COMMON JUDGMENT

The appellants in RFA No.100221/2016 are defendants 1 to 11 and the appellants in RFA.No.100197/2016 are plaintiffs 1 and 2 in O.S.173/2011 on the file of Principal Senior Civil Judge, Gadag. Plaintiff No.3 died during pendency of the suit. Her legal representatives were already on record.

2. The plaintiffs suit was for partition and separate possession of their 1/10th share each in thirteen landed properties described in schedule 'A' and four house properties described in schedule 'B' of the plaint. Rachappa Mallappa Betageri was the propositus, third plaintiff was his wife. Plaintiffs 1 and 2 and defendant 13 are the daughters, and defendants 1 and 8 to 12, Basappa and Mallappa, both being deceased, are the sons of Rachappa Mallappa Betageri and the third plaintiff. Defendant 1 is the wife and defendants 2, 3 and 4 are the children of deceased Basappa. Defendant 5 is the wife and defendants 6 and 7 are the children of Mallappa.

3. The plaintiffs claimed partition in schedule 'A' and schedule 'B' properties on the score that they were all ancestral joint family properties. They came to know that the defendants 1 to 11 created a false partition deed for their convenience, obtained their signatures and the signatures of defendants 12 and 13 deceitfully and obtained the mutations of the properties to their names. They stated that this mutation did not affect their share in the properties. Property bearing R.S.No.556/1A/1+2+3A measuring 7 acres 24 guntas exclusively belonged to third plaintiff but it was also included in the partition.

4. The tenth defendant filed written statement which was adopted by defendants 1 to 9 and 11. The specific contention in the written statement is that the first plaintiff was born before 1956 and therefore she cannot claim any share. On 05.04.2000 there took place a partition in the presence of the elders and since the plaintiffs and the defendants 1 to 13 were parties to the partition, they cannot claim partition again. The revenue entries were mutated on the basis of the partition dated 05.04.2000. It is also

contended that items 10, 11 and 12 are the self acquired properties of defendants 10 and 11. In this view suit is to be dismissed.

5. Defendant 12 filed written statement stating that himself and defendant 13 were each entitled to 1/10th share and that the partition deed dated 05.04.2000 was a created document. Defendant 13 adopted the same written statement.

6. Though the Trial Court framed seven issues, issues 3, 4 and 5 are the deciding issues, which are as below:

> 3. *Whether the plaintiffs prove that each have got 1/10 share in all the suit properties?*
>
> 4. *Whether the Defendants No.1 to 11 prove the previous partition as pleaded in written statement?*
>
> 5. *Whether Defendants No.1 to 11 prove that suit schedule A10, 11 & 12 are the self-acquired properties of Defendants No.10 & 11 as pleaded in para No.11 of their written statement?*

7. The second plaintiff adduced evidence as PW.1 and produced the documents as per Exs.P.1 to P.32. DWs.1 to 3 were the witnesses examined on behalf of the

defendants and Exs.D.1 to D.33 were the documents marked on their behalf.

8. The findings of the Trial Court are that among schedule 'A' properties, items 1 to 9 and 13 as also the house properties described in schedule 'B' were ancestral. This conclusion was drawn based on the averments made in the written statement and also admission given by DW.1. So far as items 10 to 12 of schedule 'A' is concerned the Trial Court held that they were self acquisitions of defendants 10 and 11 as the plaintiffs failed to prove that items 10 to 12 were purchased by defendants 10 and 11 from the income of the joint family and in view of clear evidence of defendants 10 and 11 that they purchased those items by selling the gold of their respective wives. The evidence of DW.1 in this regard has not been discredited.

9. In regard to partition dated 05.04.2000, it is held by the Trial Court that the plaintiffs were the signatories to the partition deed marked as per Ex.D.6 and D.7. They do not dispute their signatures. Thereafter mutations were effected in the year 2000 under entry No.ME11109, which

the plaintiff did not challenge at all. This shows that ancestral properties were divided and at that time the plaintiffs 1 and 2 and defendant 13 gave up their shares in respect of items 1 to 9 and 13. Therefore they lost their right to claim partition in these items.

10. With regard to house properties mentioned in schedule 'B the Trial Court held that they were not the subject matter of partition dated 05.04.2000. This is admitted by DW.1. There is also admission that house properties belonged to the joint family. In this view, plaintiffs 1 and 2 and defendant 13 would become entitled to claim share. With these findings the Trial Court partly decreed the suit holding that plaintiffs 1 and 2 were each entitled to $1/10^{th}$ share in schedule 'B' properties and dismissed the suit in respect of schedule 'A' properties.

11. The plaintiffs have filed the appeal aggrieved by denial of partition in schedule 'A' and defendants 1 to 12 have preferred the appeal challenging the granting of partition in schedule 'B' properties.

12. We have heard the arguments of Sri J.S.Shetty learned counsel for the appellants in RFA.No.100221/2016 and Sri H.N.Gularaddy learned counsel for the appellants in RFA.No.100197/2016.

13. Sri J.S.Shetty put forward an interesting proposition of law in that, when the plaintiffs were parties to the partition dated 05.04.2000 and abandoned their right to claim partition in the landed properties described in 'A' schedule, their conduct amounted to abandoning their right to claim partition in the house properties. Elaborating on this point, he argued that the plaintiffs were very much aware that the house properties were also ancestral. Some of the brothers of plaintiffs 1 and 2 were residing in the houses. Section 23 of the Hindu Succession Act as it stood before amendment in the year 2005 did not permit the female members to claim partition in the dwelling houses until the male heirs chose to divide their respective shares. That means, the plaintiffs 1 and 2 and defendant 13 could have demanded to effect partition in the house properties, but they did not. From the fact that they gave up their right in

the landed properties, it is not impossible to draw an inference that they did not want share in the house properties also. Merely because the partition dated 05.04.2000 states nothing about the house properties, it cannot be said that the parties decided not to effect partition in the house properties at that point of time and thus they continued to be joint family properties. He further submitted that repeal of Section 23 of the Hindu Succession Act in the year 2005 cannot be applied to grant partition to them in the house properties. Placing reliance on the judgments in ***G.Sekar Vs. Geetha and others***[1] and ***Narasimhmurthy Vs. Susheelabai (Smt.) and others***[2], he argued for allowing the appeal filed by defendants 1 to 12.

14. Sri H.N.Gularaddy argued that the evidence clearly discloses that the signatures of plaintiffs 1 and 2 were taken on blank papers which were later on used for creating a partition deed. Their signatures were obtained under a misrepresentation that their signatures were required for entering their names in the revenue records. This is the

[1] (2009) 6 SCC 99
[2] (1996) 3 SCC 644

pleading of the plaintiffs and PW.1 has deposed so. The finding of the Trial Court that the plaintiffs 1 and 2 gave up their rights in the landed properties is incorrect. His further argument was that the defendants have clearly admitted that the house properties belonged to the joint family. Because of this reason plaintiffs 1 and 2 have been given share in the house properties. There is no infirmity in this part of the judgment. Therefore the defendants appeal is to be dismissed and the plaintiffs appeal is to be allowed granting share in "A' schedule properties.

15. Now the points that may be formulated for discussion are :

(i) Is the Trial Court justified in denying share to the plaintiffs in 'A' Schedule properties holding that they had given up their share when partition took place on 05.04.2000?

(ii) Can defendants 1 to 12 contend that in view of Section 23 of the Hindu Succession Act as it stood before amendment and the partition dated 05.04.2000, the plaintiffs 1 and 2 and defendant 13 are not entitled to claim partition in schedule 'B' properties? Was there deemed abandonment of right to claim partition in schedule 'B' properties?

16. **POINT NO.1:** Ex.D.6 is the document that evidences the partition of 'A' Schedule properties. Ex.D.7 is also the same document, it appears that two certified copies obtained from office of Tahasildar, Gadag were produced and therefore they were marked twice. This is not a registered instrument; given a plain reading to the said document, it can be said that it is a memorandum of partition. Since the terms of the oral partition were reduced into writing on 05.04.2000, it can be looked into. Coming into being of a document as per Ex.D.6 or D.7 is actually not disputed by the plaintiffs for, in the plaint itself it is clearly stated that the defendants 1 to 11 created a document evidencing partition by obtaining their signatures fraudulently on white papers. Whether fraud was played or not is a matter to be decided with reference to the evidence of the witnesses, but averment in the plaint clearly indicates that the plaintiffs were very much aware of existence of a document which affected their right to claim partition. Moreover plaint does not disclose particulars of fraud.

17. If the oral testimony of PW.1, i.e., the second plaintiff is perused, what is forthcoming is that she denied all the suggestions given to her about the joint family properties being subjected to partition and a document to that effect having come into existence on 05.04.2000. She also denied the suggestions that she gave up her share in the agricultural lands and mutation of revenue records under M.E.No.11109 based on Ex.D.6. She asserted that her signature and the signatures of her sisters were taken on white papers. Whatever may be her evidence, a clear inference about earlier partition can be drawn with reference to the evidence of the defendants' witnesses. DW.1 i.e., the tenth defendant has stated in the cross-examination that items 1 to 6 were ancestral and items 7 to 9 were purchased from joint family income. It was suggested to him that even items 10 to 12 of 'A' schedule were purchased from the income of the joint family, but denying the same he asserted that those properties belonged to him and his brother Mallikarjuna. With regard to partition, he asserted the same and denied the suggestion given to him that partition had

not taken place. More than the evidence of DW.1, evidence of DWs.2 and 3 is very much important in view of the fact that they were two of six persons in whose presence the plaintiffs and the defendants agreed for effecting partition. Ex.D.6 contains their signatures and they have been marked. They state that only 'A' schedule properties were divided. These witnesses have not been discredited in the cross-examination.

18. Certain inferences can also be drawn from the documents produced by the plaintiffs. Exs.P.1 to P.13 are RTC extracts. In column No.10, there is a reference to mutation being accepted under entry No.ME11109. The RTC extracts pertain to various survey numbers mentioned in schedule 'A' and stand in the individual names of defendants 1 to 12. Ex.P.14 to 17 pertain to house properties mentioned in schedule 'B' and the names of the plaintiffs and the defendants are shown as owners of those properties. In Ex.P.18, order dated 16.09.2011 passed by the Tahasildar of Gadag taluk there is a reference to partition. Therefore on juxtaposing the oral evidence with the documentary

evidence, it is possible to draw an inference that only schedule 'A' properties were subjected to division among the widow and children of propositus Rachappa Mallappa Betageri.

19. The language of Ex.D.6 is so clear that the plaintiffs 1 and 2 and defendant 13 relinquished their shares as they had been well settled in their respective matrimonial homes. They cannot therefore contend that the schedule 'A' properties still remain undivided so that they can claim partition. It appears that after amendment was brought to the Hindu Succession Act in the year 2005, they might have thought of instituting a suit for partition as Ex.D.6 is an unregistered instrument. In this regard we have to state that Ex.D.6 is actually not a partition deed and it is a memorandum of partition which has been acted upon as evidenced by acceptance of mutation of revenue entries. It is not in dispute that the plaintiffs did not challenge the mutation. If really there had not taken place division of the joint family, they could have challenged acceptance of mutation in the names of their brothers. This circumstance

fortifies specific stand of the contesting defendants that 'A' schedule properties were subjected to partition long back and that the plaintiffs and defendants 13 chose not to take any share in them. So what we find is that the terms of oral partition was reduced to writing as per Ex.D.6 and it was acted upon. To a context like this, Division Bench of this Court (one of us being a member on the Bench), in the case of ***Venkat Vs. Anita and others***[3] took the following view in regard to validity of the oral partition.

> *24. What can be deciphered from the above is that although explanation to sub-Section (5) of Section 6 requires partition effected before 20.12.2004 to be registered, all valid oral partitions effected before the said date remain unaffected, but such oral partitions cannot be simply considered, the party relying upon oral partition must strictly prove it. The Court must scrutinize the evidence with regard to oral partition with great circumspection in order to rule out the possibility of forgery and bogus transactions of partition.*

20. The Hon'ble Supreme Court in the case of ***Vineeta Sharma Vs. Rakesh Sharma and others***[4], it has been held that:

> *129. Resultantly, we answer the reference as under:*
> *(i) ……..*
> *(ii) ……..*
> *(iii) ……..*

[3] ILR 2020 KAR 539 (RFA 6041/2013 decided on 17.12.2019)
[4] AIR 2020 SC 3117

(iv) ……..

(v) In view of the rigor of provisions of explanation to section 6(5) of the Act of 1956, a plea of oral partition cannot be accepted as the statutory recognized mode of partition effected by a deed of partition duly registered under the provisions of the Registration Act, 1908 or effected by a decree of a court. However, in exceptional cases where plea of oral partition is supported by public documents and partition is finally evidenced in the same manner as if it had been affected by a decree of a court, it may be accepted. A plea of partition based on oral evidence alone cannot be accepted and to be rejected out-rightly.

21. As there is ample evidence indicating oral partition having been acted upon, inference can be drawn that only plaint 'A' schedule properties were subjected to partition and that the plaintiffs 1 and 2, and defendant 13 voluntarily made it clear that they did not want any share in these properties. The Trial court is therefore justified in denying partition in 'A' schedule properties.

22. **POINT NO.2:** This is purely a question of law which was urged before us for the first time. We have found from the discussion on Plaint No.1 that only landed properties were divided and that the house properties continued to remain jointly in the names of the widow and children of Rachappa Mallappa Betageri. Before section 23 of

Hindu Succession Act was repealed by the Hindu Succession (Amendment) Act, 2005 it stated that if the dwelling house was wholly occupied by members of the family of a Hindu who dies intestate, the female heir was not entitled to claim partition in the dwelling house until the male members chose to divide their respective shares. This section was repealed by the Amendment Act. The argument of Sri J.S.Shetty was that when the plaintiffs 1 and 2 and defendant 13 decided not to take any share at the time when agricultural lands were divided, they had foregone their shares in the dwelling houses. Section 23 of the Hindu Succession Act as it stood before amendment estopped them from claiming shares by filing a suit for partition as the male members did not choose to effect partition of the houses.

23. Argument of Sri J.S.Shetty cannot be accepted. Though it is true that schedule 'B' house properties are occupied by some of the brothers of plaintiffs 1 and 2, it is also a fact that the houses were not subjected to partition. After repeal of Section 23, they got a right to seek partition. The Amendment Act is held to be prospective in operation

with retroactive effect. The Hon'ble Supreme Court has made this position clear in the case of Vineeta Sharma. To understand the meaning of retroactive effect of a statute, we have extracted paragraph No.56 of the said judgment.

> *56. The prospective statute operates from the date of its enactment conferring new rights. The retrospective statute operates backward and takes away or impairs vested rights acquired under existing laws. A retroactive statute is the one that does not operate retrospectively. It operates in futuro. However, its operation is based upon the character or status that arose earlier. Characteristic or event which happened in the past or requisites which had been drawn from antecedent events. Under the amended section 6, since the right is given by birth, that is an antecedent event, and the provisions operate concerning claiming rights on and from the date of Amendment Act.*

24. Sri J.S.Shetty much relied on judgment of Supreme Court in the case of ***G.Sekar***. He referred to paragraph Nos.31 and 32 to emphasize the point of argument that a vested right was created in the male members of the family when no partition of the houses was effected at the time when agricultural lands were divided. Paragraph Nos.31 and 32 are extracted below:

> *31. It is now a well-settled principle of law that the question as to whether a statute having prospective operation will affect the pending proceedings would depend upon the nature as also the text and context of the statute. Whether a litigant has obtained a vested*

right as on the date of institution of the suit which is sought to be taken away by operation of a subsequent statute will be a question which must be posed and answered.

32. It is trite that although omission of a provision operates as an amendment to the statute but then section 6 of the General Clauses act, whereupon reliance has been placed by Mr.Viswanathan, could have been applied provided it takes away somebody's vested right. Restrictive right contained in Section 23 of the Act, in view of our aforementioned discussions, cannot be held to remain continuing despite the 2005 Act.

25. We have to state that the male members of the joint family did not derive any vested right in the house properties. In fact it is the clear answer of DW.1 in the cross-examination that no partition of the house took place and the names of the plaintiffs appeared in the house extracts issued by the Panchayath. Exs.P.14 to 17 are the extracts issued by the Gram Panchayath in relation to the houses. If the plaintiffs 1 and 2 and defendant 13 did not claim their share in the houses, that could have been mentioned in Ex.D.6. The defendants 1 to 12 could have obtained the house extracts mutated to their exclusive names. That means the houses were allowed to remain undivided. It is made clear in the case of ***G.Saker*** that restrictive right contained in section 23 of the Act cannot be held to remain continuing

despite the 2005 Act (as observed in paragraph No.32). No doubt section 23 was omitted by 2005 amendment. But section 23, as it stood before repeal, applied when a Hindu died intestate surviving him or her both male and female heirs specified in clause I of the schedule to Hindu Succession Act. That means restriction that existed earlier did not apply to dwelling houses belonging to coparcenary. This is what can be gathered from the language of Section 23 and the judgment of the Supreme Court in ***G.Sekar***. In para 26, the following is the observation.

> *26. Section 23 of the Act has been omitted so as to remove the disability on female heirs contained in that section. It sought to achieve a larger public purpose. If even the disability of a female heir to inherit the equal share of the property together with a male heir so far as joint coparcenary property is concerned has been sought to be removed, we fail to understand as to how such a disability could be allowed to be retained in the statute book in respect of the property which had devolved upon the female heirs in terms of Section 8 of the Act read with the Schedule appended thereto.*
>
> *(emphasis supplied)*

26. There is a clear admission by DW.1 that the houses belonged to joint family. Ex.P.14 to Ex.P.17 evidenced the same. Abandonment of share in schedule 'A' properties cannot be construed as deemed abandonment of

shares by plaintiffs 1 and 2, and defendant 13 in house properties. In this view the plaintiffs 1 and 2 and defendant 13 can claim partition in the house properties described in 'B' schedule of the plaint. Thus, the argument of Sri J.S.Shetty fails and Point No.2 is answered in negative.

27. From the discussion on Point Nos.1 and 2, we hold that both the appeals fail and they are dismissed without order as to costs.

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