on 15.3.2016 has to be upheld. It is pertinent note that though Vijaya Prasad states that she was unconscious, such a contention is not supported by any medical records. Under these circumstances, the conclusions reached by the trial Court while furnishing its opinion as to who is to be treated as the legal representative of the estate of deceased Ashwathamma has to be accepted. The decision relied by the learned Counsel for the appellant in **Pentakota Satyanarayana Vs Pentakota Seetharatnam** *supra*, is not applicable since it pertains to a suit where the proof of *Will* was involved, but not an enquiry under Order XXII. As noted supra, the finding does not amount to *res-judicata* and it is

squarely covered by judgment of the Apex Court in the case of **Swami Vedavyasa Nandaji Maharaj** *supra*. Thus, the appellant Nos. 2,3, and 4(b), who are applicants in IA Nos. 2,3,4 of 2017 are the legal representatives of deceased Aswathamma. Consequently, I.A.Nos.2, 3, 4 of 2017 deserve to be allowed. I.A.No.1/2017 filed by Vijaya Prasad deserves to be dismissed. Point No.1 is answered accordingly.

Reg. Point Nos.2 & 3:

61. Learned counsel appearing for the appellants has contended that the plaintiffs were ousted from the suit schedule property. A perusal of the evidence on record would disclose that the DW.1 in his testimony has stated that there was a partition in the year 1970 and it was an oral partition. Thereafter, there was a demand made by the plaintiffs in the year 1972. He states that the plaintiffs were driven out holding their neck and therefore, it is contended that there is an ouster. It is pertinent to note that by driving the plaintiffs out of the house when they

demanded share cannot be equated to an ouster from the suit schedule property, for which, they were in joint possession. The defendants have denied the rights of the plaintiffs stating that they are not entitled for the share in the suit schedule properties and it cannot be an ouster. A denial of rights and title in the joint family property at no stretch of imagination can be held to be an ouster from the property.

62. It is pertinent to note that all along it is the case of the plaintiffs that they were demanding share and such share was being denied. The defendants contend that the father of the plaintiffs had refused to accept the share. It is not the case of the defendants that the father of the plaintiff Nos.1 to 3 has relinquished his share in the suit schedule property. If at all there was a relinquishment of his share, he should have executed a registered Relinquishment Deed. Furthermore, the father of plaintiff Nos.1 to 3 is not a party to the Partition Deed also. Even though there was an agreement regarding the partition in

the year 1976, it was not subscribed by the father of plaintiff Nos.1 to 3. Therefore, except the oral testimony of the defendants that the father of plaintiff Nos.1 to 3 had refused his share, it cannot be said that he had relinquished his share. There is no other evidence to show that the father of plaintiff Nos.1 to 3 had refused his share in the property. Anyhow, the plaintiffs have denied the same. Therefore, it was incumbent upon the defendants to establish that the father of plaintiff Nos.1 to 3 had relinquished his share in the suit schedule property and such relinquishment can happen only by way of a registered document. Therefore, at no stretch of imagination it can be said that the plaintiffs were ousted from the suit schedule property.

63. The second point that is urged by the learned counsel for the plaintiffs is that the registered Partition Deed dated 23.06.1983 was not challenged by the plaintiffs. Plaintiff Nos.1 to 3 are not parties to the Ex.D1. It is relevant to note that when the plaintiff Nos.1 to 3 or

their father were not parties to the Exs.D1 and D2 or any other document, it cannot be said that they should seek a declaration that such document has to be declared null and void. It would suffice to put forth their claim by ignoring the document which was entered into between the defendants alone. Therefore, this argument of the learned counsel appearing for the plaintiffs cannot be accepted.

64. It is pertinent to note that plaintiff No.4-Aswathamma was a party to the Partition Deed at Ex.D2. It is worth to note that Aswathamma was the defendant earlier and later she was transposed. She has contended in her written statement that she being an illiterate lady, she did not know the effect of the deed of partition. Moreover, she states that her husband Narayanaswamy entered into the Partition Deed at Ex.D2 in the year 1983 without knowing the contents. It is pertinent to note that though the Partition Deed was executed in the year 1983, the mutation entries have not been changed. This aspect

has been specifically observed by the trial Court in its judgment. It is also pertinent to note that a shop which was owned by father of plaintiff Nos.1 to 3 was closed after his death in the year 1982 and thereafter, the shop was vacated by the defendants after receiving a sum of Rs.3,00,000/-. It is the case of defendant No.4-Aswathamma that the said amount was not distributed to her husband. Therefore, it is contended that the Partition Deed was not acted upon.

65. Be that as it may, it is pertinent to note that the plaintiff Nos.1 to 3 were not parties to the Partition Deed of 1983 or the agreement in the year 1976. When the plaintiff No.4, who was a defendant earlier is transposed, she subscribes to the claim of the plaintiffs. She has not filed separate pleadings in this regard. It may be true that the Partition Deed binds her since her husband had signed it. But when the said partition itself is *non-est* for not giving a share to the father of plaintiff Nos.1 to 3, it would not be in the mouth of defendants to contend that the

transposition of the plaintiff No.4 would come to their aid in contending that there should be a declaration in respect of cancellation of the Partition Deed.

66. So far as Sy.No.135 which was allegedly purchased by father of plaintiff Nos.1 to 3 in the name of the plaintiff No.2 is concerned, it is relevant to note that there is no such contention in the written statement of the defendants that such property was purchased out of the joint family funds and Venkatarayappa had no independent income. It is relevant to note that as per the contention of the plaintiff No.4-Ashwathamma, Venkatarayappa had a shop. The said shop was closed after his death. That itself would indicate that Venkatarayappa had certain income. It is not the case of the defendants that the shop which was run by Venkatarayappa was the joint family business. Therefore, in the absence of any clear pleadings on behalf of the defendants in this regard, it is not possible to hold that

Sy.No.135 was purchased by Venkatarayappa out of the joint family nucleus.

67. In the light of the above discussions, there is no necessity of interference in the judgment of the trial Court. The plaintiffs are entitled for the share as determined by the trial Court. Hence, the Point Nos.2 and 3 are answered in the negative. Under these circumstances, the main appeal deserves to be dismissed. The share of the plaintiff No.4 Aswathamma will now be represented by appellant No. 2,3 and 4(b) herein.

68. Hence, the following:

ORDER

I.A.No.1/2017 is dismissed. I.A.Nos.2, 3 and 4 of 2017 filed under Order XXII Rule 4, XXII Rule 9 of CPC and Section 5 of Limitation Act seeking condonation of delay are allowed and the appellant Nos.2, 3 and 4(b) are treated as Legal Representatives of Plaintiff No.4-Aswathamma and accordingly shown in the cause title.

The appeal being devoid of merits, is ordered to be dismissed. Judgment of the trial Court in O.S.No.21/1993 is hereby confirmed.

Costs made easy.

In view of the dismissal of the appeal, IA No.1/2023 does not survive for consideration. Hence, it is dismissed.

Sd/-
(C M JOSHI)
JUDGE

tsn*/NR
List No.: 19 Sl No.: 1