

HIGH COURT OF KARNATAKA**Bench: Justice Hanchate Sanjeev Kumar****Date of Decision: 14 December, 2023****REGULAR SECOND APPEAL NO.2272/2008(PAR)**

MUTTI ... APPELLANT

VS

KUCCHARU

1. BIDUGU
2. 3 SUBBU

3. BABY
4. UMANI S/O ANGARU, MAJOR.

5. DERAPPA ... RESPONDENTS

(BY SRI YASHWANTH NETHAJI N.T., AMICUS CURIAE FOR R1,
R2A, R3, R4, R5, R6)

Legislation:

Section 13 of the Legal Services Authority Act, 1987

Section 61 of the Karnataka Land Reforms Act, 1961

Section 14, 63 of the Indian Succession Act

Section 68 of the Indian Evidence Act

Subject:

Judgment pertains to a partition suit in which the validity and proof of a Will were contested. Specifically, it deals with the bequeathal of property through a Will, the intention of the testator, and the impact of relevant legal provisions, particularly Section 61 of the Karnataka Land Reforms Act, 1961.

Headnotes .

Partition Suit – Bequeathal of Property through Will – Proof of Will – Defendant No.2 claimed exclusive ownership of ‘A’ schedule property through a Will executed by her father, Kanja Meru – Plaintiff filed a partition suit, disputing Defendant No.2’s claim – Issue of the validity and proof of the Will – Court examined the evidence and validity of the Will – Court found that the Will was executed before the Karnataka Land Reforms Act was amended, and therefore, it was not hit by Section 61 of the Act – Court considered the intention of the propositus Kanja Meru and concluded that he intended to bequeath the entire property to Defendant No.2 – Court held that the defendant No.2 had become the absolute and exclusive owner of the ‘A’ schedule property through the Will – Both courts below erred in partitioning the ‘A’ schedule property – Suit filed by the plaintiffs dismissed. [Para 17-23]

Legal Aid – Appointment of Amicus Curiae – Respondents, being women, were entitled to free legal aid as per Section 13 of the Legal Services Authority Act, 1987 – Sri Yashwanth Nethaji N.T. appointed as amicus curiae to represent the respondents and assist the Court – Amicus Curiae’s valuable assistance in presenting the law and facts is appreciated, and professional fees of Rs. 10,000/- awarded. [Para 24]

Decision – Regular Second Appeal allowed – Judgments and decrees of the lower courts set aside regarding partition of ‘A’ schedule property – Suit filed by plaintiffs regarding ‘A’ schedule property dismissed – No orders as to costs. [Para 25]

Referred Cases:

- Durga vs. Anil Kumar (AIR 2020 SCC (supp) 105)
- Raj Kumari and Ors. Vs. Surinder Pal Sharma (2011) 4 Supreme Court Cases 303
- Prema and another vs. Deva Rao and others (2002) 2 SCC 85
- Madhukar D. Shende vs. Tarabal Aba Shedage (2005) 2 SCC 784
- Sridevi and others vs. Jayaraja Shetty and others (2022 SCC Online SCC 381)
- Swarnalatha and others vs. Kalavathy and others (2008 SCC online Kar 188)
- Sri J. T. Surappa and another vs. Sri Satchidhanadendra Saraswathi Swamiji Public Charitable Trust and others (2008 SCC online Kar 188)

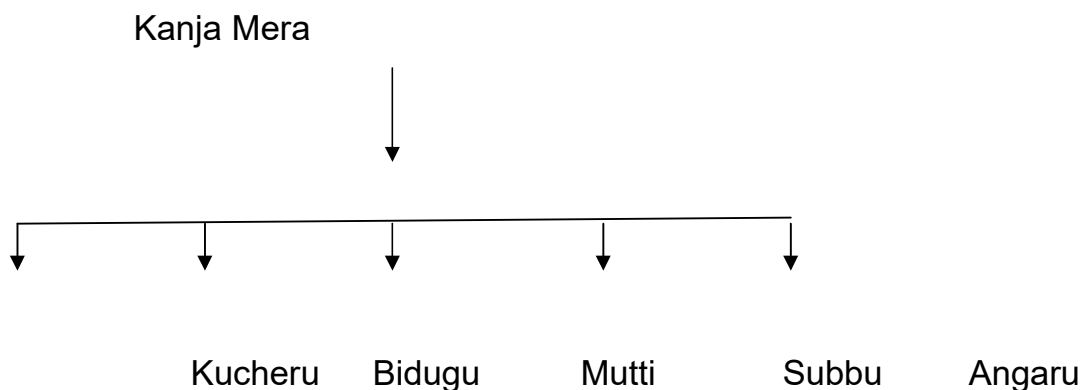
- Kavita Kanwar vs. Pamela Mehta and others (2021) 11 SCC 209
- Kanna Timma Kanaji Madiwal (dead) through legal representatives vs. Ramachandra Timmayya Hegde (dead) through legal representatives and others (2021) 14 SCC 309
- Sri Malakari since dead by his LR Smt. Sitawwa vs. State of Karnataka and others (2008) SCC Online Kar 16
- C. C. Devasia vs. The Karnataka Appellate Tribunal & Ors. (1998 SCC Online Kar 105)
- Mudakappa vs. Rudrappa and Others (1994) 2 SCC 57
- Pentakota Satyanarayana and others vs. Pentakota Seetharatnam and others (2005) 8 SCC 67

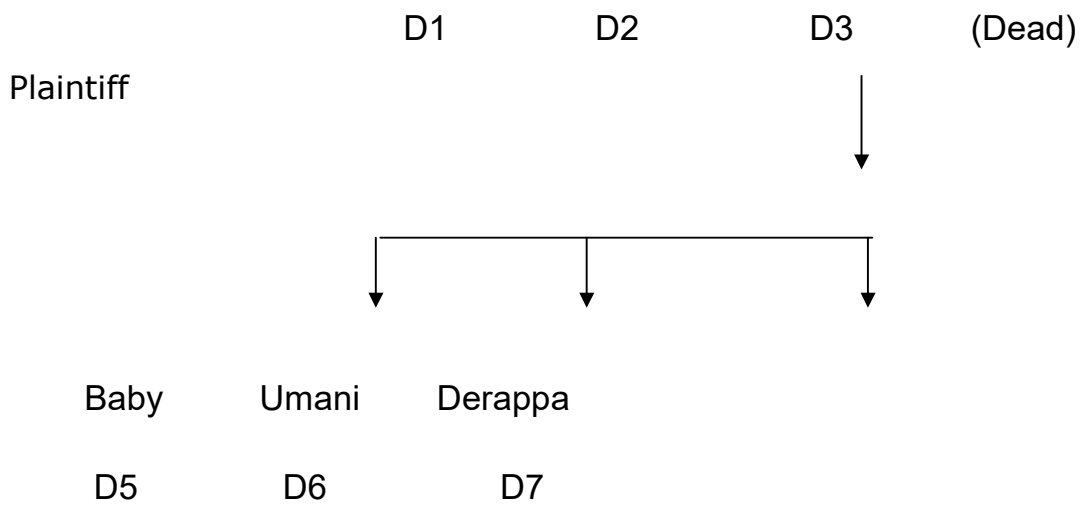
JUDGMENT

The regular second appeal is filed by defendant No.2 challenging the Judgment and Decree passed in R.A.No.28/1993 dated 04.07.2008 passed by the Court of Addl. Civil Judge (Sr.Dn.) and JMFC, Puttur, D.K., (hereinafter referred to as 'the First Appellate Court), which confirms the Judgment and Decree passed in O.S.No.217/1988 dated 11.01.1993 passed by the Court of the Munsiff and JMFC at Belthangady, D.K., hereinafter referred to as 'the Trial Court). Against the concurrent findings of both the Courts below, the present appeal is filed.

2. The rank of the parties are stated as before the Trial Court for convenience and easy reference.

3. The plaintiff who is respondent No.1 herein filed a suit for partition praying to allot 1/6th share in the suit properties. For easy reference, the genealogy is shown as follows:





4. The original propositus is Kanjameru who has five daughters. Defendant No.2 who is the appellant herein is the second daughter. It is case of the plaintiff that the suit schedule land was taken on lease by her father Kanjameru. It is the case of the plaintiff that the said Kanjameru had filed an application for claiming occupancy rights before the Land Tribunal. During the pendency of the said application, the said Kanjameru died and 2nd defendant appeared before the Land Tribunal and got registered her name as an occupant of the schedule land. The plaintiff and defendants are having share as coparceners. Therefore, the plaintiff filed a suit for partition claiming her share.

5. Defendant No.2 (appellant herein) has filed the written statement. Defendant Nos.1, 3 to 4 have not filed the written statement. Defendant No.2 admitted that the suit schedule properties were leased properties taken by her father and filed an application before the Land Tribunal for grant of occupancy rights and the Land Tribunal granted occupancy rights in her favour. It is the case of defendant No.2 that she has got absolute right over the suit schedule property in view of the Will executed by her father and not because of the order of the Land Tribunal granting occupancy rights. It is submitted that the said Kanjameru had executed a registered Will bequeathing plaintiff 'A' schedule properties and on the basis of the said Will, the Land Tribunal has granted occupancy rights in favour of defendant No.2. Therefore, Kanjameru had claimed absolute right over the suit schedule property. The Trial Court has decreed the suit by granting 1/5th share to the plaintiff on the reason that the original propositus Kanjameru has taken the land on lease basis and filed an application for grant of occupancy rights and thus, the suit land belongs to Kanjameru and therefore, all the coparceners have equal 1/5th share. Accordingly, granted 1/5th share to the plaintiff. The First Appellate Court has confirmed the said Judgment and Decree passed

by the Trial Court. Both the Trial Court and the First Appellate Court held that the suit properties are tenancy holding of her father Kanjameru and defendant No.2 had failed to prove that Kanjameru had executed Will in her favour and thus, negated the contention of defendant No.2 that defendant No.2 has become absolute owner on the basis of the Will.

6. The respondents in this appeal have been served with notice, but they have not appeared before the Court. Since the respondents herein are women, therefore, the standing counsel is ordered to appear on behalf of the respondents by virtue of Section 13 of the Legal Services Authority Act, 1987 as the respondents being women are entitled to free legal aid and also to assist the Court. Accordingly, Sri.Yeshwanth Netaji, learned Advocate is appointed as amicus curiae/standing counsel for the respondents.

7. Heard the arguments from both sides and perused the records.

8. This Court on 13.08.2015 has framed the following substantial questions of law:

- 1) *Whether the Judgment and decree of the trial court is erroneous in misreading the evidence of P.Ws.2 and 3 while holding that there are contradictions?*
- 2) *Whether the finding of the trial court is void ab initio and is unsustainable in law?*

9. Further during the course of argument, the Court deems fit to frame the following additional substantial questions of law on 23.06.2023:

i. Whether, under the facts and circumstances involved in the case, the deceased – Kanja Meru has executed the Will bequeathing 'B' schedule land or occupancy rights only? ii. Whether, under the facts and circumstance involved in the case, the plaintiff is successful that bequeath made as per Will dated 05.04.1973 as per Ex.D.1 is hit by Section 61 of the Karnataka Land Reforms Act, 1961?

10. The learned counsel for the appellant/

defendant No.2 submitted that by virtue of Will executed by the father of the plaintiffs/defendants, viz., Kanja Meru, the Defendant No.2 has become exclusive and absolute owner over the suit property. Both the Courts below have not appreciated evidence of PW.2 and PW.3 in true and correct perspective manner and also plaintiff has not proved that bequeathing the property by Kanja Meru in favour of Defendant No.2 through Will is hit by Section 61 of the Karnataka Land Revenue Act, 1961 (in short 'K.L.R Act, 1961). It is argued transfer of property by way of Will by father to daughter is not a transfer of property, but it is an arrangement within the family. Therefore, it is not hit by Section 61 of the K.L.R Act. It is further submitted that by evidence of PW.3, execution of Will is proved. It is further submitted that Kanja Meru has executed the Will. Thereby, bequeathed 'A' schedule property to the Defendant No.2, but not only occupancy rights also whole rights over the land. Therefore, when the entire land is bequeathed in favour of Defendant No.2, then by virtue of Section 14 of Hindu Succession Act, the Defendant No.2 has become exclusive and absolute owner over the 'A' schedule property. It is further submitted that Kanja Meru has only five daughters and no male issues. Kanja Meru has performed marriage of all daughters. Except Defendant No.2 all other three daughters including plaintiff are residing peacefully along with husband in their respective family. But unfortunately, the Defendant No.2 was constrained to leave due to ill-treatment by her husband and started to reside along with father Kanja Meru and Defendant No.2 has looked after her father till his death. Therefore, out of not only love and affection towards Defendant No.2, but for security of life of Defendant No.2, since she has left her husband, therefore, for her livelihood, father Kanja Meru has bequeathed suit schedule 'A' property to the Defendant No.2 by way of Will. Therefore, it is amounting to bequeathing the entire property to the Defendant No.2 through the Will, but not occupancy rights only. Thus, Defendant No.2 has become absolute and exclusive owner of the 'A' schedule property. This is lost sight of by both the Courts below. Hence, prays to set aside the Judgment and Decree of both the Courts below by allowing the appeal.

11. Learned counsel for the appellant has relied on the following decisions:

i) *Durga vs. Anil Kumar.*¹

¹ (2005) 11 SCC 189

- ii) *Raj Kumari and Ors. vs. Surinder Pal Sharma.*²
- iii) *Prema and another vs. Deva Rao and others.*³ iv) *Madhukar D. Shende vs. Tarabal Aba Shedage.*⁴
- v) *Sridevi and others vs. Jayaraja Shetty and others.*⁵
- vi) *Swarnalatha and others vs. Kalavathy and others.*⁶
- vii) *Sri J. T. Surappa and another vs. Sri Satchidhanadendra Saraswathi Swamiji Public Charitable Trust and others.*⁷ viii) *Kavita Kanwar vs. Pamela Mehta and others.*⁸
- ix) *Kanna Timma Kanaji Madiwal (dead) through legal representatives vs. Ramachandra Timmayya Hegde (dead) through legal representatives and others.*⁹
- x) *Sri Malakari since dead by his LR Smt. Sitawwa vs. State of Karnataka and others.*¹⁰
- xi) *C. C. Devasia vs. The Karnataka Appellate Tribunal & Ors.*¹¹ xii) *Mudakappa vs. Rudrappa and Others.*¹²
- xiii) *Pentakota Satyanarayana and others vs. Pentakota Seetharatnam and others.*¹³

² AIR 2020 SCC (supp) 105

³ (2011) 4 Supreme Court Cases 303

⁴ (2002) 2 SCC 85

⁵ (2005) 2 SCC 784

⁶ 2022 SCC Online SCC 381

⁷ 2008 SCC online Kar 188

⁸ (2021) 11 SCC 209

⁹ (2021) 14 SCC 309

¹⁰ (2008) SCC Online Kar 16

¹¹ 1998 SCC Online Kar 105

¹² (1994) 2 SCC 57

¹³ (2005) 8 SCC 67

12. The respondents were served notice, but they remained absent in spite of service of notice to them. Therefore, the respondents being

women, are entitled for free legal aid as per Section 13 of the Legal Services Authority Act, 1987. Accordingly, the standing counsel is appointed by name Sri.Yeshawanth Netaji, advocate-cumamicus curiae, Advocates' Association, Bengaluru, to represent the respondents and also to assist the Court.

13. The learned standing counsel for the respondents-cum-amicus curiae submitted that Will is not proved. Therefore, there is no valid bequeath by Kanja Meru to the Defendant No.2. Then, plaintiff and defendants are daughters of Kanja Meru. Therefore, quite naturally, the occupancy rights granted in favour of Defendant No.2 is liable to be equally partitioned among the plaintiff and defendants. Therefore, both the Courts below have correctly held and decreed the suit. Hence, submitted that the appeal filed by the Defendant No.2 is liable to be dismissed.

14. Learned counsel for the respondents has relied on the following decisions:

- i) *Shambu Eshwar Hegde vs. Land Tribunal Kumta and another.*²
- ii) *Timmakka Kom Venkanna Naik vs. Land Tribunal.*³ iii) *Jahirodin vs. Land Tribunal & Ors.*⁴
- iv) *Sri J. T. Surappa and another vs. Sri Satchidhanandendra Saraswathi Swamiji Public Charitable Trust and others.*⁵
- v) *M. L. Abdul Jabbar Sahib vs. M.V. Venkata Sastri & Sons and others.*⁶ vi) *Bhagat Ram & Anr vs. Suresh & Ors.*⁷
- vii) *N. Kamalam (dead) and another vs. Ayyasamy and another.*⁸
- viii) *Suraj Lamp and Industries Private limited (2) through Director vs. State of Haryana and Another.*⁹

² (1979) SCC Online Kar 156

³ (1987) SCC Online Kar 172

⁴ (1978) SCC Online Kar 292

⁵ ILR 2008 KAR 2115

⁶ (1969) 1 SCC 573

⁷ (2003) 12 SCC 35

⁸ (2001) 7 SCC 503

⁹ (2012) 1 SCC 656

- ix) *Shanti Swaroop deceased and others vs. Onkar Prasad deceased and others.*¹⁰
- x) *Veerabhadrapam and Ors. vs. Virupaxappa Totappa Bilebal.*¹¹ xi) *Booda Poojary vs. Thomu Poojarthy.*¹²
- xii) *Ganesh Rai and Others vs. Mahalinga Rai and Others.*¹³
- xiii) *Narayana and Others vs. A. Sadashiva and Others.*¹⁴
- xiv) *Kanteppa and Another v. Land Tribunal Bidar Taluk, Bidar and Another.*¹⁵ xv) *Malliga vs. P.Kumaran.*¹⁶ xvi) *Sarada vs. Radhamani.*¹⁷
- xvii) *Ramesh Verma (dead) through Legal Representatives vs. Lajesh Saxena (Dead) by Legal Representatives and Another.*¹⁸
- xviii) *S.R.Srinivasa and Others vs. S.Padmavathamma.*¹⁹
- xix) *K.Laxmanan vs. Thekkayil Padmini and Others.*²⁰
- xx) *Smt.Jaswant Kaur vs. Smt. Amrit Kaur and Others.*²¹
- xxi) ²¹ *Yumnam ONGBI Tampha Ibema Devi vs. Yumnam Joykumar Singh and Others.*²²
- xxii) *Janki Narayan Bhoir vs. Narayan Namdeo Kadam.*²³
- xxiii) *H. Venkatachala Iyengar vs. B.N. Thimmajamma and Others.*²⁴

¹⁰ Second Appeal No.795/2011

¹¹ ILR 1998 KAR 2508

¹² ILR 1992 KAR 1359

¹³ ILR 2003 KAR 2764

¹⁴ ILR 2000 KAR 487

¹⁵ ILR 2001 KAR 426

¹⁶ 2022 SCC Online Mad 1289

¹⁷ 2017 SCC Online Ker 41632

¹⁸ (2017) 1 SCC 257

¹⁹ (2010) 5 SCC 274

²⁰ (2009) 1 SCC 354

²¹ (1977) 1 SCC 369

²² (2009) 4 SCC 780

²³ (2003) 2 SCC 91

²⁴ AIR 1959 SCC 443

15. The decisions placed on by the appellant and respondents-Amicus Curiae are considered and those are regarding the principle of law laid down on proof of Will and the same are applied in this appeal.

16. Sub-section (1) of Section 61 of the K.L.R Act, 1961 reads as follows:

“61. Restriction on transfer of land of which tenant has become occupant.—(1) Notwithstanding anything contained in any law, no land of which the occupancy has been granted to any person under this Chapter shall, within [fifteen years] [from the date of the final order passed by the Tribunal under sub-section (4) or sub-section (5) or sub-section (5-A) of section 48A] be transferred by sale, gift, exchange, mortgage, lease or assignment; but the land may be partitioned among members of the holder’s joint family.”

17. The father Kanja Meru has executed a Will on 05.04.1973 before coming into force of Amendment Act to the Karnataka Land Reforms Act, 1961. Thereby, bequeathing ‘A’ schedule property in favour of Defendant No.2. Ex.D1-Will is executed before coming into force of the Amendment Act to the K.L.R.Act, 1961. Therefore, certainly, it does not mean that Kanja Meru did have intention to bequeath occupancy rights only. Before coming into force of the Amendment Act to the K.L.R.Act, 1961, Kanja Meru had bequeathed entire property exclusively and absolutely to the Defendant No.2. Such bequeath is not hit by Section 61 of the K.L.R.Act, 1961. The Land Tribunal has passed an order on 31.08.1977 as per Ex.D2. Therefore, Section 61 of the K.L.R.Act, 1961 restricts transfer of land of which tenant has become occupant. Here, Kanja Meru was tenant over the ‘A’ schedule property and before passing Land Tribunal order, he died. The Defendant No.2 had continued the prosecution of application filed for grant of occupancy rights before the Land Tribunal and was successful in granting order of occupancy right by the Land Tribunal. Thus, the Defendant No.2 has become occupant by virtue of Land Tribunal Order by conferring occupancy rights on her. Therefore, there is no transfer by sale, gift, exchange, mortgage, lease or assignment or any other mode. Bequeathing property by way of Will is not restricted as per Section 61 of the K.L.R.Act. Furthermore, Kanja Meru had executed a Will before grant of occupancy rights. Therefore, it is not hit by

Section 61 of the K.L.R.Act. Accordingly, I answer substantial question of Law No.2 framed on 23.06.2023 in negative.

18. Upon considering Ex.D1-Will, as it is executed before coming into force of the Amendment Act to the K.L.R.Act, 1961, considering occupancy rights, therefore, it could not be anticipated that Kanja Meru has executed the Will that he would come to know of the amendment in future and therefore, he bequeathed occupancy rights only. Therefore, it means upon considering the intention of Kanja Meru, he bequeathed the entire property to Defendant No.2 for the reason that the Defendant No.2 was constrained to leave her husband and started to reside along with her father Kanja Meru and therefore, Kanja Meru has bequeathed property in favour of Defendant No.2. Therefore, the bequeath of 'A' schedule property to the Defendant No.2 is bequeathing of 'A' schedule property absolutely by virtue of Will.

19. Considering the proof of execution of Will is concerned, DW.2 is the scribe. DW.2 is bond writer by profession. He identified EX.D1-Will that he has written the said Will in his own handwriting. He has stated that the father of the plaintiffs and defendants namely Khanamiru has instructed him to write the will and accordingly he has written the said will. DW.2 has stated that after signature of attested witnesses, he has also put his signature and he identified left hand thumb impression of the propositus Kanjamiru. Upon considering the cross examination of this DW.2, the evidence is given before the Court on 04.01.1993. The Ex.D1 is dated 05.04.1973.

Therefore, when considering the nature of human conduct, DW.2 examined after 20 years from the date of writing of the Will. Therefore, quite naturally, DW.2 might have stated that he does not know who is Kanjamera since memory fades, if a person is not frequently met him. Therefore, in this context, if the DW.2 admitted in the cross examination that he does not know who is Kanjamera that does not mean that the DW.2 has not written the Will. Further, the DW.2 had stated that DW.3 Niranjan Rao had introduced Kanjamera and this DW.2 had put signature on the Will as one of the attesting witness. Therefore, from the evidence of DW.2, it is proved that the DW.2 is scribe of the Will and he has also put his signature as a scribe.

20. DW.3 is another attesting witness to the Will. DW.3 has stated that he has put his signature on the Ex.D1-Will as attesting witness and Kanjamera has put his left hand thumb impression on the Will. It is revealed in the cross examination that Kanjamera has given instruction to him to write will and in turn DW.3 has instructed the DW.2 to write the Will. It is evidence,

revealed from the DW.3 that there is no second attesting witness signature on the will.

21. Therefore, when considering these evidence on record, as per Section 63 of the Indian Succession Act and Section 68 of the Indian Evidence Act, the requirement is putting signature on the Will by two attesting witnesses but one attesting witness is proved to have attested and signed on the Ex.D1-Will. The question is whether the DW.2 can be considered as attesting witness. The DW.2 has stated that he has written the Will as the propounder of the Will was introduced by the DW.3 and DW.2 himself and DW.3 has put signature on the Will. Therefore, the scribe is also to be considered as attesting witness apart from the status as scribe. Therefore, the requirement of proof of Will as per Section 63 of the Indian Succession Act and Section 68 of Indian Evidence Act are complied with.

22. Therefore, as discussed above, upon considering the entire case on its true and correct prospective way, the propositus has five daughters, all five daughters who are coparceners have got married. There is no male issue to propositus Kanjamera. The DW.2 was constrained to leave her husband and started to reside along with her father Kanjamera. All other coparceners (daughters) have been residing in their own family along with their respective husband and children. Therefore, when the defendant No.2 was residing along with her father Kanjamera, quite naturally, being the dutiful father towards his daughter for security of life has bequeathed suit schedule 'A' property in favour of the defendant No.2. Bequeathing the entire land itself since, as on the date of execution of Will i.e. on 05.04.1973, the Karnataka Land Reforms Act was not got amended for grant of Occupancy Right. Therefore, the intention of propositus Kanjamera is that to bequeath the entire land that is suit schedule 'A' property to defendant No.2 for the reasons above gathered from the case on all its preponderance of probability. Therefore, the defendant No.2 has proved that suit schedule 'A' property is bequeathed by father and thus defendant No.2 has become absolute and exclusive owner of the suit 'A' schedule property.

23. In this regard, both courts below have not appreciated the evidence on record correctly and mere just swayed away that the plaintiffs and other defendants are also coparceners and held that all are equally entitled for share in the 'B' schedule property. When the entire case is considered on all its preponderance of probability as discussed above, the intention of the propositus Kanjamera is proved very clear that for security of

life of defendant No.2, since defendant No.2 was constrained to leave her husband and started to reside along with her father, then Defendant No.2 has prosecuted the application before the land tribunal. The land tribunal has granted occupancy rights by the order dated 31.08.1977 which was not challenged by the plaintiff and other defendants till filing of the suit that is till 29.11.1985. Therefore, for more than eight years from the date of grant of occupancy rights, the plaintiffs and other defendants were silent and suddenly woke up and filed suit for partition. This conduct of the plaintiff proves that she has consented by acquiescence by silence about the grant of occupancy rights in favour of defendant No.2. Hence, by virtue of Will-Ex.D1, the defendant No.2 has become exclusive and absolute owner in possession of the suit schedule 'A' property is not amenable for partition. In this regard, both the courts below have committed error in partitioning the suit schedule 'A' property and the same are liable to be set aside. Therefore, the suit filed by the plaintiffs is liable to be dismissed.

24. Learned Amicus Curiae-Sri Yashwanth Nethaji N.T. has assisted the Court in well studied manner and appraised the Court regarding law of Wills and has taken the Court thoroughly on facts involved in the case and his assistance to the Court is very valuable and appreciable, making the Court to arrive at a just conclusion. Therefore, the efforts put by the learned Amicus Curiae is placed on record along with appreciation of the Court. The Secretary, High Court Legal Services Committee, Bengaluru is directed to pay professional fees of Rs.10,000/- to the learned Amicus Curiae-Sri Yashwanth Nethaji N.T., advocate.

25. Accordingly, I proceed to pass the following:

ORDER

- i) Regular Second Appeal filed by the defendant No.2 is allowed.
- ii) Judgment and decree passed in RA No.28/1993 dated 04.07.2008 by Addl. Civil Judge(Senior Division) and JMFC.,

Puttur and judgment and decree passed in OS No.217/1988 dated 11.01.1993 by Civil Judge (Jr.Dn.) Puttur are hereby set aside so far as partitioning the 'A' schedule property.

- iii) The suit filed by the plaintiffs so far as suit schedule 'A' property is concerned is dismissed.
- iv) Draw decree accordingly.
- v) No orders as to costs.

© All Rights Reserved @ LAWYER E NEWS

*Disclaimer: Always compare with the original copy
of judgment from the official website.