

KAMS400020542018



**IN THE COURT OF
SENIOR CIVIL JUDGE AND JMFC AT
KRISHNARAJANAGARA, MYSURU
Presided Over by Sujatha Madiwalappa Sambrani**

Dated this 15th day of October 2022

F.D.P./4/2018

PETITIONER : Chandrashekar

Vs

RESPONDENTS: Smt. Sharadamma & others

:: I.A.NO. 2 ::

APPLICANT : Smt. Sharadamma
W/o.late K.R.Shivamurthy,
Aged about 77 years,
R/at Door No.2340,
Sampige Road,
Adichunchangiri II Cross,
J Block, Kuvempungar,
Mysuru-570 023.

.... 1st respondent

Vs

OPPONENTS : M. Chandrashekar,
S/o late Mallappashetty,
Aged about 75 years,
R/at No.208, Nottigham Drive
Okaville, ON. L6H 4H6,
CANADA.

..... Petitioner.

ORDERS ON I.A.NO.2

The learned counsel for the respondent No.1 has filed this application under section 151 CPC., seeking an order of modification of the share granted in favor of the Respondent No.1 in the preliminary decree and to enhance her share to 1/5th over the suit schedule properties by allotting equal share in view of the decision of Vineetha Sharma Vs Rakesh Sharma.

2. This application is objected by the petitioner by filing objections.

3. Heard and perused the records.

4. The following point that would arise for my consideration is:

1. Whether the application filed by the respondent No.1 u/s 151 of CPC., seeking an order of modification of the share granted in favor of the respondent No.1 in the preliminary decree and to enhance her share to 1/5th over the suit schedule properties by allotting equal share in view of the decision of Vineetha Sharma Vs Rakesh Sharma, deserves to be dismissed?

2. What order?

5. My findings on the above points are as follows:

Point No.1 : In the Affirmative

Point No.2 : As per final order,
for the following

REASONS

POINT No.1:-

6. The petitioner has filed this petition seeking drawing of final decree based on the Judgment and Decree passed in O.S.No.12/2007 dated 01.03.2010 and the said suit came to be decreed in part by allotting 1/8th share in suit item Nos.1 to 6 of 'A' schedule property in favor of plaintiff and relief in respect of 'B' and 'C' schedule properties was rejected.

7. In support of the application the respondent No.1 sworn to the affidavit and submitted that, she has filed a suit in O.S.No.12/2007 before this court seeking partition and separate possession of her equal 1/5th share in the schedule properties. The petitioner has contested the suit and finally the suit came to be decreed in part for partition and separate possession by allotting 1/18th share in the suit Item Nos.1 to 6 properties of 'A' schedule on 01.03.2010 as notional partition. By that time the

position of law as per the decisions rendered by various Hon'ble High courts and Honble Supreme Court was that the rights of coparceners under Amendment Act 2005, are applicable to living daughters of living coparceners as on 09.09.2005 irrespective of the birth date of daughters which means that, if the father died before the commenced date then the daughter can not acquire equal share of the coparcenary property, but only for notional partition. However, in Vineetha Sharma Vs Rakesh Sharma case, Hon'ble Supreme Court held that Section 6 has been amended to elevate the rights of female coparcenary by giving equal share as that of the male coparcenary in the property and also declared that there is no requisite of the coparcenary being alive which is amended in 2005 Amendment Act.

8. It is further submitted that, 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 also. In view of the Judgement of Vineetha Sharma Vs Rakesh Sharma case, the Hon'ble Supreme Court over rule the views to the contrary expressed in Prakash VS Phulavati and Mangammal Vs. T.B.Raju and Others and the

opinion expressed in Danamma @ Suman Surpur and another Vs Amar is partly overruled to the extent it is contrary to this decision.

9. In view of the changed circumstances and the principle enunciated and as held by the Hon'ble Supreme Court in Vineetha Sharma Vs Rakesh Sharma's case, the shares of the respective parties stands altered and she is entitled to partition and separate possession of her 1/5th share in the suit schedule properties. Hence, in view of the decision of Hon'ble Supreme Court in Vineetha Sharma Vs Rakesh Sharma's case, preliminary decree in OS.NO.12/2007 out which this final decree petition arose is to be amended or an another preliminary decree is to be passed allotting equal shares i.e. 1/5th share each as prayed in the plaint by allowing this application. Hence prayed to allow the application.

10. The petitioner filed objections to this application contending that this application is not maintainable in law and this court cannot exercise powers in drawing final decree cannot go behind the decree passed by this court and prayed to reject the application with exemplary cost.

11. In this regard, the learned counsel for petitioner has relied upon the decision reported in **ILR 2007 Karnataka, page 3408 held in between Sundar Rao and Others, Vs. K.Ramakrishna Rao**, wherein it is held as follows:

“ Therefore, if the reason given by the High Court is accepted it would mean that no finality attaches to decree at all. That is not the law. A decision is said to be final when so far as the court rendering it is concerned, it is unalterable except by resort to such provision of the CPC., as permit reversal, modification or amendment. Similarly, a final decision would mean a decision which would operate as res judicata between the parties if it is not sought to be modified or reversed by preferring an appeal or a revision or a review application as is permitted by the Code. A preliminary decree passed, whether it is in a mortgage suit or a partition suit, is not a tentative decree the decree which would be executable would be the final decree but must, in so far as the matters dealt with by it are concerned, be regarded as

conclusive. No doubt, in suits which contemplate the making of two decrees a preliminary decree and a final decree the decree which would be executable would be the final decree. But the finality of a decree or a decision does not necessarily depend upon its being executable”.

On going through the entire decision, it appears that the facts and circumstance of this case is different. Hence, this decision is not applicable to the present set of facts.

12. On the other hand, the learned counsel for respondent No.1 relied upon the decision reported in **MUTHANGI AYYANA VS. MUTHANGI JAGGARAO AND OTHERS**, the Apex Court has held that a court cannot go behind the preliminary decree on a matter determined by the preliminary decree. It has been held thus:

“5. This appeal, coming up before us from the final decree, raises the question whether the preliminary decree, confines, as the learned counsel for the appellant-defendant No.4 submits, accounting to the claims

made by and against individual parties mentioned in the preliminary decree. He urges that it cannot be extended to all parties, including the defendant No.4, if the terms of the preliminary decree are binding. The contention is based on the well recognized proposition that a final decree cannot amend or go behind the preliminary decree on a matter determined by the preliminary decree”.

13. Further, in the case of Smt. Parvathamma Vs A. Muniyappa and others, it is held that:

“26. The above provisions were newly introduced for the first time in the present Code to bring into an important change that in a preliminary decree, certain rights are conclusively determined and unless the preliminary decree of a Court is challenged in appeal, the right so determined become final and conclusive and cannot be questioned in the final decree”.

14. Now coming to the concept of preliminary decree, in a decision reported in **AIR 1977 KAR 60 held in between A.THAKURDAS AND ANOTHER VS A. VENILAL AND OTHERS**, it is held that,

“A preliminary decree is declaratory in nature and it is implicit in that decree that further proceedings are required to complete the partition. In a partition suit, it is not essential that only one preliminary decree may follow. There may arise subsequent events which make it obligatory to pass another preliminary decree modifying the terms of the former and thereby setting at rest the various controversies which may be raised between the parties. The purpose of the preliminary decree is that the terms settled by the Court are executed and respective possessions are delivered after deciding equities between the parties”.

15. It is also held in the decision reported in **(1991) 3 SCC 647 between Sai Reddy VS S.Narayana Reddy and others**, wherein it is held that:

“When a suit for partition is filed in a Court, a preliminary decree is passed determining shares of the members of the family. The final decree follows, thereafter, allotting specific properties and directing the partition of the immovable properties by metes and bounds. Unless and until the final decree is passed and the allottees of the shares are put in possession of the respective property, the partition is not complete. The preliminary decree which determines share does not bring about the final partition. For, pending the final decree the shares themselves are liable to be varied on account of the intervening events”.

These decisions are rightly applicable to the present case. Based on the principles laid down in this decision it can be held that, there may be more than one preliminary decree can be passed based on subsequent events. Therefore, the contentions of the petitioner that, this court cannot exercise powers in drawing final decree cannot go behind the decree passed by this court cannot be accepted.

16. On perusal of decree of the suit in O.S No. O.S.No.12/2007 dated 01.03.2010 , the suit came to be decreed in part by allotting 1/8th share in suit item Nos.1 to 6 of 'A' schedule property in favor of plaintiff and relief in respect of 'B' and 'C' schedule properties was rejected.

17. On the other hand, the **Hon'ble Supreme Court of India in Civil Appeal No. Diary No.32601 of 2018 between Vineetha Sharma Vs Rakesh Sharma and others**, it is held that,

'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'.

It is further held that,

'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 daughter s cannot be deprived of their right of

equality conferred upon them by section 6.

18. As rightly contended by the learned counsel for the petitioner the Hon'ble Supreme Court of India has confirmed equal share or equal right to the daughter to that of son. In view of the decisions of Hon'ble Apex Court reported in KCCR 2020(3) 1993 (sc) in between Vineeth Sharma Vs Rakesh Sharma, the daughters are given equal share to that of sons, the petitioner being the daughter/sister is entitled for equal share to that of respondents. This decision is applicable to the pending cases also. Consequently, preliminary decree present case is required to be modified to the extent of allocation of share, that is to the extent of 1/5th instead of 1/8th share. Accordingly, point No.1 is answered in the **Affirmative.**

POINT No.2:-

19. For the reasons stated above, I pass the following;

ORDER

I.A.No.2 filed by the Respondent No.1 under section 151 of CPC., seeking modification of her share

granted in the preliminary decree and to enhance her share to 1/5th over the suit schedule properties by allotting equal share in view of the decision of Vineetha Sharma Vs Rakesh Sharma, is allowed.

Office to draw second preliminary decree allotting 1/5th share instead of 1/18 share to the respondent No.1 in the suit 'A' Schedule Item Nos.1 to 5 and 8 to 20 by metes and bounds.

(Dictated to the stenographer, transcribed, typed and printout taken by her and added some paragraph directly on computer and corrected, signed and then pronounced by me in the open court, on this the **15th October 2022**)

(Sujata M. Sambrani)
Senior Civil Judge & J.M.F.C.
K.R.Nagar.

