

04.02.2023:

ORDER ON IA No.VI

IA No.VI is filed by respondent Nos.6, 7, 9 and 10 under Section 151 of CPC seeking to modify the share of respondent Nos.6, 7, 9 and 10 who are original plaintiff no 3, 4, 6 and 7 as 1/ 24th share as per judgment of Vineetha Sharma Vs. Rakesh Sharma.

2. In the accompanying affidavit Sri. Channappa Nagappa Hongal who is respondent No.10 had sworn to the fact that they have filed IA No.VI to modify the judgment and decree. At the time of judgment in O.S. No.20/2003 notional partition was granted to them and they were allotted 1/ 24th share each. But due to the recent judgment they are entitled for 1/ 6th share.

3. The petitioners have not filed objections to the IA.

4. Heard both sides and perused documents on record.

5. The following points arise for my consideration;

“ Whether the applicants have made sufficient grounds to modify the preliminary decree as sought under I.A. No.VI ? If so, what order ?”

6. My finding to the above point is in the Affirmative for the following;

REASONS

7. Admittedly, OS No. 20/2003 was filed by Smt Savakka and others seeking the relief of partition and separate possession. The judgment was delivered on 31.10.2006 and as per the said judgment plaintiff Nos.1 and 2 and 3 to 7 were held to be entitled for 1/24th share each.

8. On perusal of the certified copy of the judgment passed in this case it is apparent that the court has observed that the suit schedule properties are ancestral joint family properties. While carving share this court has granted notional share to the parties.

9. It is apparent that the trial court held that the daughters of propositus are entitled for 1/ 24th share, and sons are entitled for 7/24th shares each.

10. As per the genealogy apparent from the judgment page 5 it is apparent that the propositus of the family was Basappa, he had a wife Tippavva and they had three sons and three daughters, Neelawwa, Rudrappa, Savakka, Nagappa, Irappa and Kashawwa. Neelawwa had husband Nagappa who is dead and plaintiff no 1, 4 to 7 are their children. Thus plaintiffs are children of Neelawwa. Plaintiff no 1 and 2 are daughter s and defendant no 1 to 3 are the sons of the propositus. This being the case as per the recent judgment if the partition is effected then all the legal heirs of Basappa are entitled for 1/ 6th share in the suit properties each.

12. It is beneficial to rely on the following rulings;

i) **AIR 1967 SC 1470** in the case of **Poolchand and another V. Gopal Lal**, wherein it is held that, wherein it is held that, the court can in suit for partition pass a second preliminary decree. It was observed that, there is no prohibition for

passing a second preliminary decree.

ii) **AIR 2009 SC 1089** in case of **S. Santnam Singh & Others Vs. Surender Kaur and another**, wherein it is held that the court may rectify mistake. It was also observed that in a suit for partition addition of properties may be permitted by amending decree. It was further observed that there is no bar in CPC prohibiting passing of more than one preliminary decree if circumstances justify the same.

iii) **AIR 2011 SC 2077** in the case of **Prema V. Nanje Gouda and others**, wherein it is held that in a suit for partition where preliminary decree was passed it was open for the unmarried daughter to seek equal share even in the final decree. It was further observed that where there is clear determination of rights of the parties, there is nothing which prohibits drawing second preliminary decree.

iv) **AIR 2012 SC 169** in case of **Ganduri Koteshwaramma and another Vs. Ghakiri Yanadi and another**, wherein it is held that, right of the daughter in coparcenary property is not lost by passing preliminary decree. It was further observed that a second preliminary decree can be in

suit for partition by which shares allotted in the preliminary decreed already passed can be amended.

v) In the case of **Janaki Vs. Lalita and others** reported in **2015 E-Juris (Kar) (7) 84**, wherein it was observed that, in a suit for partition where application under Order VI Rule 17 amendment was allowed it was held that it was permissible.

The said rulings aptly apply to the case on hand. Thus there is no bar to draw further decree altering the shares as per recent judgment.

13. Recently the Honorable Apex court in the case of **VINEETA SHARMA Vs RAKESH SHARMA & ORS** reported in **2020 SCC online SCC 641**; three judges bench on August 11, 2020 has clarified the position of section 6 and observed at para 129 and 130 that;

" 129. Resultantly, we answer the reference as under:

(i) The provisions contained in substituted Section 6 of the Hindu Succession Act, 1956 confer status of coparcener on the daughter born before or after amendment in the same manner as son with same rights and liabilities.

(ii) The rights can be claimed by the daughter

born earlier with effect from 9.9.2005 with savings as provided in Section 6(1) as to the disposition or alienation, partition or testamentary disposition which had taken place before 20th day of December, 2004.

(iii) Since the right in coparcenary is by birth, it is not necessary that father coparcener should be living as on 9.9.2005.

(iv) The statutory fiction of partition created by proviso to Section 6 of the Hindu Succession Act, 1956 as originally enacted did not bring about the actual partition or disruption of coparcenary. The fiction was only for the purpose of ascertaining share of deceased coparcener when he was survived by a female heir, of Class I as specified in the Schedule to the Act of 1956 or male relative of such female. The provisions of the substituted Section 6 are required to be given full effect. Notwithstanding that a preliminary decree has been passed the daughters are to be given share in coparcenary equal to that of a son in pending proceedings for final decree or in an appeal.

(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 evinced 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 outrightly.

130. We understand that on this question, suits/appeals are pending before different High

Courts and subordinate courts. The matters have already been delayed due to legal imbroglio caused by conflicting decisions. The daughters cannot be deprived of their right of equality conferred upon them by Section 6. Hence, we request that the pending matters be decided, as far as possible, within six months.

In view of the aforesaid discussion and answer, we overrule the views to the contrary expressed in *Prakash v. Phulavati* and *Mangammal v. T.B. Raju & Ors.* The opinion expressed in *Danamma @ Suman Surpur & Anr. v. Amar* is partly overruled to the extent it is contrary to this decision. Let the matters be placed before appropriate Bench for decision on merits “.

14. It is relevant to add here that the case law of *Vineetha Sharma Vs. Rakesh Sharma* though it is recent decision applies to all pending proceedings case whether in the case of final decree proceedings or appellate proceedings. As such the said case law fully applies to the present case on hand. FDP is continuation of the suit. Thus being the case law the court had allotted daughters share notionally as per the prevailing legal position and now due to the changed legal position even daughters are entitled for equal shares.

15. it is apparent that the propositus of the family was Basappa, he had a wife Tippavva and they had three sons and three daughters, Neelawwa Rudrappa, Savakka, Nagappa, Irappa and Kashavva.

Thus these children are all entitled for 1/ 6th shares each in the suit properties. Already IA no 8 has been allowed.

16. Applicants are plaintiff no 3 to 7 who were held to be entitled for 1/24th share together. Now they are entitled for equal 1/ 6th shares in the suit properties.

17. Thus, applicants are entitled for 1/ 6th shares. Hence in view of the above discussions I answer point under consideration in the affirmative and I proceed to pass the following;

ORDER

The I.A No.VI filed by the applicants U/s 151 of CPC is hereby allowed.

The applicants/ respondent No.6, 7, 9 and 10/ plaintiff Nos.3, 4, 5, 6 and 7 in original suit are held to be entitled for 1/ 6th share in the suit properties by metes and bounds.

Draw a preliminary decree accordingly.

Senior Civil Judge, Bailhongal

