



IN THE HIGH COURT OF KARNATAKA AT  
KALABURAGI BENCH

DATED THIS THE 25<sup>TH</sup> DAY OF JANUARY, 2024

BEFORE

THE HON'BLE MR.JUSTICE M.G.S.KAMAL

**R.S.A.NO.7034 OF 2011**

**BETWEEN:**

SHARNAMMA CLAIMS TO BE WIFE OF ANNAYYA  
AGED ABOUT 41 YEARS  
OCC: HOUSE HOLD  
R/O SURWAR, TQ: SEDAM  
DIST:GULBARGA

...APPELLANT

(BY SRI. CHAITANYA KUMAR C.M., ADVOCATE)

**AND:**

1. RENUKA ALIAS KAVITA  
W/O SHANKARAYYA  
JETTUR MATHA (D/O ANNAYYA)  
AGED ABOUT 28 YEARS  
OCC: AGRICULTURE & ANGANWADI TEACHER  
R/O : KACHUR, TQ: SEDAM  
DIST : GULBARGA.
2. ANNAYYA S/O LATE SHARNAYYA JANEEM  
DEAD BY LR  
RENUKA @ KAVITA  
W/O SHANKARAYYA JETTUR MATH (D/O ANNAYYA)  
AGED ABOUT 28 YEARS  
OCC: AGRICULTURE & ANGANWADI TEACHER

R/O : KACHUR, TQ: SEDAM  
DIST : GULBARGA.

3. CHANBASAMMA W/O LATE SHARNAYYA JAHEEM  
DEAD BY LR  
a) SIDDAMMA W/O GURULINGAPPA  
AGED ABOUT 46 YEARS  
OCC: HOUSE HOLD  
R/O : KODLA VILLAGE NOW RESIDING AT SURWAR  
TQ: SEDAM, DIST : GULBARGA.
4. NAGAMMA W/O LATE CHANNAYYA JANE  
AGED ABOUT 41 YEARS  
OCC: HOUSE HOLD,  
R/O SURWAR, TQ: SEDAM, DIST : GULBARGA.
5. SHARNAYYA S/O LATE CHANNAYYA JANEEM  
AGED ABOUT 26 YEARS  
OCC: AGRICULTURE  
R/O SURWAR, TQ: SEDAM, DIST : GULBARGA.
6. ANAND S/O LATE CHANNAYYAHA JANEEM  
AGED ABOUT 17 YEARS  
MINOR THROUGH HIS GUARDIAN/  
NATURAL MOTHER NAGAMMA  
W/O LATE CHANNAYYA JANEEM  
AGED ABOUT 41 YEARS,  
OCC: HOUSE HOLD & AGRICULTURE  
R/O SURWAR TQ: SEDAM, DIST : GULBARGA.
7. SMT.NARAYANAMMA  
W/O BABAYYA ILLIGER  
AGED ABOUT 36 YEARS  
OCC: AGRICULTURE  
R/O : SURWAR TQ: SEDAM, DIST : GULBARGA.

...RESPONDENTS

(BY SMT. HEMA L.K., ADVOCATE FOR R1;

R4, R5 & R7 ARE SERVED, R6 IS MINOR REPRESENTATIVE BY LRS)

THIS REGULAR SECOND APPEAL IS FILED UNDER SECTION 100 OF CPC AGAINST THE JUDGMENT AND DECREE DTD- 21.10.2010 PASSED IN R.A. NO. 137/2009 ON THE FILE OF THE IV ADDL. DISTRICT JUDGE AT GULBARGA, ALLOWING THE APPEAL AND SETTING ASIDE THE JUDGMENT AND DECREE PASSED IN O.S. NO. 90/2005 BY THE LEARNED CIVIL JUDGE (SR.DN.) AT SEDAM, DATED:23.07.2009 AND DISMISSED THE SUIT WITH COSTS THROUGHT OUT.

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

### **JUDGMENT**

This appeal is by the defendant No.6 being aggrieved by the Judgment and decree dated 21.10.2010 passed in R.A.No.137/2009 on the file of IV Additional District Judge, Gulbarga (First Appellate Court) by which while allowing the said appeal the First Appellate Court set aside the Judgment and decree dated 23.07.2009 passed in O.S.No.90/2005 by Civil Judge (Sr.Dn), Sedam (Trial Court) and partly decreed the suit of the plaintiff holding that the plaintiff is

entitled for half share in all the suit properties except item No.1.

2. The above suit was filed by the plaintiff/respondent No.1 herein for relief of partition and separate possession in respect of 8 items of suit schedule properties contending *interalia* that she is the daughter of defendant No.1 namely Sri. Annayya and that her marriage was performed in the year 1994. That originally one Sri.Sharanayya the paternal grandfather of the plaintiff was the owner in possession of the suit properties. That defendant No.2 namely Smt.Chanbasamma is the wife of said Sri. Sharanayya and defendant No.1 is the son of said Sri. Sharanayya. That the said Sri. Sharanayya had another son by name Sri.Channayya who passed away leaving behind defendant Nos.3 to 5 being his wife and children as his legal heirs. Thus, the father of the plaintiff namely

Annayya, the defendant No.1 and his brother Channayya being the sons and defendant No.2 being the wife were the legal heirs of said Sharanayya who inherited the suit schedule properties. As such the suit schedule properties are joint family properties. That Defendant Nos.1 and 2 are living jointly while defendant Nos.3 to 5 were living separately. That Defendant No.6 is no way concerned with the family of defendant No.1 though she falsely claimed herself to be the wife of defendant No.1. It is further contended that the plaintiff and her mother by name Siddamma were neglected by defendant No.1 and they were driven out of their home by defendant No.1 during the year 1985-86. Plaintiff and her mother Siddamma had initiated proceedings under Section 125 of Cr.P.C against defendant No.1 which was allowed granting maintenance. That the Defendant No.1 and said Siddamma had filed the compromise petition and

accordingly the said matter was disposed of. That though the plaintiff was married in the year 1994 she continued to be the co-parcener and joint possessor of the suit schedule properties along with defendant Nos.1 to 5. That the plaintiff is having her specific share in each item of the suit schedule properties. That the defendant No.1 was trying to alienate suit schedule properties to deny the share of the plaintiff. That defendant No.6 being a stranger to the family of the plaintiff and defendant Nos.1 to 5, in collusion with Panchayat Officials got her name entered in respect of house property bearing No.1-5/2. That since the request of the plaintiff for partition and separate possession was not conceded by the defendant Nos.1 to 5, the plaintiff was constrained to file suit for partition and separate possession.

3. Despite service of summons defendants 3 to 5 did not appear and were placed *exparte*. Defendants 1, 2 and 6 appeared and contested the suit. Defendant No.1 filed written statement which was adopted by defendants 2 and 6.

4. Defendant No.1 in his written statement denied the plaint averments and also denied the claim of the plaintiff of her share in respect of the schedule properties. It is contended that defendant Nos.1, 2 and 3 to 5 had already partitioned the schedule properties by metes and bounds and have been residing separately. The allegation of defendant No.6 being a stranger to the family of the plaintiff and defendants 1 to 5 is denied. It is contended that plaintiff has no vested share, right, title and interest over the schedule properties. Hence, sought for dismissal of the suit.

5. The trial court framed following issues:

*"1. Whether plaintiff proves that, family pedigree shown in para -3 of the plaint is complete and correct?*

*2. Whether defendant No.1 proves that the family pedigree shown in para-3 of the W.S. is complete and correct?*

*3. Whether plaintiff proves that defendant No.6 is not legally wedded wife of defendant No. 1 and she has no any right or interest in the suit properties?*

*4. Whether plaintiff proves that all the suit properties are ancestral Hindu joint family properties between plaintiff and defendants-1 to 5?*

*5. Whether plaintiff proves that she has got her legitimate share in the suit properties? If so what is the exact extent of share of this plaintiff?*

*6. Whether plaintiff proves that defendant No.1 and 6 are trying to transfer the lands illegally without giving legitimate share to the plaintiff and thereby they are denying the share in the suit properties?*

*7. Whether plaintiff is entitled for decree of partition and separate possession?*

*8. To what order or decree?"*

*Addl. Issue No.1: Whether defendants prove that suit of the plaintiff is bad for non-joinder of necessary parties?*

6. Plaintiff examined herself as PW-1 and one Gundappa as PW-2 and exhibited 19 documents marked as Ex.P-1 to P-9 and defendant No.1 Annayya



examined himself as DW-1 and exhibited four documents marked as Ex.D-1 to D-4. Trial court answered issue Nos.1, 4, 5, 6, 7 and additional issue No.1 in the negative and issue Nos.2 and 3 in the affirmative and consequently dismissed the suit by its Judgment and decree dated 23.07.2009.

7. Aggrieved by the aforesaid Judgment and decree plaintiff preferred regular appeal before the First Appellate Court in R.A.No.137/2009. The first appellate court on considering the grounds urged in the memorandum of appeal framed the following points for its consideration:

*"1. It is undisputedly plaintiff/appellant at the appellate stage is only surviving legal heir to deceased Respondent No.1 and also as per amendment has come on record. This being so, whatever the observations made by the lower court keeping in view of FDP No.2/2001 during life time of respondent No.1 are not sustainable on account of his death in view of legal position that the plaintiff/appellant as per the amended Hindu Succession Act, 2005 became sole*

*surviving coparcener and entitled to succeed to the properties of deceased Respondent No.1?*

*2. Whether defendant No.7 is bonafide purchase to the extent of share of respondent No.1 and her rights and interest to the extent of share of respondent No.1 at the time of partition by metes and bounds so far to be adjusted under equity?*

*3. As to what order?"*

8. On re-appreciation of the evidence, the first appellate court by the impugned Judgment and order allowed the appeal, set aside the Judgment and decree passed by the trial court decreeing the suit in part holding that the plaintiff is entitled for 1/2 share in all the suit schedule properties except item No.1 of the suit schedule properties and further held that the plaintiff is bound over by the sale transaction between respondent No.1 and respondent No.7. But however the rights and interest of the plaintiff is directed to be adjusted by equity at the time of partitioning the properties by metes and bounds.

9. The first appellate court at paragraph 7 of the impugned Judgment and order has observed that trial court did not believe the claim of defendant No.1 that defendant No.6 was his legally wedded wife and there was no cross objection from the defendants with regard to said finding of the trial court. While answering point No.1 at paragraph 12 the First Appellate Court has observed that the plaintiff is the sole surviving co-parcener to succeed to the estate of deceased Annayya and that defendant No.6 has not proved to be his legally wedded wife and therefore she cannot enter her name in respect of the house property. Having thus observed the first appellate court proceeded to pass the impugned Judgment and order as above.

10. Being aggrieved by the above Judgment and order of the first appellate court defendant No.6 is before this Court.

11. This Court by order dated 03.02.2020 admitted the appeal for consideration of the following substantial question of law:

*"Where a suit of the plaintiff for partition is dismissed on merit and the plaintiff has preferred an appeal, whether a finding on an issue against the defendant is required to be considered by the appellate court, though the said defendant has not preferred any appeal against the said finding on the issue?"*

12. Sri.Chaitanya Kumar C.M., learned counsel appearing for appellant submitted that the first appellate court being the last court of fact ought to have formulated the point for consideration and adjudicated afresh upon all the issues that were raised by the trial court. He submitted that the trial court has specifically framed issue No.3 casting burden on the plaintiff to prove that the defendant No.6 is not the legally wedded wife of defendant No.1 and she had no right over the suit properties. He submitted that the

first appellate court grossly erred in neither framing the point for consideration with respect to said issue nor determining the said issue afresh. He further submitted the first appellate court grossly erred in narrowing the scope of appeal merely because there was no cross objection filed by the defendant No.6 with regard to the findings of the trial court on issue No.3. Thus, he submitted that the first appellate court under the law required to have adjudicated afresh all the issues framed by the trial court. That not having been done, the impugned Judgment and order has caused prejudice and injustice to the appellant/defendant No.6. In support of his submissions learned counsel for appellant relied upon the Judgment of the Apex Court in the case of (i) ***K.Karuppuraj Vs M.Ganesan in Civil Appeal Nos.6014-6015/2021*** decided on 04.10.2021. He also relied upon the Judgment of this court in the case of (ii) ***Shri Annasaheb Balesha Waghe and others Vs Shri***

***Appasaheb Dada Pomma and others in RSA No.2948/2006 decided on 13.03.2007.***

13. Smt.Hema L. Kulkarni, learned counsel appearing for the respondents justifying the Judgment and order passed by the first appellate court submitted that there is no provision in Civil Procedure Code to file appeal against the findings. The appellant not having filed any appeal or cross objection against the findings given on issue No.3 by the trial court cannot maintain the present appeal. She further submitted that since there was no decree passed against the appellant, appellant cannot be considered as an aggrieved person. She relies upon the Judgment of the Apex Court in the case of ***Gangabai and others Vs Vijay Kumar and others*** reported in ***AIR 1974 SC 1126***. Thus, seeks for dismissal of the appeal.

14. Heard. Perused the records.

15. It is necessary at this juncture to refer Order 41 Rule 31 of CPC which reads as under:

**31. Contents, date and signature of judgment.-**

*The judgment of the Appellate Court shall be in writing and shall state-*

*(a) the points for determination;*

*(b) the decision thereon;*

*(c) the reasons for the decision; and*

*(d) where the decree appealed from is reversed or varied, the relief to which the appellant is entitled,*

*and shall at the time that it is pronounced be signed and dated by the Judge or by the Judges concurring therein.*

16. Thus the aforesaid provision of Civil Procedure Code mandates the first appellate court to frame the points for determination and dispose of the appeal afresh. The Apex Court in the case of ***B.V.Nagesh and another Vs H.V.Sreenivasa Murthy*** reported in ***(2010) 13 SCC 530*** at paragraphs 3 and 4 has held as under:

*"3. How regular first appeal is to be disposed of by the appellate Court/High Court has been considered by this Court in various decisions. Order XLI C.P.C. deals with appeals from original decrees.*

*Among the various rules, Rule 31 mandates that the judgment of the appellate Court shall state:*

- a) the points for determination;*
- b) the decision thereon;*
- c) reasons for the decision; and -*
- d) where the decree appealed from is reversed or varied, the relief to which the appellant is entitled.*

*4. The appellate Court has jurisdiction to reverse or affirm the findings of the trial Court. The first appeal is a valuable right of the parties and unless restricted by law, the whole case therein is open for re-hearing both on questions of fact and law. The judgment of the appellate Court must, therefore, reflect its conscious application of mind and record findings supported by reasons, on all the issues arising along with the contentions put-forth and pressed by the parties for decision of the appellate Court. Sitting as a court of first appeal, it was the duty of the High Court to deal with all the issues and the evidence led by the parties before recording its findings. The first appeal is a valuable right and the parties have a right to be heard both on questions of law and on facts and the judgment in the first appeal must address itself to all the issues of law and fact and decide it by giving reasons in support of the findings. [Vide Santosh Hazari vs. Purushottam Tiwari, (2001) 3 SCC 188, para 15 and Madhukar and Others vs. Sangram SCC P.758, para 5."]*

17. Aforesaid principle of law has been reiterated by the Apex court in the case of **State Bank of India and Another Vs Emmsons International Limited and Another** reported in **(2011)12 SCC 174,**



***H.Siddiqui (dead) by LRs Vs A.Ramalingam***

reported in **(2011) 4 SCC 240** and has held that sitting as a court of first appeal it is the duty of the appellate court to deal with all the issues and evidence led by the parties before recording its findings.

18. It is relevant also at this juncture to refer to Order 41 Rule 22 of CPC which reads as under:

***Order 41 Rule 22. Upon hearing respondent may object to decree as if he had preferred a separate appeal.-***

*(1) Any respondent, though he may not have appealed from any part of the decree, may not only support the decree<sup>2</sup>[but may also state that the finding against him in the Court below in respect of any issue ought to have been in his favour; and may also take any cross-objection] to the decree which he could have taken by way of appeal provided he has filed such objection in the Appellate Court within one month from the date of service on him or his pleader of notice of the day fixed for hearing the appeal, or within such further time as the Appellate Court may see fit to allow.*

19. Perusal of the first part of the aforesaid provision would make it clear that a respondent who has not preferred an appeal against any part of the decree, apart from supporting the decree may also

state that the finding against him in the court below in respect of any issue ought to have been in his favour. The second part of the provision clarifies that if the respondent intends to challenge the decree he may file a cross objection if he has not filed a separate appeal but within the time specified under the provision.

20. What emanates from the above is though an appeal against the finding is not provided in Code of Civil Procedure a respondent to an appeal has been given an option to apart from supporting the decree and filing a cross objection to the decree to state that finding on any issue against him ought to have been in his favour.

21. It may also be relevant at this juncture to refer to the Judgment of the Apex Court in the case of ***Gangabai Vs Vijay Kumar and others*** reported in ***AIR 1974 SC 1126*** wherein at paragraphs 24 and 25

the Apex Court referring to a Judgment of the Calcutta High Court on the issue of filing an appeal against finding in a Judgment has held as under:

*"24. In Harchandra Das v. Bholanath, (1935) ILR 62 Cal 701 on which the learned counsel for the respondents relies in support of this submission, a suit for preemption was dismissed by the trial court on the ground of limitation. In an appeal filed by the plaintiff, the District Court reversed that finding but confirmed the decree dismissing the suit on the ground that the sale effected by defendants 4 and 5 in favour of defendants 1, 2 and 3 was not validly registered and there being no "sale", there can be no right of preemption. Defendants 1 to 3 preferred an appeal to the High Court against the finding recorded by the District Court that the sale effected in their favour by defendants 4 and 5 was not valid as it was not lawfully registered. On a preliminary objection raised by the plaintiffs to the maintainability of the appeal, the High Court of Calcutta, held that though under the Code of Civil Procedure there can be no appeal as against a mere finding, "it may be taken to be the view of courts in India generally, that a party to the suit adversely affected by a finding contained in a judgment, on which a decree, is based, may appeal; and the test applied in some of the cases for the purpose of determining whether a party has been aggrieved or not was whether the finding would be res judicata in other proceedings". The High Court, however, upheld the preliminary objection on the ground that the issue regarding validity of the sale which was decided against defendants 1 to 3 would not operate as res judicata in any subsequent*

*proceeding and therefore the appeal which was solely directed against the finding on that issue was not maintainable.*

*25. The position here is similar to that in the Calcutta case. The trial court decreed the mortgagee's suit only as against defendant 1, the father, and directed the sale of his one half interest in the mortgaged property on the ground that part of the consideration for the mortgage was not supported by legal necessity, the remaining part of the consideration was tainted with immorality and therefore the mortgage was not binding on the interest of the sons, defendants 2 and 3. Whether the partition between the father and sons was sham or real had no impact on the judgment of the trial court and made no material difference to the decree passed by it. The finding recorded by the trial court that the partition was a colourable transaction was unnecessary for the decision of the suit because even if the court were to find that the partition was genuine, the mortgage would only have bound the interest of the father as the debt was not of a character which, under the Hindu law, would bind the interest of the sons. There is no substance in the submission made on behalf of the sons that if the partition was held to be genuine, the property would have been wholly freed from the mortgage encumbrance. The validity or the binding nature of an alienation cannot depend on a partition effected after the alienation; or else, a sale or a mortgage effected by the Karta of a joint-Hindu family can easily be avoided by effecting a partition amongst the members of the joint family. As the matter relating to the partition was not directly and substantially in issue in the suit, the finding that the partition was sham cannot operate as res judicata. Therefore, the appeal filed by defendants 2 and 3 against that finding was not*

*maintainable, even on the assumption that the High Court of Calcutta is right in its view that though under the Code there could be no appeal against a finding, yet "On grounds of justice" an appeal may lie against a finding provided that it would operate as res judicata so as to preclude a party aggrieved by the finding from agitating the question covered by the finding in any other proceeding. It is not necessary here to determine whether the view of the Calcutta High Court is correct".*

22. Thus, even though there is a possible view that an appeal against a finding may lie if it operates as resjudicata so as to preclude a party aggrieved by that finding from agitating the question covered by the said finding in any other proceeding, the aforesaid provisions of Order XLI Rule 22 also provides an opportunity to the respondent in an appeal to state that the finding against him on a particular issue ought to have been in his favour without filing the appeal or cross objection.

23. In the instant case, issue No.3 having specifically framed by the trial court with regard to

validity or otherwise of the status of defendant No.6 with that of defendant No.1 and the same having been answered in the negative, in the appeal filed against the decree by the plaintiff, defendant No.6 is entitled to state that such a finding ought to have been in her favour without filing an appeal or the cross objection.

24. As noted above, the first appellate court being the final fact finding court is mandated to frame points for consideration and adjudicate afresh on all the issues of controversies taking into consideration pleadings, oral and documentary evidence adduced by the parties. In the instant case the first appellate court had declined to address the issue merely on the premise of there being no cross objection filed by the appellant. This is the error committed by the first appellate court declining to address and adjudicate upon the said issue.

25. The First Appellate Court thus ought to have heard and adjudicated afresh upon all the issues of controversy and could not have abdicated its legal obligation and declined to hear the appellant merely because there was no cross objection.

In that view of the matter appeal is allowed. The Judgment and order dated 21.10.2010 passed by the First Appellate Court in R.A.No.137/2009 is set aside. Matter is remitted to the First Appellate Court to address all the issues of law and facts and decide it by giving reasons thereof.

Since the matter is pending for a long period the first Appellate Court shall dispose of the appeal, after giving opportunity to the parties, within an outer limit of one year from the date of receipt of certified copy of this order.

**Sd/-  
JUDGE**

SBN