

KAHV300017312017



**IN THE COURT OF THE SENIOR CIVIL JUDGE AND
J.M.F.C AT HANGAL**

Present: Smt.Anitha, B.A. (Law) L.L.B.,
Senior Civil Judge & JMFC.,
Hangal.

Dated this the 21st day of September 2022.

OS No.270/2017
(Old OS No.71/2012)

Plaintiffs:

1. Panchappa, S/o Basavenneppa
Nelogalla, Aged 85 years,
Agriculturist, R/o.Belagalpete,
Hangal Taluk, Haveri District.
2. Veerappa, S/o Basavenneppa
Nelogalla, Aged, 80 years,
Agriculturist and Retired
employee, R/o.Aladakatti,
Hangal Taluk, Haveri District.
(Dead by his legal heirs)
- 2(a). Smt.Shantamma, W/o Veerappa
Nelogalla, Aged 75 years,
Household work, R/o Aladakatti,
Hangal Taluk.
- 2(b). Gangadhar, S/o Veerappa
Nelogalla, Aged 58 years,
Agriculturist, R/o Aladakatti,
Hangal Taluk.

- 2(c). Smt.Shivaleela @ Pushpa,
W/o Vijay Halli, Aged 55 years,
Household work, R/o Rasta Peta,
Puna, Maharashtra State.
- 2(d). Smt.Annapurana @ Nanda,
W/o Mallikarjunappa Tonkad,
Aged 53 years, Household work,
R/o State Bank Colony, Keshwapu
Hubballi, Hubballi Taluk,
Dharwad District.
- 2(e). Prakash, S/o Veerappa Nelogalla,
Aged 52 years, Agriculturist,
R/o Aladakatti, Hangal Taluk.
- 2(f). Smt.Parimala @ Poornima,
W/o Rajashekhar Savadatti,
Aged 48 years, Household work,
R/o Hangal, Hangal Taluk.
- 2(g). Smt.Pratibha, W/o Vishwanath
Inamati, Aged 45 years,
Household work, R/o Mulagunda
Naka Gadag, Gadag Taluk.

-Vs-

- Defendants:
1. Basavaraj, S/o Jagadevappa
Nelogalla, Aged 30 years,
Private Job, R/o.Belagalpete,
Hangal Taluk, Haveri District.
 2. Jagadevappa, S/o Basavenneppa
Nelogalla, Aged 83 years,
Agriculturist, R/o.Aladakatte,
Hangal Taluk, Haveri District.
 3. Shanmukappa, S/o Basavenneppa
Nelogalla, Aged 78 years,
Agriculturist, R/o.Belagalpete,
Hangal Taluk, Haveri District.

4. Nagaraj, S/o Jagadevappa
Nelogalla, Aged 30 years,
Advocate, R/o.Aladakatte,
Hangal Taluk, Haveri District.
5. Shanthveeresh, S/o Jagadevappa
Nelogalla, Aged 35 years,
Agriculturist, R/o.Aladakatte,
Hangal Taluk, Haveri District.
6. Shivalingappa, S/o Gadigeppa
Viruppannavar, Major,
Advocate, R/o.Kunkura,
Kundagola Taluk.

ORDERS PASSED ON I.A.NO.XXIII

The learned counsel for the 4th defendant filed IA No.XXIII under Order 14 Rule 5 R/w Section 151 of CPC seeking for recasting issue No.4 framed on 30.10.2014 and to frame the proposed additional issues as additional issues.

2. The application is supported with the affidavit of the 4th defendant stating that, the 2nd defendant is his father and he is the GPA holder of his father. That the plaintiffs have filed the suit for the relief of partition and separate possession and in the written-statement at para No.11 and at para No.4 of the additional written-statement the 2nd defendant taken up specific contention that, suit schedule 2A, 2C to 2H properties are his self acquired properties. Defendants No.1, 2 and 4 to 6 in their written-statements at para No.11, 12, 15 and 17 and in the additional written-

statements defendants No.1 and 2 at para No.7 and 8 have taken up specific contention that, the suit without the relief of declaration is not maintainable. In the written-statement the 6th defendant at para No.9 contended that, he is the bonafide purchaser of suit schedule 2C and 2D properties. There is no issues framed regarding said facts and issue No.4 needs to be amended and proposed additional issues are to be framed as additional issues. If issue No.4 is not amended and the proposed additional issues are not framed the 4th defendant will be put to incalculable loss. Hence, prayed to allow the application.

3. Per contra the learned counsel for the plaintiffs filed objection contending that, the application is not maintainable under law or on facts. It is also contended that, issue No.4 is with regard to “whether the 2nd defendant proves that, the suit 2 ‘A’ property is his self acquired property by virtue of sale dated 22-09-1966 out of his own income?. If the said issue is amended by inserting 2C to 2H properties then the date of the purchase will not be changed and such amendment cannot be allowed. It is further contended that, the proposed additional issues No.1 and 2 are not at all necessary since already this court has framed additional issues. It is also contended that, the 6th defendant in his written-statement has not at all taken up specific contention that, he is the bonafide purchaser of suit schedule

2C and 2D properties and 4th defendant cannot file the application on behalf of the 6th defendant since the 4th defendant is not the GPA holder of the 6th defendant. The application is filed when the case is posted for arguments. Hence, prayed to reject the application with costs.

4. Thereafter, heard arguments addressed by learned counsel for the plaintiffs and defendants No.1, 2 and 4 to 6 and perused the case papers. After hearing the arguments and on perusal of the case papers, the points that arise for consideration are as hereunder:

POINTS

1. Whether the 4th defendant has made out sufficient grounds to recast issue No.4 and to frame proposed additional issues as additional issues in this case?
2. What order?
5. The findings of the above points are as hereunder:

Point No.1: Partly in the affirmative
Point No.2: As per final order
for the following:

REASONS

6. **Point No.1:** Initially the suit was filed by the two plaintiffs against three defendants only in respect of two properties. Thereafter by way of amendment the plaintiffs impleaded defendant No.4 to 6 and have also added some more properties which are suit schedule 2C to 2H properties.

Admittedly, there is written-statement of defendants No.1, 2, 4 and 6 and there is also counter claim to which the plaintiffs filed the rejoinder. After the amendment the defendants have also filed their additional written statements. On 30-10-2014 this court framed issues. The said issues are framed before amendment. Further on 27-06-2018 the court has framed two additional issues regarding proper valuation of the suit and payment of proper court fee and the suit being barred by law of limitation.

7. On going through the written statement of the 2nd defendant it clearly to show that, in his written-statement filed on 03-07-2012 the 2nd defendant taken up the specific defence that, suit schedule 2A property is his self acquired property purchased out of his own income. Admittedly, on the basis of the same this court framed issue No.4 which is specifically on the basis of above said defence of the 2nd defendant. Furthermore, in the written-statement the 1st defendant at para No.8 contended that, the suit is bad since the relief of declaration has not been claimed by the plaintiffs. It is further necessary to mention that, after the amendment defendants No.1 and 2 have filed additional written-statement and after getting impleaded the 4th defendant also filed his written-statement. In the additional written-statement of the 2nd defendant and in the written-statement of the 4th defendant it is specifically contended

that, the suit schedule 2C to 2H properties are the self acquired properties of the 2nd defendant. Admittedly, on the said pleadings of the parties there is no issues framed by this court till now. The issue regarding the said fact is very much necessary for proving the defence of defendants No.2 and 4. On the basis of the above discussions this court comes to the conclusion that, issue No.4 is required to be re-casted as follows:

“Whether the 2nd defendant proves that, the suit schedule 2A, 2C to 2H properties are his self acquired properties”?

8. In the application the 4th defendant also mentioned two proposed additional issues and the additional issue No.1 is with regard to maintainability of the suit without seeking the relief of declaration. Admittedly, in the written-statement of defendants No.1, 2 and 4 to 6 they have taken up specific contention that, since there are sale deeds and gift deeds the plaintiffs have to seek the relief of declaration about those documents and without seeking the said reliefs the suit of the plaintiffs is not maintainable. Admittedly, there is no issues framed about the said pleading of the above said defendants and it is just and necessary to frame proposed additional issue No.4 as one of the additional issue.

9. Order 14 Rule 5 speaks about recasting and striking of the issues already framed. It is the settled position of law that, issues are to be framed on the basis of the pleadings of the parties. If a party urges a fact and if the other party denied the said material fact, then the court is bound to frame an issue on the said material fact. Now on going through the proposed additional issue No.2 it speaks about the 6th defendant being a bonafide purchaser of suit schedule 2C and 2D properties. It is pertinent to note that, this issue casts burden upon the 6th defendant. On careful perusal of the written statement of the 6th defendant at para No.9 he has pleaded that he is the bonafide purchaser of the said properties. However, in a suit for partition there is no question about a purchaser being a bonafide purchaser. It is specific contention of the 6th defendant that, he has purchased the said property from the 1st defendant. If at all at the conclusion of trial this court comes to the conclusion that, the 1st defendant is having share in the suit schedule properties then the right of the 6th defendant will be protected by way applying the principles of equity at the time of carving out their shares. As such there is no reason in framing the proposed issue No.2. Furthermore the 4th defendant is not a proper party to seek for framing of said additional issues regarding the defence taken up by the 6th defendant. At the time of arguments learned counsel for the

4th defendant argued that, if the issues are framed and re-casted definitely the burden is cast upon them to prove those issues. Therefore, this court comes to the conclusion that, to some extent the 4th defendant has made out grounds to allow the application by recasting issue No.4 and by framing proposed additional issue No.1 as one of the additional issue in this case. Accordingly, point No.1 is answered partly in the affirmative.

10. **Point No.2:** In view of the reasons discussed above this court proceeds to pass the following:

ORDER

I.A.No.XXIII filed by the 4th defendant
under Order 14 Rule 5 R/w Section 151 of
CPC is hereby partly allowed with costs of
Rs.500/-.

(Dictated to the Stenographer, transcribed and computerized by her on the computer, transcript corrected and pronounced by me in the open court on this the 21st day of September 2022.)

Sd/-
(ANITHA)
Senior Civil Judge and JMFC,
Hangal.