

IN THE HIGH COURT OF KARNATAKA AT BENGALURU

THE HON'BLE MR. JUSTICE N.K. SUDHINDRARAO

R.F.A.No. 1582/2010 C/ W R.F.A No.450/2009 DATED:10-10-2019

SMT. B K PADMAVATHI AND OTHERS VS. SRI B K GANESH AND OTHERS

JUDGMENT

These two appeals by the plaintiffs as well as by the defendants 2 and 3 are directed against the judgment and decree dated 06/01/2009 passed in O.S.NO.7651/1999 by the learned First Additional City Civil and Sessions Judge, Bangalore City.

2. In order to avoid confusion and overlapping, the parties herein are referred to with their rankings as stood before the trial Court.

3. Suit in O.S.No.7651/1999 was filed by ( 1) Smt.B.K.Padmavathi; ( 2) Smt. B.K.Nagalaxmi; ( 3) Smt. B.K.Gayathri; ( 4) Smt. B.K.Subbalaxmi and ( 5) Mr. Tejaswi Raghu, for partition and separate possession of the suit schedule ' A ' and ' B ' properties.

Item No. 1 of ' A ' Schedule property is a residential house bearing No.305, 10th Main Road, 3rd Block, Jayanagar, Bangalore-11, built on 60 x 40 ' site bounded on the North by property of Sri. Ramaswamy; South by Property of Sri. Shivarama Iyer; East by Private property and on the West by 10th Main Road, Jayanagar, Bangalore ( A main house 10 to 11 squares built in area and an out house of 2 squares).

Item No.2 of ' A ' schedule consists of three sites, namely:

( a) Site at Ekalavyanagar 30 ' x 40 ' ; (exact location not known); ( b) Site at Sarvabhomanagar 30 ' x 40 ' (exact location not known) ( c) Site at Krishnarajapuram-30 ' x 40 ' two sites (exact location not known)

' B ' schedule property consists of totally six items of moveable properties, including house hold articles, gold jewelries; silver articles, bank deposits and S.B. Accounts, Chit funds, Shares, Pension Account at Canara bank and valuables;

4. In the suit filed by the plaintiffs, they sought 1/8th share in all the schedule properties for each of them having admitted the said extent of share each for the defendants 1 to 3.

5. The case of the plaintiffs is that, plaintiff Nos. 1 to 4 viz., B.K.Padmavathi; B.K.Nagalaxmi; B.K.Gayathri; B.K.Subbalaxmi and one B.K.Nagarathna are the daughters of late B.R.Krishnamurthy Rao. Regard being had to the fact that plaintiff No.5-Tejaswi Raghu is the son of Smt. B.K.Nagarathna who is the pre-deceased daughter of late B.R.Krishnamurthy Rao and since said Nagarathna is dead, the 5th plaintiff Tejaswi Raghu represents her rights in share.

6. The defendant Nos. ( ( 1 1)) B.K.Ganesh; ( 2) B.K.Srinivas and ( 3) B.K.venkatesh are the sons of the late B.R.Krishnamurthy Rao. The suit schedule properties consisting of ' A ' schedule (two items) and ' B ' schedule ( 6 items) belonged to said B.R.Krishnamurthy Rao who was working as an Accounts Officer under Central Government. He died leaving behind the plaintiffs 1 to 4 and defendant Nos. 1 to 3, whereas, plaintiff No.5 is the son of B.K.Nagarathna, pre deceased daughter of B.R.Krishnamurthy Rao.

7. Defendants No.1 to 3 being the siblings of plaintiffs No. 1 to 4 and uncle of plaintiff No.5 entered appearance and filed written statements.Defendants No. 1 and 2 chose to file their written statements separately and defendant No.3 adopted the written statement filed by defendants No. 1 and 2.

8. The substance of the written statements endorses the pleadings of the plaintiffs to a substantial extent as the defendants do not dispute many of the material areas, such as, parental relationship between the plaintiffs and defendants with late B.R.Krishnamurthy Rao, ownership and possession of Item No.1 of ' A ' schedule properties, the non disposal of the said property by Sri. B.R.Krishnamurthy Rao during his life time.It is not the case of neither of the parties to claim or to contend regarding the joint family or the coparcenery. However, the lis between the parties is in respect of Item No.2 of ' A ' schedule property which consist of three vacant sites said to have been situated at Ekalavyanagar, Sarvabhomanagar and Krishnarajapuram respectively is a nonest. Equally, ' B ' schedule properties. As both item No.2 of ' A ' schedule property and Item Nos. 1 to 6 of ' B ' schedule properties according to the defendants never existed much less were under the ownership of their late father Sri.B.R.Krishnamurthy Rao.

9. Insofar as house hold items, certain valuables, shares and other items of ' B ' schedule items are not substantially contested nor contended seriously.

10. The matter went into trail before the learned First Additional City Civil and Sessions Judge, Bangalore city and was disposed of.The relevant issues framed therein were with reference to CO ownership, entitlement of 1/8th share and the existence of the properties (understandably, item No.2 of ' A ' schedule and all the items in ' B ' schedule).

11. The learned trial Judge was accommodated with the oral evidence of PW1-B.K.Padmavathi and documentary evidence of Exs.P1 to P6 on behalf of plaintiffs and oral evidence of DWs 1 to 3 and documentary evidence of Exs.D1 to D3 on behalf of defendants.

12. The learned trial Judge concluded that the item No.1 of the ' A ' schedule property which is stated to be a residential house belonged to Sri. B.R.Krishnamurthy Rao, the propositus as on the date of his death. Further recognized 1/8th share for each of the plaintiffs who are five in numbers and the same extent for each of the defendants who are three in number. Thus, the property that was accepted for partition by the Court is, Item No.1 of ' A ' schedule property. However, the prayer in respect of item No.2 of ' A ' schedule and all the items in ' B ' schedule were not considered.

13. Meanwhile, it is necessary to mention that the defendant No.2-B.K.Srinivas before the trial Court had taken up a contention that plaintiffs No. 1 to 4 being married daughters and plaintiff No.5 being the son of the pre-deceased married daughter are not entitled for share even in Item No.1 of ' A ' schedule property on the score that all the five daughters were married and settled in their families separately and the said property being a dwelling house has been in possession of defendant Nos. 2 and 3 was not available for partition because of the bar provided under Section 23 of the Hindu Succession Act, 1956.Thus, in the appeal filed by defendant Nos. 3 and 2 in R.F.A.No.450/2009 they claim that the decree passed by the learned trial Judge to the extent of granting partition in respect of item No.1 of ' A ' schedule property has to be set aside and suit is liable to be dismissed in principle.

14. Learned counsel Mr.K.C.Shanthakumar, for plaintiffs 1 to 4 would submit that the learned trial Judge seriously erred in coming to a finding and holding that item No.2 of ' A ' schedule property was not available for partition as they did not exist at all. Learned counsel would further submit that the assertion of the plaintiffs regarding the said item No.2 of the ' A ' schedule property or the ' B ' schedule properties. There was no substantive denial.

15. Learned counsel would further submit that apart from format denial the existence of the said properties, the defendants did not make rival claim over the same and the learned trial Judge erred in not going deeper into the aspects regarding existence or non existence of the said item of properties.

16. Learned counsel Sri. Vikram Padke for Sri. G. Vedavyasachar, appearing for plaintiff No.5 would submit that the admitted facts in the entire suit are:relationship between Sri. B.R.Krishnamurthy Rao on one side and the plaintiffs and the defendants on the other side.

17. The ownership late B.R.Krishnamurthy Rao over the item No.1 in ' A ' schedule is not disputed as well. Learned counsel would submit that due to marital status and lack of procedural aspects of identifying the documents, the deeper details with numbers were not given in respect of item No.2 of ' A ' schedule. However, the trial Court could have made efforts to direct the parties ascertain the identification of the said properties power. Learned counsel would submit that Exs.P5 and P6, the encumbrance certificates marked in the case would give a definite lead and give clue regarding existence of item No.2 of ' A ' schedule property and their ownership in the name of Sri. B.R.Krishnamurthy Rao.

18. Learned counsel would further submit that all the plaintiffs and the defendants are entitled to succeed at par to the estate of Sri. B.R.Krishnamurthy Rao in accordance with the rules of intestate succession under Hindu Succession Act, 1956.The scope of Section 23 of the Hindu Succession Act, 1956 was wrongly canvassed by the defendants.

19. Learned counsel Sri. Aravinda Babu B.S. appearing for defendant No.1/respondent No.1 would submit that defendants did not deny the pleadings regarding relationship. Further, learned counsel brought to the notice of the Court that even two affidavits are filed by defendant No.1-B.K.Ganesh regarding his no objection for

sharing the properties. Learned counsel also drew the attention of the Court to para No.4 of the affidavit regarding the fact of relinquishment of the share of this defendant in favour of all the heirs of Sri.B.R.Krishnamurthy Rao.

20. Before dwelling on the other aspects, it is necessary to dispose of the two applications filed by the plaintiff No.5 -Tejaswi Raghu under order 41 Rule 27 CPC dated 30/09/2013 in I.A.No.1/2013 and dated 28/8/2018 in I.A.No.2/2018 for production of additional documents and I.A.No.1/2018 dated 28/8/2018 filed for amendment.

21. Insofar as I.A.No. 1/2018 filed for amendment is concerned, the proposed amendment sought by the plaintiff No.5 is as under:

" All that piece and parcel of the Site No.61 in Sy.No.69, presently presently M-26, near K.S.R.T.C. Layout situated in Sarvabhuma Nagar at 4th Main, 1st Cross Cross,, Chikkalasandra, Uttarahalli Hobli, Bangalore -560 085, measuring East to West:40 feet, North to South:30 feet, totally measuring 1200 square feet, with a residential building and bounded on the:

East by: Road

West by: Taku No.50

North by: Taku No.60

South by: Taku No.62 "

22. Similarly, I.A.No.1/2013 and I.A.No.2/2018 filed by plaintiff No.5 are seeking permission to produce additional evidence are in the form of the following documents:

In I.A.No.1/2013

" 1. Certified Copy of Sale Deed dated 24.1.1981, executed in favour of Sri B R Krishnamurthy Rao;

2. Encumbrance Certificate for the period 1st April 2004 to 18th January 2013 pertaining to suit Schedule A, Item No.2 ( b). "

In I.A.No.2/2018

" 1. Letter dated 10.12.2015 issued by the Asst.Executive Engineer of Bruhat Bengaluru Mahanagar Palike (BBMP), Uttarahalli Sub-Division;

2. Attested copy of the sketch/map of Sarvabhomanagar Layout, issued by Asst.Executive Engineer, BBMP, Uttarahalli Sub-Division;

3. Letter dtd. 01.03.2017 written by Appellant 5 to BBMP (seeking attested copy of letter dtd.06.01.2017 submitted by Respondent 1 to BBMP), the said letter dtd.01.03.2017 contains the acknowledgement of the BBMP, along with a shara that only one copy of the letter is given and no other document is given (by Respondent).

4. True copy of the letter dtd.06.01.2017 given by the Respondent 1 to the BBMP. "

23. Learned counsel Sri. M.Narasimha Murthy, appearing for defendant No.2/respondent No.2 B.K.Srinivasa, would submit that there is no objection for allowing those applications. However, submitted that it calls for enquiry.

24. Considering the facts and circumstances of the case, the said applications are allowed. The plaintiff No.5 is permitted to amend the plaint to include the proposed amendment and to produce the documents filed along with I.A.No. 1/2013 and I.A.No.2/2018 as additional documents and the documents produced along with the said applications are ordered to be taken on record.

25. In the overall context and circumstances of the case, the moot question would be,

Whether the bone of contentions between the parties regarding the existence or non existence of Item No.2 of ' A ' schedule property and item Nos. 1 to 6 of ' B ' schedule properties are nonest and fictitious. Further whether there was no question of ownership over the said property by Sri.B.R.Krishnamurthy Rao, to be available for partition among the plaintiffs and defendants?

26. It is necessary to place on record that there is no rival claim set up by the defendants in respect of the said item No.2 of ' A ' schedule or 6 items of ' B ' schedule, such as, separate property or disposed of property.

27. On the other hand, the only plea from the point of view of defendants would be that the suit properties are non existed properties. At the cost of repetition, at no point of time be it in pleadings, evidence or through the documents, the defendants asserted that the said items of property, particularly, item No.2 of ' A ' schedule property is a nonest. Paving ways thereby if it is held to be the property of Sri. B.R.Krishnamurthy Rao, it would have been available for partition. This observation is made in the light of the fact that it is the claim of the plaintiffs that all the three properties as mentioned in ' A ' schedule under Item No.2 formed vacant sites situated at Ekalavyanagar, Sarvabhomanagar and K.R.Puram, each sites measuring 30 ft. x 40 ft.

28. Learned trial Judge while disposing of the matter found that the plaintiffs failed to establish the identity regarding existence or non existence of Item No.2 of ' A ' schedule and full items of ' B ' schedule. If the said properties are established to be belonging to Sri. B.R.Krishnamurthy Rao, invariably, it is available for intestate succession for the parties in respect of item No.2 of the ' A ' schedule property and full items of ' B ' schedule. However, there is no serious contest by the defendants regarding item No.1 of the ' A ' schedule property.

29. In the light of the fact that there is no rival claim over the suit properties by the defendants on facts as per the materials placed before the Court, it is not a matter to be remanded to the trial court for adducing additional oral evidence, more particularly, considering the fact that the documents sought to be produced under I.A.No.1/2013 and I.A.No.2/2018 are the certified copies of the sale deed, encumbrance certificate, copy of RTI application of letter addressed to BBMP authorities. Thus, within the meaning of Rules 23, 24 of Order 41 of CPC, this Court finds that the matter pertaining to documents sufficiently and completely could be

disposed of by this Court based on the contents of the documents, more particularly, in the light of the fact that, common interest is claimed by the plaintiffs and no rival interest is claimed by the defendants. If the property is held to be in the name of Sri. B.R.Krishnamurthy Rao, the defendants also stand to gain to the extent of their respective shares along with the plaintiffs.

30. Now to trim the length of the judgment, it is necessary to observe regarding item No.1 of the Schedule ' A ' property which is a residential house situated at 3rd Block, Jayanagar, Bangalore. The plaintiffs and the defendants fall in the same line either regarding blood relationship with late Sri B.R.Krishnamurthy Rao and his ownership over the suit property. Insofar as six items of ' B ' schedule property is concerned, no specific and precise details are placed before the Court either to conclude that those properties existed and were under the ownership of of Sri. B.R.Krishnamurthy Rao and their availability for partition. Thus, in this connection, I find the learned trial Judge was right in not considering the prayer for partition over the ' B ' schedule items.

31. Insofar as item No.2 of ' A ' schedule property is concerned, the defendants have gone on record for denial of the existence of the said property, and the trial Judge has dislodged the claim of the plaintiffs on the ground that item No.2 of ' A ' schedule was not available for partition. As noted above, by virtue of allowing of the amendment application, I.A.No.1/2018, the description and identity of the suit item No.2 ( b) of ' A ' schedule property is sought to be incorporated in the plaint.

32. The said item refers to site No.61, in Survey No.69, M-26, near KSRTC Layout, situated at Sarvabhounanagar at 4th Main, 1 st Cross, Chikkalasandra, Uttarahalli Hobli, Bangalore-560 085, measuring East to West 40 feet and North to South 30 feet, totally, measuring 1200 square feet with a residential building, bounded on the East: Road; West:Taku No.50; North:Taku No.60 and South:Taku No.62 and it is stated to be item No.2 of the ' A ' schedule.

33. Incidentally, the said property is also claimed to have been purchased under the registered sale deed dated 24.1.1981 by Sri. B.R.Krishnamurthy Rao from B.V. Munivenkatappa for a cash consideration of Rs. 1,000/-, which is stated to be item ( b) of Item No.2 of ' A ' schedule property.

34. Now position boiled down to the fact that the plaintiffs claim that the said item No.2 ( b) of ' A ' schedule property belonged to late B.R.Krishnamurthy Rao, who remained as the owner as on the date of his death and as such, it is available for intestate succession by plaintiffs and defendants.

35. Per contra, the defendants, more particularly, the contesting defendant Sri. B.K.Srinivasa claimed that the said property never existed. In the light of the said stand taken up insofar as the said defendant is concerned, the property does not exist. However, when once it is established that it existed and remained under the ownership of Sri. B.R.Krishnamurthy Rao, it becomes partible property among the plaintiffs and defendants and all of them would be beneficiaries.

36. Insofar as item No.2 ( a) and ( c) of ' A ' schedule properties are concerned, the status continues that details regarding the existence or identity of the same are not brought before the court. In the said circumstances of the case, the learned trial Judge recognized the rights of partition to the extent of 1/8th share each to the plaintiffs 1 to 5 and defendants 1 to 3. At the same time, insofar as item No.2 of ' A ' schedule and six items of ' B ' schedule property are considered, the claim was rejected.

37. The material bone of contention between the parties boils down to Item No.2 of ' A ' schedule and item Nos. 1 to 6 of ' B ' schedule. Now in the circumstances more fully stated above, Item No.2 ( b) of ' A ' schedule property that was fully gets crystallized for the purpose of identification as to the existence and ownership.

38. When a formality or consideration that ought to have been observed or adjudicated is not done by the trial Court or the First Appellate Court as the case may be, the Appellate Court which is assigned of the matter for the disposal of the appeal more fully in the light of Rules 23, 23A and 24 of CPC retains the power to remand the matter. However, when it is within the realm of Appellate Court considering the age and stage of the case, which is coming up for consideration, when no prejudice would be caused to either of the parties, besides ends of principles of natural justice and in the light of the circumstance when sufficient material are available before the court to inspire the confidence or when things are spoken by themselves, the appellate court proceeds to dispose of the matter instead of passing the same on remanding to the trial court.

39. Insofar as Section 23 of Hindu Succession Act, is concerned, it is necessary to mention that the said Section was deleted by amending the Act during the year 2005 and is prospective in nature. In the light of the fact that, the suit was filed in the year 1999. Learned counsel for 2nd defendant-B.K.Srinivas would submit that by virtue of marriage of the daughters prior to 1989 they are dislodged from succeeding for a share in a dwelling house.

40. In the larger perception of the legal effect of Section 23 of Hindu Succession Act, 1956, the rights of partition are to claim a share in the dwelling house for a married daughter is not uprooted in full. Succession of properties will be testamentary or intestate. In other words, under codified or uncodified, but both cannot be applied simultaneously that the married daughters of a Hindu male dying intestate are not entitled for seeking share in respect of dwelling house in the occupation of the other male heirs.

The married daughters of a Hindu male dying intestate who cannot claim share in dwelling house left out by necessity of priority by claiming partition or release as the case may be until the male heirs chose to divide or partition such property, as such the married daughters of such Hindu male dying intestate is not deprived of right to claim residence in such properties provided she is a divorced or deserted by her husband or a widow. The restriction does not uproot the rights of unmarried daughter to claim a share. The momentum is gained when male heirs choose to divide.

41. In the above circumstances, it cannot be forgotten for a while that defendant No.1 B.K.Ganesh, sibling has gone on record to assert and affirm his intention that he is agreeable and welcomes the division of property

between the plaintiffs which includes the married daughters. Further the act of partition is not only on the claim of the plaintiffs and also point made by said defendant No.1-B.K.Ganesha who has even filed affidavit.

42. The postponement of the exercise of right is not for eternity. In this connection, plaintiff No.5 Tejaswi Raghu is the son of predeceased daughter Nagarathna of B.R.Krishnamurthy Rao. Thus, the male heir is also included along with female heirs in the share of plaintiff.

43. In the overall circumstances of the case, the learned trial Judge though was right in appreciating the demand of the plaintiffs regarding Item No.1 of ' A ' schedule property and granting 1/8th share to each of the parties, but erred in not sparing the attention regarding the identity of the properties, more particularly, the identity of item 2 ( b) of ' A ' schedule property, more particularly, when the clue was given by the plaintiff through Exs. P5 and P6.

44. Further, the learned counsel for plaintiff No.5 Mr. Vikram Padake would submit that a question was posed to the PW1 by the contesting defendant regarding another item of property was available, for which, PW1 has answered in the affirmative during cross examined.

45. As stated above, I find the learned trial Judge erred in respect of recording the finding regarding item No.2 ( b) of ' A ' schedule property. Insofar as rest of the finding is concerned, I concur with the judgment and decree passed by the learned trial Judge.

46. Insofar as RFA No.450/2009 is concerned, it is filed by defendant Nos. 2 and 3 to set aside the judgment and decree and the same is liable to be dismissed.

47. Hence, I pass the following:

#### ORDER

RFA No.450/2009 is dismissed confirming the judgment and decree dated 06.01.2009 passed in OS.No.7651/1999 by the trial Judge.

RFA No. 1582/2010 is allowed. The judgment and decree dated 06.01.2009 passed in OS.No.7651/1999 by the trial Judge so far as item No.2 ( b) of ' A ' schedule property is set aside. Consequently, the suit of the plaintiffs in O.S.NO.7651/1999 is decreed in part to cover item No.2 ( b) of ' A ' schedule property for partition along with item No.1 of ' A ' schedule property thereby the plaintiffs are entitled for 1/8th share for each of them.

The remaining judgment and decree passed in respect of Item No.2 ( a) and ( c) of ' A ' schedule property and item Nos. 1 to 6 of ' B ' schedule property stands confirmed.

Draw preliminary decree accordingly. No costs.