

**IN THE COURT OF THE III ADDL. DISTRICT AND SESSIONS  
JUDGE, RAMANAGARA.**

**R.A.25/2013**

**Dated 28<sup>th</sup> Day of April 2016**

**Present:**

**Smt.S.Nagashree., B.A., LL.M.,  
III Addl. District and Sessions Judge,  
Ramanagara.**

BETWEEN:

Sri.Puttaswamy  
s/o late Ningaiah  
aged about 48 years  
r/at No.2227,  
Out house, 2<sup>nd</sup> Cross,  
Kuvempunagar,  
Channapatna,  
Ramanagara Dist.

Appellant

(Rep by. Sri.B.R., Adv.)

AND:

Smt.Yashodamma  
Since dead and others

1. Smt.S.Parvathi  
w/o Sri.R.Keshava Murthy  
aged about 57 years  
r/at No.2869, 4<sup>th</sup> Cross,  
Chamundipura Extn.,  
Mysore City.

2. Smt.N.L.Shamanthamani  
w/o late Srinivasa Murthy  
aged about 61 years

3. Smt.S.Ambika  
d/o late Srinivasa Murthy  
aged about 36 years

4. Smt.S.Sharada  
d/o late Srinivasa  
aged about 34 years

5. Smt.K.S.Lakshmi  
d/o late Srinivasa Murthy  
w/o Venkatesha Babu  
aged about 25 years  
r/at No.142/1, Coconut Avenue Road,  
Malleshwaram, Bangalore – 560 003.

6. Sri.S.Sudheendara  
s/o late Srinivasa Murthy  
aged about 23 years

respondents 2 to 4 and 6 are  
r/at No.2218, 2<sup>nd</sup> Main Road,  
Kuvempunagar,  
Channapatna Town,  
Ramanagara Dist.

(R1 by Sri.K.V.M., Adv.)  
(R2 to 6 by Sri.S.N., Adv.)

Respondents

**R.A.34/2013**

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## RESPONDENTS

(R1 by Sri.B.R., Adv.)  
(R2 to 6 by Sri.S.N., Adv.)

Date and Nature of decree of order appealed against	The Judgment & Decree passed in O.S.21/2012 by the Senior Civil Judge & JMFC, Channapatna, dated 01-03-2013		
Date of Institution of the appeal	27-04-2013 (R.A.34/2013)		
Date of Institution of the appeal	10-04-2013 (R.A.25/2013)		
Date of Judgment	28-04-2016		
Duration	Years	Months	Days (R.A.34/13)
	03	00	01
Duration	Years	Months	Days (R.A.25/13)
	03	00	18

## **JUDGMENT**

R.A.25/2013 is an appeal filed by the plaintiff/appellant against the impugned judgment and decree passed in O.S.21/2012 by the Senior Civil Judge & JMFC, Channapatna dated 01-03-2013 as the suit of the plaintiff was decreed ordering that 'B' schedule property has to be allotted to the share of the 1<sup>st</sup> defendant and 2<sup>nd</sup> defendant is permitted to purchase 'B' schedule property if not the plaintiff is entitled for possession of the 'B' schedule property.

2. R.A.34/2013 is filed by the 1<sup>st</sup> defendant(daughter of Yashodamma)/appellant challenging the impugned judgment and decree passed in O.S.21/2012 dated 01-03-2013 by the Senior Civil Judge & JMFC, Channapatna, as the suit of the plaintiff came to be decreed.

3. As both the appeals relate to the same judgment, both appeals are taken together and both the appeals have been heard together and the counsels for the appellants in both the appeals have submitted their common arguments. Hence, I propose to take the two appeals together for discussion so as to decide the two appeals by a common judgment.

4. For the sake of convenience, the parties to this appeal are referred to by their original ranks as stood before the court below.

5. The brief averments of the plaint reads as follows:

O.S.21/2012 is filed by the plaintiff for general partition and separate possession in respect of 'A' schedule property by metes and bounds and to allot eastern  $\frac{1}{2}$  portion in favour of the 1<sup>st</sup> defendant and 'B' schedule property in favour of the plaintiff and also for mesne profits and costs. 'A' schedule property consists of municipal No.2218 situated at Channapatna Town, measuring 100 X 40' which is a vacant site and it was purchased in the year 1948 by one Yashodamma

and her son deceased Srinivasa Murthy. Yashodama is the 1<sup>st</sup> defendant and the 2<sup>nd</sup> defendant is her daughter. The defendant 3 is the wife and the defendants 4 to 7 are the children of the deceased Srinivasa Murthy.

**Note: (However, during the pendency of the proceedings the 1<sup>st</sup> defendant Yashodamma is reported to be dead and her daughter Parvathi who was the 2<sup>nd</sup> defendant in the original plaint is brought as the legal representative of Yashodamma and she is shown as 1<sup>st</sup> defendant in the amended plaint after the death of Yashodamma. So, before the trial court Parvathi is referred as 1<sup>st</sup> defendant because she later came on record as the legal representative of Yashodamma. However, as per original plaint when filed 1<sup>st</sup> defendant was Yashodamma. Therefore, to avoid confusion in their ranks I proposed to refer to them by their names instead of referring as 1<sup>st</sup> and 2<sup>nd</sup> defendant.)**

6. During the lifetime of Srinivasa Murthy he and his mother jointly purchased A schedule property in 1948 from one Sharifabeen. This 'A' schedule property was divided into two portions between Yashodamma and her son Srinivasa Murthy and eastern ½ portion fell to the share of Yashodamma the 1<sup>st</sup> defendant, and the remaining western ½ portion fell to the share of Srinivasa Murthy. As per the division 'A' schedule was mutated in the name of the 1<sup>st</sup> defendant, and the 1<sup>st</sup> defendant after becoming the absolute owner of the eastern portion of 'A'

schedule property has also obtained katha in her name and she has left 4 feet space as common passage, and the remaining 45 X 36' in the said 'B' schedule property has been sold by her in favour of the plaintiff under sale deed dated 20-12-2004. That property sold to the plaintiff is shown in the schedule of the plaint as 'B' schedule. So, katha has been changed to the plaintiff accordingly and the plaintiff also obtained power supply and water connection to the building existing in the 'B' schedule property. As per division the 1<sup>st</sup> defendant and her son enjoyed the property giving eastern portion to the 1<sup>st</sup> defendant and western portion to the deceased Srinivasa Murthy. However, the defendants 3 to 7 by suppressing the sale of property to the plaintiff by the 1<sup>st</sup> defendant, filed O.S.7/2005 for the relief of permanent injunction against this plaintiff and obtained a decree in the year 2006. Since the plaintiff was in possession and enjoyment of 'B' schedule property, defendants 3 to 7 have taken advantage and have obtained decree in O.S.7/2005. Therefore, a cause arose for the plaintiff to file this suit for general partition and separate possession of 'A' schedule property by metes and bounds because the plaintiff has purchased 'B' schedule property and became the lawful owner. Hence, the plaintiff has sought for general partition and separate possession in respect of the 'A' schedule property by metes and bounds and to allot 'B' schedule property in favour of the plaintiff and also to order for mesne profits and costs.

7. On receipt of summons defendants 1 and 2 have filed their written statement through their counsel and likewise defendants 3 to 7 have also filed their written statement which in brief is as follows:

The written statement filed by the defendants 1 and 2 is that the averments of para 3 and 4 is correct, but instead of effecting katha of the eastern  $\frac{1}{2}$  portion of 'A' schedule property measuring east-west: 50', north-south: 40' in the name of the 1<sup>st</sup> defendant, katha has been effected only to an extent of property measuring 45 X 36' and also failed to effect katha in the name of Srinivasa Murthy to an extent of 50X 40' of the western  $\frac{1}{2}$  portion. Out of the share given to the 1<sup>st</sup> defendant in 'A' schedule property she sold 45 X 36' and left 4' space as common passage to have access to 5 X 36' retained by her on the western side. The averments of para 6, 7 and 8 are true and correct and the rough sketch produced by the plaintiff is correct in so far as the 'B' schedule property sold by the 1<sup>st</sup> defendant in favour of the plaintiff. But the sketch does not indicate the land retained by the 1<sup>st</sup> defendant measuring 5X36'. The remaining 40X 50' out of the 'A' schedule property which belonged to Srinivasa Murthy is liable for partition among the LRs of the deceased Srinivasa Murthy. The averments of para 10 to 12 is also correct as there was already division between the defendants of 'A' schedule property. Therefore, it is not correct for the plaintiff to file a suit for general partition of the suit property. The averments of the para

14 and 15 are correct but when already the property has been divided between the 1<sup>st</sup> defendant, and her son there was no cause of action for this suit and the suit is liable to be dismissed. Hence, it is prayed to dismiss the suit in the interest of justice.

8. The written statement of the defendants 3 to 7 in brief is that the averments of para 2 and 3 is admitted but the averments of para 5 to 10 are denied. The averments of para 11 is partially admitted but the averments of para 12, 13 and 14 are denied. The case of these defendants is that the plaintiff has not come to the court with clean hands and has no right of any manner as pleaded in the plaint. The plaintiff is having intention to dispel the defendants 3 to 7 from 'A' schedule property with ulterior motive and by destroying and disturbing the legal rights and the mental peace of the defendants 3 to 7. 'A' schedule property is totally in possession of the 3<sup>rd</sup> defendant and her family, whereas the 1<sup>st</sup> defendant is residing in Mysore relinquishing her rights in 'A' schedule property. The 1<sup>st</sup> defendant had virtually no right to execute a sale deed in favour of the plaintiff. In O.S.7/2005 the court has upheld the rights and ownership and possession of the defendants 3 to 7 over 'A' schedule property. The plaintiff has filed this suit only to grab the suit schedule property and to damage the rights of the defendants 3 to 7. The plaintiff has wrongly pleaded about the division between the 1<sup>st</sup> defendant and her son. There is no

such division of the property between the defendants and there was no right available to the 1<sup>st</sup> defendant on 'A' schedule property or on the eastern portion. So the plaintiff is not entitled for any relief as sought in the plaint and hence it is prayed to dismiss the suit with costs.

9. During the pendency of the proceedings it appears that the plaintiff has amended the plaint and so the defendants 2 to 6 (original defendants 3 to 7) filed additional written statement contending further that there was no partition between Yashodamma and her son Srinivasa Murthy during his lifetime. The suit property was in joint possession till 1993. Srinivasa Murthy passed away in 1991. The 1<sup>st</sup> defendant has left 'A' schedule property in 1995 and settled in Mysore by handing over her right over the properties and by executing the documents for monitory benefit of Rs.1,60,000/-, and so the defendants 3 to 7 have exclusive rights over 'A' schedule property. In order to improve the 'A' schedule property Srinivasa Murthy borrowed loan from KSFC in 1997 by mortgaging 'A' schedule property and due to his untimely death, the defendants 3 to 7 with all the struggle have cleared the loan borrowed from KSFC in 1995 and got mortgage redeemed. So, the plaintiff has no rights over the property or under the alleged transaction. The defendants 2 to 6 are in no way concerned and have no obligation with reference to the sale deed dated 20-12-2004. Since the property is a residential

house the defendants 2 to 6 shall have right of preemption and preferential right. The defendants 2 to 6 specifically want to keep the house property for them and to save the ancestral property with higher values. Therefore, it is prayed to dismiss the suit.

10. During the pendency of the proceedings the 1<sup>st</sup> defendant Yashodamma died and her daughter came as legal representative who is denoted as 1<sup>st</sup> defendant in the amended plaint and she filed her additional written statement contending inter alia that the 1<sup>st</sup> defendant Yashodamma during her lifetime bequeathed her portion of the 'A' schedule in favour of this defendant on 03-09-1999. She sold 'B' schedule property in favour of the plaintiff and original 1<sup>st</sup> defendant Yashodamma died on 29-09-2011 and so in view of the property being bequeathed to this LR who is her daughter, she is entitled for a share out of the property that would be allotted in favour of the 1<sup>st</sup> defendant Yashodamma. Hence, the written statement.

11. In view of the additional written statement been filed, the plaintiff filed rejoinder further contending that it is falsely alleged by the defendants 2 to 6 that late Srinivasa Murthy improved 'A' schedule property solely with his own earned money and scale. But, the true facts are that Srinivasa Murthy was not doing any job and so Yashodamma advised him to do business and assured to provide him financial help. After sanction of loan from KSFC, Srinivasa Murthy did not do the

business but constructed 2 houses behind 'B' schedule property. During the life time of Srinivasa Murthy 'A' schedule property was brought for auction. At that time Yashodamma and Srinivasa Murthy repaid 80% of the loan amount and Srinivasa Murthy died in 1991. In 1995 remaining 20% was repaid by Yashodamma and her daughter the 1<sup>st</sup> defendant. Based on concocted and created documents defendants 2 to 6 have taken a false plea and so the averments of the written statement are denied. Therefore, it is prayed to decree the suit in the interest of justice.

12. Based on the pleadings of the parties the trial court framed the following 7 issues and one addl. Issue for consideration:

1. ವಾದಿ ದಾವಾ (ಬಿ) ಸ್ವತ್ತನ್ನು ದಿಃ 20-12-2004 ರಂದು 1ನೇ ಪ್ರತಿವಾದಿಯಿಂದ ಕ್ರಯಕ್ಕೆ ಕೊಂಡಿರುತ್ತೇನೆ ಎಂಬುದನ್ನು ಸಾಬೀತುಪಡಿಸಿರುತ್ತಾರೆಯೇ?

2. ವಾದಿ ದಾವಾ (ಬಿ) ಅನುಸೂಚಿ ಸ್ವತ್ತನ್ನು 1ನೇ ಪ್ರತಿವಾದಿಯ ಹಿಸ್ಸೆಗೆ ಕೊಡತಕ್ಕದ್ದು ಆ ಮೂಲಕ ಸದರಿ ಸ್ವತ್ತು ತನಗೆ ಸೇರಬೇಕೆಂಬುದನ್ನು ಸಾಬೀತುಪಡಿಸಿರುತ್ತಾರೆಯೇ?

3. ವಾದಿ ಈ ದಾವೆಯಲ್ಲಿ ಕೇಳಿದಂತೆ ದಾವಾ (ಬಿ) ಸ್ವತ್ತಿನ ಸ್ವಾಧೀನತೆಯನ್ನು ಪ್ರತಿವಾದಿಯರಿಂದ ಪಡೆದುಕೊಳ್ಳಲು ಅರ್ಹನಾಗಿರುತ್ತಾನೆ ಎಂಬುದನ್ನು ಸಾಬೀತುಪಡಿಸಿರುತ್ತಾರೆಯೇ?

4. ವಾದಿ ಈ ದಾವೆಯಲ್ಲಿ ಕೇಳಿದಂತೆ ಮಧ್ಯಕಾಲಿನ ಲಾಭ ಪಡೆದುಕೊಳ್ಳಲು ಅರ್ಹರೇ?

5. 3ನೇ ಪ್ರತಿವಾದಿ ಲಿಖಿತ ಹೇಳಿಕೆಯಲ್ಲಿ ತಿಳಿಸಿದಂತೆ 1ನೇ ಪ್ರತಿವಾದಿಗೆ ದಾವಾ (ಎ) ಸ್ವತ್ತಿನಲ್ಲಿ ಯಾವುದೇ ಹಕ್ಕು ಇಲ್ಲ ಅದರಿಂದ ಆಕೆಗೆ ವಾದಿಗೆ ದಾವಾ (ಬಿ) ಸ್ವತ್ತಿನ ಬಗ್ಗೆ ಕ್ರಯಪತ್ರ ಬರೆದುಕೊಡಲು ಬಾರದು ಅದರಿಂದ ವಾದಿಗೆ ಸ್ವತ್ತಿನಲ್ಲಿ ಯಾವುದೇ ಹಕ್ಕು ಹಿತಾಸಕ್ತಿ ಪಡೆದುಕೊಂಡಿಲ್ಲ ಎಂಬುದನ್ನು ಸಾಬೀತುಪಡಿಸಿರುತ್ತಾರೆಯೇ?

6. ವಾದಿ ಈ ದಾವೆಯಲ್ಲಿ ಕೇಳಿದಂತೆ ಪರಿಹಾರ ಪಡೆದುಕೊಳ್ಳಲು ಅರ್ಹನೇ?

7. ಯಾವ ಆದೇಶ ಅಥವಾ ಡಿಕ್ರಿ?

### **ADDITIONAL ISSUE:**

1. Whether the defendant No.1(a) proves the will dated 03-09-1999?

13. After framing of issues the case has been posted for evidence and plaintiff got himself examined as PW1 and got marked Ex.P1 to P17. On the other hand, the 1<sup>st</sup> defendant is examined as DW1, 3<sup>rd</sup> defendant as DW2, 1<sup>st</sup> defendant's daughter D1(a) is examined as DW3 and the witness to the Will as DW4 and Ex.D1 to D21 have been marked.

14. On considering the evidence, the documents and the materials placed on record, the trial court proceeded to answer the issue No.1 in the affirmative and addl. Issue No.1 in the affirmative, issue No.4 in the negative, issue No.2, 3 and 6 accordingly as discussed in the judgment and issue No.5 partly in the affirmative and in the result has proceeded to decree the

suit of the plaintiff ordering that 'B' schedule property be allotted to the 1<sup>st</sup> defendant through final decree proceedings and permitting the 2<sup>nd</sup> defendant to purchase 'B' schedule property at the market rate if not the plaintiff is entitled for possession of the 'B' schedule property. Further the defendant 1(a) is held to be entitled for the property bequeathed to her by means of a Will dated 03-09-1999 and accordingly ordered to draw preliminary decree.

15. Highly aggrieved by the impugned judgment and decree passed by the learned trial judge the plaintiff/appellant has filed R.A.25/2013 and the grounds of appeal are as follows:

The impugned judgment and decree passed by the court below are illegal and incorrect and opposed to law. The 2<sup>nd</sup> defendant in her cross examination admitted that the suit property is self acquired property of Yashodamma and her son Srinivasa Murthy, and hence the provisions of the partition act do not apply to the case on hand. Same has not been considered by the learned trial judge and hence the judgment requires modification. It is clear by the evidence that the defendants were aware of the fact of division of 'A' schedule property which they did not challenge. In the evidence it is very clear that the defendants were aware of the division in the family. But the suit decreed in part would make it clear that, before plaintiff purchased 'B' schedule property there was a partition in the family and hence the impugned judgment and

decree passed by the trial court requires modification and suit of the plaintiff has to be decreed in toto. The trial court though noticed that the defendants have contended that they are in possession of 3 houses situated in the 'A' schedule property and the katha and the other documents and also the suit O.S.7/2005 being decreed would clearly show that 'A' schedule property was divided and therefore the suit of the plaintiff had to be decreed in its entirety. The defendants 2 to 6 had filed application u/s 3 and 4 of the partition act and Section 44 of T.P. Act and the appellant has contended that the application is not maintainable because there is already a division in respect of the A schedule property. The trial court has not referred to the case laws and has not distinguishing the same. Hence the order passed by the trial court requires interference but there is no proper appreciation of the oral and documentary evidence by the learned trial judge and the judgment and decree passed by the court below are not based on judicial reasoning. Viewed from any angle the judgment of the trial court is not sustainable and hence it is prayed to allow the appeal and accordingly to modify the judgment and the decree passed in O.S.21/2012 and to decree the suit of the appellant/plaintiff as prayed for general partition and to grant such other reliefs by allowing the appeal.

16. The 2<sup>nd</sup> defendant Parvathi (1<sup>st</sup> defendant after amendment) of the original suit O.S.21/2012 filed R.A.34/2013

challenging the impugned judgment and decree and the grounds of appeal are as follows:

The judgment and decree passed by the court below are completely illegal and incorrect, they are opposed to law of facts and circumstances of the case. It is contrary to the case put-forth by the parties and the evidence. This appellant was examined as DW3 in the case has specifically requested the trial court to permit her to purchase 'B' schedule property if plaintiff is willing to sell the same. But the trial court has not considered her request and without observation or any reasons, permitted the 2<sup>nd</sup> defendant to purchase B schedule property and therefore the impugned judgment and decree requires modification. The 1<sup>st</sup> defendant had filed O.S.491/2007 praying 7/12<sup>th</sup> share in the property of her son deceased Srinivasa Murthy and the suit came to be decreed. In view of the execution of the Will by Yashodamma, the 1<sup>st</sup> defendant this appellant will get more share than the respondents 2 to 6 and therefore preference should be given to this appellant to purchase 'B' schedule property.

17. The defendants 2 to 6 filed application u/s 4 of partition act and Section 44 of T.P., Act and this appellant has orally opposed to the application because such application ought to have been filed in FDP proceedings. So, the trial court allowing the application is contrary to the judgment of the Hon'ble High Court of Karnataka. But the trial court has permitted only

respondents 2 to 6 to purchase the 'B' schedule property which calls for interference in this appeal. The judgment and decree passed is not based on the proper appreciation of oral and documentary evidence and it is not based on the judicial reasoning. Therefore, it is prayed to allow the appeal and to modify the impugned judgment and decree dated 01-03-2013 passed in O.S.21/2012 and permit the appellant to purchase 'B' schedule property and to grant such other reliefs in the interest of justice.

18. The lower court records are made available and I have perused the same. I have also perused the written arguments of the learned counsel Sri.K.V.M., for the Appellants in R.A.34/2013 and heard the oral arguments addressed by Sri.S.N., for the respondents 2 to 6 in both the appeals and Sri.B.R., for the appellant in R.A.25/2013 and Sri.K.V.M., for 1<sup>st</sup> respondent.

19. Upon considering the evidence and the materials on record and also on hearing the arguments of both sides, the points that arise for determination in both the appeals are:

- 1) Whether the appellant in R.A.25/2013 has made out grounds to condone the delay of 5 days caused in filing the appeal?

2) Whether the plaintiff proved that 'A' schedule property was partitioned between Yashodamma and her son deceased Srinivasa Murthy?

3) Whether the plaintiff has proved that he has purchased the suit property from Yashodamma under a registered sale deed dated 20-12-2004?

4) Whether the impugned judgment and decree passed by the trial court is erroneous, perverse, capricious and arbitrary?

5) Whether the findings recorded by the trial court are not sustainable in the eye of law and on facts of the case?

6) Whether there are reasonable and sufficient grounds to interfere with the findings recorded by the lower court?

7) To what order?

20. My findings to the above points are:

Point No.1: Affirmatively to the appellant

Point No.2: Negatively to the plaintiff

Point No.3: Affirmatively to the plaintiff

Point No.4, 5 and 6: Affirmatively to the appellant in  
both the appeals

Point No.7: As per the final order for the following

## **REASONS**

**21. Point No.1:** In R.A.34/2013 the appellant has filed application u/s 5 of Limitation Act to condone the delay of 19 days caused in filing the appeal. On 06-02-2016 this suit has condone the delay on payment of costs. However, on perusal of R.A.25/2013 the appellant has filed application u/s 5 of Limitation Act with a prayer to condone the delay of 5 days in filing this appeal. That application has not been allowed at any time during the pendency of the appeal. In the annexed affidavit the plaintiff as appellant contends that he filed the suit for general partition and separate possession of 'A' schedule property and also for mesne profits and costs. As he is working in KSRTC and his nature of duty is to collect the cheques and amounts all over the state, he was busy in the month of March on official duty as it was year ending accounts. Therefore, he could not contact his counsel and give instructions to file the appeal. There is a good case to succeed on merits and therefore he prays to condone the delay and if the application is not allowed greater loss and injustice would be caused to the appellant and hence it is prayed to allow this application and to condone the delay.

22. To this application the respondents have not filed any objections. I have perused the main appeal, the grounds urged therein and also the impugned judgment and decree. Considering the grounds urged by the appellant and the

reasons assigned therein, I am of the opinion that the delay of 5 days caused in filing the appeal if condoned, it would meet the ends of justice and would also definitely serve the purpose because the decision on the merits of the appeal can be given and that would meet the ends of justice. But if the delay is not condoned the appeal will have to be dismissed and it would cause irreparable loss and injury to the appellant which can never be compensated in terms of money. Therefore, I find that the delay if condoned in the present set of facts and if a decision on the merits of the appeal is ordered, it would serve the purpose of the appellant in filing the appeal and more so when no objections are filed by the respondents. Therefore, the delay caused in filing the appeal is to be condoned and the application filed u/s 5 of the Limitation Act has to be allowed. Accordingly, the delay in filing the appeal is condoned and I answer point No.1 in the affirmative.

**23. Point No.2 to 6:** On considering the pleadings of the parties and the case pleaded by them, before deciding whether the judgment of the trial judge is erroneous or capricious or whether it is according to law, this court has to decide the 2 main points in dispute which has been affirmed by one party and denied by the other. This court while raising the points has taken the 2<sup>nd</sup> point as it requires to be decided as to whether there was a division of the 'A' schedule property between the 1<sup>st</sup> defendant Yashodamma and her son deceased Srinivasa

Murthy. Similarly, under the third point, the court has to also decide whether 'B' schedule property being a portion of 'A' schedule property, has been sold by the 1<sup>st</sup> defendant being eastern ½ portion allotted to her share. So, only after deciding these two points the court can decide the 2 appeals and also give a finding about impugned judgment and decree passed by the learned trial judge. Therefore, I have raised those two points for determination according to the pleadings of the parties and those points are raised as point No.2 and 3 for both the appeals. Point No.4 and 5 follows the findings on the point No.2 and 3. Therefore, I have taken all these 4 points for determination at a single discussion.

24. The admitted facts of this case are the relationship of the defendants 1 to 7 with the deceased Srinivasa Murthy. It is also admitted that 'A' schedule property was purchased by the 1<sup>st</sup> defendant Yashodamma and her son Srinivasa Murthy jointly under a registered sale deed. These two points are admitted by the plaintiff as well as all the defendants to the case. According to the plaintiff 'B' schedule property fell to the share of the 1<sup>st</sup> defendant Yashodamma in a partition and she in turn sold it to the plaintiff under the sale deed of 2004 and that sale in favour of the plaintiff is admitted by the 1<sup>st</sup> defendant in her written statement but the defendants 3 to 7 being the legal representatives of Srinivasa Murthy have not admitted the sale in favour of the plaintiff and they have also not admitted the

division of 'A' schedule property between Yashodamma and her son Srinivasa Murthy.

25. So, to establish the case pleaded by him, the plaintiff got himself examined as PW1 and he has got marked documents Ex.P1 to P17. On the other hand, the 1<sup>st</sup> defendant was examined as DW1 and the 3<sup>rd</sup> defendant as DW2 and DW3 was the 2<sup>nd</sup> defendant of the suit and also LR of deceased 1<sup>st</sup> defendant who died during the pendency of the proceedings, DW4 is a witness to the Will. The documents marked for the defendants is Ex.D1 to D21. The plaintiff as PW1 when examined reiterated the plaint allegations and deposed that the suit schedule property shown in schedule 'A' measuring 100 X 40' bearing municipal No.2218 of Channapatna town was purchased by the 1<sup>st</sup> defendant Yashodamma and her son Srinivasa Murthy under a sale deed dated 31-01-1948 and to substantiate this oral evidence he has got marked document Ex.P1. None of the defendants have disputed the joint purchase of the suit property shown in 'A' schedule and the documentary evidence Ex.P1 which is the certified copy of the sale deed dated 31-01-1948 has been produced by the plaintiff which clearly indicates that one Sharifabeen has sold the suit schedule 'A' property measuring 100 X 40' in favour of the 1<sup>st</sup> defendant Yashodamma and Srinivasa Murthy her son. In fact, the defendants have produced the original sale deed of 31-01-1948 which is marked as 'D' series and Ex.D1 in the case. So, Ex.D1

and P1 would completely prove the purchase of the suit schedule property in the name of Yashodamma and her son Srinivasa Murthy jointly way back in the year 1948.

26. So, the vital issue of the case is whether there was a division of 'A' schedule property between Yashodamma and her son Srinivasa Murthy as contended by the plaintiff and as now to be determined by the oral and the documentary evidence. PW1 in his evidence has stated that between Yashodamma and her son Srinivasa Murthy, there was a division and eastern  $\frac{1}{2}$  portion fell to the share of Yashodamma and western  $\frac{1}{2}$  portion fell to the share of Srinivasa Murthy and his family. So, eastern  $\frac{1}{2}$  portion was mutated in the name of the 1<sup>st</sup> defendant, and she became the absolute owner of eastern  $\frac{1}{2}$  portion. It is his evidence that the 1<sup>st</sup> defendant obtained katha in her name for the said  $\frac{1}{2}$  portion in eastern side and retained 4' common space and sold the remaining 45 X 36' to this plaintiff under sale deed 20-12-2004.

27. Before decide regarding the sale in favour of the plaintiff the court has to now determine whether eastern  $\frac{1}{2}$  and western  $\frac{1}{2}$  as stated by PW1 was the division between Yashodamma and Srinivasa Murthy with reference to 'A' schedule property. But, in the cross examination a question is posed to PW1 as to when such division has been effected between the 1<sup>st</sup> defendant Yashodamma and the remaining defendants, for which PW1

gives an answer that he does not know. He also gives explanation that based on the katha and the registered documents there was division of the eastern and western ½ portion of 'A' schedule property between Yashodamma and her son. He also claims to have produced those documents before the court. He has been specific in deposing that in the registered document of the 1<sup>st</sup> defendant Yashodamma, there was a clear recital of the absolute rights to the 1<sup>st</sup> defendant over the said property. Further it is questioned to him as to whether he can give the exact date as to when the property was partitioned between Yashodamma and Srinivasa Murthy and his answer is that he does not remember and he also deposed that he has not produced any document regarding that partition between the 1<sup>st</sup> defendant and Srinivasa Murthy. His evidence in Kannada on the point needs to be extracted hereinafter:

“ 1ನೇ ಪ್ರತಿವಾದಿ ಮತ್ತು ಇತರೆ ಪ್ರತಿವಾದಿಯರ ನಡುವೆ ಯಾವಾಗ ವಿಭಾಗ ಆಗಿತ್ತು ಎಂದರೆ ಆ ಬಗ್ಗೆ ನನಗೆ ಗೊತ್ತಿಲ್ಲ ಅಂತ ನುಡಿಯುತ್ತಾರೆ. ....  
 .....  
 ಯಶೋಧಮ್ಮ ಮಾಡಿಕೊಂಡಿದ್ದ ನೋಂದಾಯಿತ ಪತ್ರದಲ್ಲಿ ಸ್ವತ್ತಿನಲ್ಲಿ ಆಕೆಗೆ ಮಾತ್ರ ಪೂರ್ಣ ಹಕ್ಕು ಇತ್ತು ಅಂತ ನುಡಿದಿರುತ್ತಾರೆ. ....  
 ..... ಪ್ರತಿವಾದಿ 1 ಮತ್ತು ಶ್ರೀನಿವಾಸಮೂರ್ತಿ ಅಂದರೆ ಪ್ರತಿವಾದಿಯ ಮಗ ಇವರ ನಡುವೆ ಯಾವಾಗ ವಿಭಾಗ ಆಗಿತ್ತು ಎಂಬುವುದು ನನಗೆ ನೆನಪಿಲ್ಲ. ವಿಭಾಗ ಆದ ಬಗ್ಗೆ ಯಾವ ದಾಖಲೆಯನ್ನು ನ್ಯಾಯಾಲಯಕ್ಕೆ ಹಾಜರುಪಡಿಸಿಲ್ಲ.”

28. So, by reading the above version elicited in the cross examination of PW1 the oral evidence of PW1 and his pleadings as stated in the plaint regarding the partition of 'A' schedule property between Yashodamma and her son Srinivasa Murthy is not supported by any documents and it is also not deposed as to when exactly such division was made and on which date etc. No such details are forth-coming in the evidence of PW1. So, when such is the evidence of PW1 and he gives evidence without any documents and also when he pleads ignorance, a question would arise as to how he has stated in para 4 of the plaint that there was a division between Yashodamma and Srinivasa Murthy giving eastern  $\frac{1}{2}$  to Yashodamma and western  $\frac{1}{2}$  to Srinivasa Murthy. So, in every para in his plaint he makes a reference to the alleged partition or division of 'A' schedule property between Yashodamma and Srinivasa Murthy but which is not at all supported by any documents as such.

29. Now, I would like to refer to the documents produced by the plaintiff to find out whether such a division is found in any of those documents to support the contentions of the plaintiff. Ex.P2 is the endorsement issued in the name of the 1<sup>st</sup> defendant Yashodamma by the municipal office showing her name to the suit schedule property to an extent of 45 X 40'. But under what circumstance such endorsement has been issued and how the name of the 1<sup>st</sup> defendant came to entered to a property measuring 45 X 40' is the material question that has

to be now considered and based on the endorsement the court cannot come to any conclusion to hold that there was a division or partition between the 1<sup>st</sup> defendant and her son Srinivasa Murthy.

30. Ex.P3 is the tax assessment extract for the year 1996-97 to 2004-05 which reads about the joint name of the 1<sup>st</sup> defendant Yashodamma and her daughter-in-law who is the wife of Srinivasa Murthy. But specific measurement being entered in the name of Yashodamma and Shamanthamani wife of deceased Srinivasa Murthy though finds a place in this document, it does not make a reference to any partition or division and no such document has been referred, to make an entry as found in Ex.P3. Ex.P4 to P7 are all the tax challans which does not answer the question now before the court regarding the partition or division. All the documents produced by the plaintiff marked as Ex.P8 to P17 also do not refer to any such partition or division between Yashodamma and her son Srinivasa Murthy. So, when actually such division has occurred and when eastern  $\frac{1}{2}$  and western  $\frac{1}{2}$  as shown in the rough sketch, was purchased by the plaintiff is not evidenced by any documentary evidence. So, by the oral evidence of PW1 and the documents it does not establish the claim of the plaintiff that there was any division between Yashodamma and her son Srinivasa Murthy dividing 'A' schedule property giving eastern  $\frac{1}{2}$  to Yashodama and western  $\frac{1}{2}$  to Srinivasa Murthy. So, the

plaintiff has miserably failed to prove either by documentary evidence or by oral evidence on the point regarding the partition or division of 'A' schedule property between Yashodamma and her son Srinivasa Murthy.

31. Now, I would like to go to the evidence of DW1 the 1<sup>st</sup> defendant who has been examined in this case. She has filed written statement and admitting that there was a partition between herself and her son Srinivasa Murthy and claims that eastern ½ portion was given to her and western ½ portion was given to Srinivasa Murthy. In the evidence also DW1 has deposed that after purchase of 'A' schedule property under sale deed dated 31-01-1948, she claims that there was some misunderstanding between DW1 and her daughter-in-law and therefore her son Srinivasa Murthy during his life time, divided the suit property between Yashodamma and Srinivasa Murthy giving eastern ½ to Yashodamma and western ½ to Srinivasa Murthy and there after katha was effected accordingly and so she claims to have sold eastern ½ portion in favour of the plaintiff under registered sale deed of 2004.

32. In her cross examination truth has been elicited because when a question is posed to her as to whether there is any document to evidence the partition of 'A' schedule property between herself and her son, she claims that there are documents. It is suggested to her that no such document has

been produced which she has denied. So, though she denies the suggestion and claims that there is a document she is not aware whether such a deed of partition was registered before the Sub-Registrar office. She is also is not able to recollect when and where such division took place. However, in her further cross examination she also deposed that there is no such division as stated in her evidence. But on perusal of all the katha and tax assessment extracts marked by the plaintiff as Ex.P2 to P16 they are all dated 2004 and subsequent to that date but according to DW1 if there was division or partition between herself and her son Srinivasa Murthy during the life time of Srinivasa Murthy, katha and other documents should have been effected in the name of the 1<sup>st</sup> defendant prior to the death of Srinivasa Murthy. Admittedly Srinivasa Murthy died on 16-12-1991. So, before that date if there was a division of 'A' schedule property between the 1<sup>st</sup> defendant and her son there should have been documents before that date or prior to the death of Srinivasa Murthy being in 1991. So, from looking to the entire evidence on record even on considering the documents exhibited by both the parties it is very clear that there is no single document which would reflect the alleged partition or division between the 1<sup>st</sup> defendant and her son Srinivasa Murthy. The evidence of DW1 in her cross examination needs to be extracted.

“ ನನ್ನ ಮಗ ಮತ್ತು ನನ್ನ ನಡುವೆ ವಿಭಾಗ ಆಗಿತ್ತು ಎಂದು ತೋರಿಸಲು ದಾಖಲೆಗಳನ್ನು ನ್ಯಾಯಾಲಯಕ್ಕೆ ಕೊಟ್ಟಿದ್ದೇನೆ. ಅಂತಹ ಯಾವುದೇ ದಾಖಲೆಯನ್ನು ನ್ಯಾಯಾಲಯಕ್ಕೆ

ಹಾಜರುಪಡಿಸಿಲ್ಲ ಎಂದರೆ ಸರಿಯಲ್ಲ. ಆ ವಿಭಾಗ ಪತ್ರವನ್ನು ಉಪ-ನೋಂದಣಾಧಿಕಾರಿಗಳ ಸಮಕ್ಷಮ ನೋಂದಾಯಿಸಲಾಗಿದೆ ಎಂದರೆ ಜ್ಞಾಪಕವಿಲ್ಲ. ಯಾವ ವರ್ಷದಲ್ಲಿ ನನ್ನ ಮತ್ತು ನನ್ನ ಮಗನ ನಡುವೆ ವಿಭಾಗ ಯಾವಾಗ ಆಗಿತ್ತು ಎಂದು ಹೇಳಲು ಜ್ಞಾಪಕವಿಲ್ಲ.  
 .....  
 ..... ನನ್ನ ಪ್ರಮಾಣಪತ್ರದಲ್ಲಿ ನನ್ನ ಮಗ ಶ್ರೀನಿವಾಸಮೂರ್ತಿ ಜೀವಂತವಾಗಿದ್ದಾಗ ವಿಭಾಗ ಆಗಿತ್ತು ಎಂದು ಬರೆಸಿರುವುದಿಲ್ಲ. ಆ ರೀತಿ ಯಾವುದೇ ವಿಭಾಗ ಆಗಿಲ್ಲ.”

33. The wife of Srinivasa Murthy is examined as DW2 in this case who has specifically denied the partition and division of ‘A’ schedule property between Yashodamma and her son and it is her evidence that there is no such division as alleged by the plaintiff. Even in the cross examination when it is suggested to her about the division she has specifically denied that there is no division.

“ ನನ್ನ ಗಂಡ ಮತ್ತು ಯಶೋಧಮ್ಮ ಜೀವಂತ ಇದ್ದ ಸಮಯದಲ್ಲಿ ದಾವಾ ಆಸ್ತಿಯನ್ನು ಭಾಗ ಮಾಡಿಕೊಂಡಿದ್ದರು ಎಂದರೆ ಸರಿಯಲ್ಲ.”

34. Truth of the case has come out in the evidence of DW3 who is the 2<sup>nd</sup> defendant of the suit who was later made as D1(a) because her mother the 1<sup>st</sup> defendant died during the pendency of the suit. She being the daughter of the 1<sup>st</sup> defendant is the best person to give evidence on the point regarding the alleged division or partition between her mother and her brother with reference to ‘A’ schedule property. In the entire chief examination she has not whispered a single word about the partition or division of ‘A’ schedule property. So, her

cross examination needs a reference which would speak the truth of the case.

35. A question is posed to her in the cross examination regarding the alleged partition between her mother and her brother that is Yashodamma and Srinivasa Murthy. For that question in her cross examination she has stated that she does not know about any partition between her mother and her brother. Her evidence in Kannada reads as follows:

“ನನ್ನ ತಾಯಿ ಮತ್ತು ನನ್ನ ಅಣ್ಣನ ನಡುವೆ ಭಾಗವಾಗಿದ್ದ ಬಗ್ಗೆ ನನಗೆ ಗೊತ್ತಿಲ್ಲ.”

36. So, if this evidence of DW3 is perused wherein her chief examination is completely silent about the alleged partition or division of 'A' schedule property between her mother and her brother. Her cross examination is no better than her chief examination because even when a question is posed to her about the partition, she has deposed that she does not know and therefore an inference can be drawn that because there was no division or partition of 'A' schedule property, DW3 was not able to give any explanation on that point either in her chief examination or in her cross examination. She being the family member and daughter of the 1<sup>st</sup> defendant Yashodamma, would be the best person to know about the entire affairs of the family and such transactions would have been in her knowledge definitely if there was a partition as stated by the plaintiff.

37. Out of the documents exhibited by the defendants Ex.D1 to D21 there is no document which can support the version of the plaintiff or the 1<sup>st</sup> defendant in proving the alleged partition or division of 'A' schedule property between Yashodama and her son Srinivasa Murthy. So, the second point raised in this appeal will have to be answered in the negative holding that the plaintiff has failed to establish that there was a partition of 'A' schedule property or it was divided between the 1<sup>st</sup> defendant Yashodamma and her son Srinivsa Murthy giving the eastern ½ portion to the 1<sup>st</sup> defendant and western ½ portion to Srinivasa Murthy.

38. No doubt, for the reasons discussed herein before it is very clear that there was no division of 'A' schedule property between Yashodamma on one side and her son Srinivasa Murthy on the other. However, to answer 3<sup>rd</sup> point raised in this appeal the court should also determine whether the claim of the plaintiff that the 'B' schedule property being a portion of 'A' schedule property was sold by Yashodamma the 1<sup>st</sup> defendant under a registered sale deed. In fact, in the written statement filed by the defendants 1 and 2 she has clearly admitted about the sale in favour of the plaintiff and that has been averred in her written statement. It is only the defendants 3 to 7 who are the LRs of Srinivasa Murthy have disputed the sale of 'B' schedule property and took a contention that the 1<sup>st</sup> defendant had no right over the eastern portion exclusively and therefore

she had no right to execute the sale deed in favour of the plaintiff.

39. But the plaintiff when adduced evidence, deposed on the point that the 1<sup>st</sup> defendant Yashodamma executed a sale deed dated 20-12-2004 and sold 'B' schedule property in favour of this plaintiff. He has also deposed that after the sale he has obtained katha and has paid electricity and water charges and claims that the tax of 'B' schedule property is also paid by this plaintiff and he has therefore sought for the relief as in the plaint to allot eastern ½ portion that is 'B' schedule property in favour of this plaintiff. To substantiate his oral evidence there are certain documents produced by him regarding the sale transaction. Ex.P8 is the original sale deed executed by the 1<sup>st</sup> defendant Yashodamma in favour of the plaintiff and she has sold the 'B' schedule property for a sum of Rs.4,38,000/- in favour of the plaintiff. The property shown in the sale deed as per schedule is the property that has been shown in the plaint described as 'B' schedule measuring 45 X 36'. So, under this document the plaintiff is claiming a right over 'B' schedule property. No doubt, in the document Ex.P8 the vendor Yashodamma has mentioned that by excluding the portion or share of co-owner Srinivasa Murthy and his legal representatives, the remaining portion is sold to the plaintiff under this document Ex.P8. No where in the document Ex.P8 the vendor Yashodama made any reference to any kind of

division of A schedule property between herself and her son Srinivasa Murthy, though 'A' schedule property was purchased jointly by her son and Yashodamma. Till the sale of 'B' schedule property the 1<sup>st</sup> defendant Yashodamma has paid the tax to the property shown in the plaint and those tax challans are marked as Ex.P4 to P7. The EC marked as Ex.P9 would support the claim of the plaintiff because as per encumbrance the transaction between the 1<sup>st</sup> defendant and the plaintiff under sale deed Ex.P8 is found in EC for a period from 2004 to 2006 for the said property and that is reflected in Ex.P9.

40. The claim of the plaintiff is also supported by the another important document Ex.P10 which is a loan document issued by his office which clearly indicates that the plaintiff being employee of KSRTC has obtained advance from provident fund and the amount borrowed by him is Rs.1,00,000/-. The purpose clearly mentioned in the said document is for the purchase of a house or in Kannada “ಮನೆ ಖರೀದಿಗಾಗಿ”. This document is dated 16-11-2004 when the advance has been given to him by the department and this date corroborates to the sale deed under Ex.P8 which is dated 20-12-2004. So, the loan document Ex.P10 is just 4 days prior to the registration of the sale deed and it corroborates to the claim of the plaintiff that he has purchase the suit property.

41. Further the plaintiff has produced Ex.P11 which also goes to show that the plaintiff's name is entered to the extent of 'B' schedule property after he purchased the suit property from Yashodamma for the year 2004-05 and his name has been entered in the municipal records or in the tax assessment extract. Ex.P12 is another document which also corroborates the other documents of the plaintiff because in 2006 he has given an application to BESCO and has got the RR number for the said property transferred from the name of Yashodamma to the name of the plaintiff. Ex.P13 is the bills issued by the BESCO also in the name of the plaintiff for the year 2006 and Ex.P14 and P15 refer to tax challans for having paid the tax to the municipal No.2218 by the plaintiff. Ex.P16 is the water tax also again relating to municipal, No.2218.

42. Ex.P17 is the order sheet of O.S.7/2005 in which the defendants 3 to 7 herein have filed a suit for permanent injunction against the plaintiff herein, with reference to the same property. Holding that the plaintiffs have made out a case, their suit for injunction has been decreed on 12-12-2006 restraining the defendant from causing interference to the plaintiff till they are evicted under due process of law. So, by all the documents now referred it is very clear that the 1<sup>st</sup> defendant has sold 'B' schedule property in favour of the plaintiff under a registered sale deed and consequent to the registered sale deed, plaintiff has got some more documents in

his name which corroborate the sale transaction.

43. Moreover, the defendants 1 and 2 when filed written statement have not disputed the sale deed and the transaction but rather have clearly admitted the same. Even otherwise, the 1<sup>st</sup> defendant also gave oral evidence which is very much in support of the plaintiff to the extent of the sale of the suit property under a registered sale deed. DW1 the 1<sup>st</sup> defendant has clearly stated that she has sold to the plaintiff 'B' schedule property under registered sale deed measuring 45 X 36' and she has also stated that katha is made in the name of the plaintiff and he is in possession. Even in the cross examination DW1 has very specifically deposed that any transaction done by her and any sale deed executed by her is only with reference to the plaintiff which would support the claim of the plaintiff with reference to the sale deed. Her daughter who is examined in this case as DW3 has spoken in corroboration to the claim of the plaintiff with reference to the sale deed dated 20-12-2004 executed by DW1 who is the mother of DW3.

44. On looking to the document exhibited by the defendants the judgment of O.S.7/2005 marked as Ex.D19 it would clearly go to show that in that suit the court has held that the plaintiff herein who was the defendant has purchased the property under 'B' schedule shown in the suit and held that the 1<sup>st</sup> defendant herein who was the vendor in that suit has executed

a sale deed but because possession was with the defendants 3 to 7 herein who were the plaintiffs of that suit, suit for permanent injunction has been decreed. So, by looking to the entire materials now placed on record and also the documents which I have referred during my discussion earlier, it is very clear that the 'B' schedule property has been sold by the 1<sup>st</sup> defendant Yashodamma under a registered sale deed and consecutive entries like EC, tax assessment, documents of BESCO and documents of water tax are all found in the name of the plaintiff.

45. So, though there was no division or partition between the 1<sup>st</sup> defendant Yashodama and her son Srinivasa Murthy, however, she has sold a portion of 'A' schedule property measuring 45 X 36' in favour of the plaintiff that too under a registered sale deed. So, various documents including the registered sale deed speak about the transaction following the registered sale deed and those documents cannot be termed as concocted or cooked up documents and no such defence is also taken by the defendants seriously. Even otherwise, when the 1<sup>st</sup> defendant the vendor admits the sale in favour of the plaintiff it is needless to contend by the defendants 3 to 7 that the sale in favour of the plaintiff would not give any rights to the plaintiff. So, I hold that though there was no partition or division between Srinivasa Murthy and Yashodama literally with reference to 'A' schedule property jointly purchased by them,

still it is the 1<sup>st</sup> defendant Yashodamma who has sold 'B' schedule property which is portion of 'A' schedule property under registered sale deed in the year 2004 which is subsequent to the death of Srinivasa Murthy. So, the LRs of Srinivasa Murthy are not the executants for the sale deed Ex.P8 along with the 1<sup>st</sup> defendant Yashodamma but she alone has executed the sale deed to the plaintiff. Therefore, the plaintiff has proved point No.3 and the same has to be answered in the affirmative.

46. Now, with this background the court has to determine point No.4 and 5 as to whether the findings and the reasons given by the learned trial judge and the suit being decreed giving 'B' schedule property to the 1<sup>st</sup> defendant and permitting the 2<sup>nd</sup> defendant to purchase the 'B' schedule property is an order which is erroneous or illegal. Therefore, the court has to now decide on these two points by looking to the evidence and the documents placed on record.

47. In view of the findings on point No.2 and 3 it is clear that though the 'A' schedule property was not partitioned or divided between Yashodamma and her son Srinivasa Murthy still Yashodamma has sold her undivided right in the 'A' schedule in favour of the plaintiff. The relief sought by the plaintiff in the suit was for a general partition to allot eastern ½ portion in 'A' schedule to the 1<sup>st</sup> defendant Yashodamma and 'B' schedule

property in favour of the plaintiff.

48. On perusal of the judgment of the trial court it also gave a similar finding regarding point No.2 and 3 raised by me in this appeal and held that there was no division of 'A' schedule property between Yashodamma and her son and also held that 'B' schedule property was sold to plaintiff by Yashodamma. But, while discussing the remaining facts of the case and while determining the relief's in favour of the parties the trial court has failed to consider certain points which were vital to the case. It is to be noted that in O.S.21/2012 the legal representatives of Srinivasa Murthy being defendants 3 to 7 (later defendants 2 to 6) had filed an application under Section 4 of partition Act and Section 44 of T.P. Act, specifically praying that they are ready to pay jointly the amount for the undivided share of schedule property dwelling house and to retain the possession since transferee is a stranger and not a member of the family. Therefore, the application has been filed for determining the value of the schedule property and to permit the defendants 2 to 6 to purchase the property from the plaintiff by making the payment of the amount. That application has been objected by the plaintiff by filing his statement of objections. In its judgment the learned magistrate in para 10 (j) discussed on I.A.7 filed under Section 4 of the partition Act and Section 44 of T.P. Act and has also allowed I.A.7 permitting the defendant 2 to purchase the B schedule

property at the market price. In the result, the learned trial judge has passed the final order in its judgment which is clear to indicate that the prayer of the defendants 2 to 6 has been allowed as sought under I.A.7.

49. But first of all the learned trial judge has committed a serious error by not framing an issue on the point regarding Section 4 of the Partition Act and Section 44 of T.P. Act. In fact, in the addl. written statement filed by the defendants 2 to 6 dated 23-06-2012 have pleaded in para 17 and 18 of their written statement that the plaintiff has no right against defendants 2 to 6 because the property is a residential house and defendants 2 to 6 have right of pre-emption and preferential right. They have contended in the written statement that the defendants 2 to 6 intend to keep and save the ancestral property as their exclusive property and ready to contribute the amount to the plaintiff as an equitable relief. But they are not ready to part with the 'A' schedule property. So, when such was the addl. written statement filed by defendants 2 to 6 the learned trial judge ought to have framed an issue relating to the defence taken in the written statement in para 17 & 18 which corresponds also to the prayer made under I.A.7.

50. Another point that has been noticed by me in the judgment and the learned trial judge is on issue No.2. Though,

issue No.2 has been framed by the trial court and it is taken for discussion in para 10, no specific findings are given on the issue No.2. Similarly, the learned counsel for the appellant in R.A.25/2013 Sri.B.R., submitted that issue No.5 is framed on the defence taken in the written statement. But, while determining issue No.5 the learned trial judge has based its finding on Section 44 of T.P. Act and Section 4 of Partition Act. This is the arguments addressed by the learned counsel. I have gone through the entire judgment of the trial court which clearly indicates that specific findings on issue No.5 has not been given at all by the learned trial judge and no proper findings are given under issue No.5. Even the findings given for addl. Issue No.1 is not properly reasoned but in the order portion the trial court has granted relief to the LR of the 1<sup>st</sup> defendant by name Parvathi. Therefore, looking to all these points which have not been determined by the learned trial judge, I find that the learned trial judge had to frame addl. Issues regarding the addl. written statement filed by the defendants 2 to 6 dated 23-06-2012.

51. While addressing the arguments the learned counsels for the appellant and the respondents have referred to a number of decisions on various points. However, the decisions on the point relating to Section 4 of the Partition Act are very important in the set of facts in the case.

52. The decisions referred by the counsel for the appellant/plaintiff are as follows:

**AIR 1995 SC 1728 between Digambar Adhar Patil v/s. Devaram Giridhar Patil and another.** I have perused this decision wherein the Hon'ble Supreme Court has held that entries in record of rights regarding partition is a relevant piece of documentary evidence to prove the factum of partition.

**AIR 2009 SC 2561 between Gangamma v/s. Nagarathamma and others.** I have perused this decision wherein the Hon'ble Supreme Court has held that by operation of Section 14 the mother-in-law becomes the full owner of property and plea that it is joint family property is not tenable.

**AIR 2005 Patna 174 between Yogendra Kumar Singh and another v/s. Mahendra Prasad and another.** I have perused this decision wherein the Hon'ble High Court of Patna has held that self acquired property cannot be legally held to be either a joint family property or ancestral property of undivided family. Both purchasers have full right to dispose of their portion according to their own wish.

**AIR (39) 1952 Kutch 14 between Govindji Dosa v/s. Kanji Mavji.** I have perused this decision it is held that the purchaser of the undivided interest of a co-parcener has to file a suit for general partition.

**AIR 2007 (Noc) 2551 (Del). Between Sushil Kumar Guptha v/s. Anil Kumar Gupta and others.** I have perused this decision wherein it is held that object of TP Act and Partition Act is to protect house from being invaded by outsiders. Though, there was no division, parties were in possession of respective portion of the house. Therefore, it could no more be said that there was joint character of a dwelling house to

attract provisions of Section 44 of T.P. Act and Section 4 of Partition Act.

53. To the contrary the counsel for the respondents 2 to 6 / defendants referred to the following decisions.

**W.P.16738/2005 between Jayamma v/s. Asst. Revenue Officer.** I have perused this decision wherein the Hon'ble High Court of Karnataka has held that katha is a certificate to show the name of the occupier of the immovable property responsible for paying the tax.

**AIR 1993 HP 141 between Baldev Singh v/s. Smt.Darshini Devi and another.** I have perused this decision wherein the Hon'ble High Court of HP has held that a co-owner who is not in exclusive occupation of a land cannot transfer a valid title to that portion of the property.

**Appeal (civil) 2019/2007 between Usha Balashaheb Swami and others. v/s. Kiran Appaso Swami and others.** I have perused this decision wherein the Hon'ble Supreme Court has held that taking inconsistent plea in the written statement is not objectionable but substituting a new cause of action in the plaint is objectionable.

**(2006) IILLJ 615 Guj between Amul Potteries v/s. Employees State Insurance.** I have perused this decision wherein the Hon'ble High Court has held that when a finding of fact is not challenged it attains finality.

**CM (M) No.546/2010 & CM No.7428/2010 between Ganpat Ram v/s. Union of India and another.** I have perused this decision wherein the Hon'ble High Court has held that when the findings of the Civil Court is never challenged, the same attains finality and binds the parties.

**AIR 1968 Cal 380, 72 CWN 128 between Birendra Nath Banerjee v/s. Smt.Snehalata Devi and another.** I have

perused this decision wherein the Hon'ble High Court has held that an application for pre-emption u/s 4 of the Partition Act can be filed at any stage when the suit is pending.

**Appeal (civil) 5942/2000 between Gautam Paul v/s. Debi Rani Paul and others.** I have perused this decision wherein it is held that a co-sharer is entitled to move u/s 4 of the partition Act at any stage of the suit.

**C.O.No.1931/2010 between Shew Sdhankar Shaw @ Shew Sankar Das v/s. Gaur Hari Maity and others.** I have perused this decision wherein the Hon'ble High Court has held that it is open for the court to determine the valuation of the property and then to pass the decree.

**Supreme Court of India between Ghantesher Ghosh v/s. Madan Mohan Ghosh and others - on 18-09-1996.** I have perused this decision wherein the Hon'ble Supreme Court has held that the members of the family having undivided share in a dwelling house should put forward their claim of pre-emption.

**AIR 1950 Cal 111, 54 CWN 660 between Boto Krishna Ghose v/s. Akhoy Kumar Ghose and others.** I have perused this decision where Section 4 of the Partition Act is referred and held that where a share of a dwelling house of undivided family is transferred to a third party any member of the family can buy the share of such transferee after making a valuation.

**AIR 1981 Kant 40, ILR 1981 KAR 78 between Parameshwari Bai v/s. Muthojiral Scindia.** I have perused this decision wherein the Hon'ble High Court of Karnataka has held that mere suggestion is made and denied is not evidence at all.

**Gujarat High Court Case No.1468/1980 between Khimjibhai Kurjibhai v/s. The state of Gujarat.** I have perused this decision wherein it is held that suggestion denied by a witness remains only a suggestion and has no evidentiary value.

**I (1996) DMC 16, 1995 (4) KARLJ 553 between B.Narayana Murthy and others v/s. B.Venkateshalu and others.** I have perused this decision wherein the Hon'ble High Court has held that when a property is purchased in the name of two persons each of the parties as co-owners would get ½ share.

**AIR 2006 Cal 88, 2006(1) CHN 521 between Atindra Nath Chakrabarty v/s. Anil Kumar Chakravarty and others.** I have perused this decision wherein the Hon'ble High Court has held that even when co-purchaser does not pay any amount towards consideration he cannot be deprived of their legal right as a co-sharer.

**AIR 2007 Ori 65 between Purna Chandra Mallik v/s. Renuka Jena and Others.** I have perused this decision wherein the Hon'ble High Court has held that a co-sharer who has sold away portion of dwelling house cannot once again be allowed to opt for repurchase.

**4 Ind Cas 740 between Hossein Mahomed v/s. Fakri Mahomed.** I have perused this decision wherein the Hon'ble High Court has held that a co-sharer who attested the transfer as a witness amounted to giving consent to the sale transaction.

**RSA No.3096/1985 between Bohru v/s. Khubi and others.** I have perused this decision wherein it is held that when a party has knowledge of sale and witnessed the sale deed in question it means he has waived his right to pre-empt the sale on principle of estoppel.

**AIR 1987 MAD 15 between S.Sundaram and another v/s. Damodaraswami and another.** I have perused this decision wherein the Hon'ble High Court has held that in cases of pre-emption by a positive act amounts to relinquishment of pre-emptive rights.

**Supreme Court of India, between Jagad Bandhu Chatterjee v/s. Nilima Rani and others.** I have perused this decision

wherein the Hon'ble Supreme Court has held that law of pre-emption includes acquiesce in the sale by any positive act amounting to relinquishment of a pre-emptive right and has the effect of forfeiture of such right.

**Appeal No.193/2009 between Punjab – Haryana High Court Subhash v/s. Anil Kumar and others.** I have perused this decision wherein it is held that a party who is an attesting witness to the sale deed is the proof of the fact that he appeared before Sub-Registrar and did not raise any objection to the sale deed.

**AIR 2005 Patna 174 between Yogendra Kumar Singh and another v/s. Mahendra Prasad and another.** I have perused this decision wherein the Hon'ble High Court has referred to Section 4 of the Partition Act and held that in every case of such nature has to be decided on its own facts and circumstances. When a small portion of the house is let out to the stranger which affects the residential character of the dwelling house definitely it would not be decided in the same spirit.

**AIR 1958 Pat 232 between Aley Hassan v/s. Toorab Hussain and others.** I have perused this decision wherein the Hon'ble High Court has held that the word family used in partition act has to be given a liberal and comprehensive meaning and it includes a group of persons related in blood.

**2000 IAD Delhi 609, 82 (1999) DLT 979, 2000 (52) DRJ 236 between Brahm Dev Narang v/s. Mr.Satyajeet Narang and another.** I have perused this decision wherein it is held that an undivided share when transfer to a person who is not a member of such family and transferee files a suit for partition any member of the family can undertake to buy the share of such transferee.

54. By looking to the principles laid down in all the decisions, I find that the dispute between the parties can be fully

adjudicated only if fresh addl. Issues are framed more so on the point relating to Section 4 of the Partition Act or the right of pre-emption. A defence has been taken in the addl. Written statement of defendants 2 to 6 but still the trial court has not framed any issue. Therefore, the trial court needs to frame addl. Issues and then to give a finding on all the issues afresh.

55. Another point is to be noticed in the judgment of the trial court, the trial court has answered addl. Issue No.1 in the affirmative and also granted the relief to defendant No.1(a). Under addl. Issue No.1 the trial court has not discussed the two contradictory documents executed by the 1<sup>st</sup> defendant that is the Will dated 03-09-1999 and the sale deed to the plaintiff dated 20-12-2004. So, even for the determination of addl. Issue No.1 there is a need to remand the matter to the trial court.

56. The learned counsel also submitted during his arguments that in spite of the court orders directing the defendants to pay the stamp duty, the same has not been paid even after the trial of the case and the impugned judgment passed by the trial court. I have perused the lower court records and as per orders dated 13-07-2011 the learned trial judge has passed an order u/s 37 (1) and (2) of Karnataka Stamp Act. Directing the office to impound the document and send the same to the DR to determine stamp duty and penalty. Further, the learned trial judge has passed an order on 04-09-2012 once again directing

the defendants to pay the stamp duty and penalty. However, the trial court records would go to show that the defendants have not paid the duty and penalty as ordered by the trial court. The defendants have not even challenged that order dated 04-09-2012 and 13-07-2011. So, the order determining payment of stamp duty and penalty is unchallenged and has become final. But, without payment of stamp duty and penalty the defendants have proceeded to go with the suit till its adjudication on merits of the suit. Therefore, on this point also there is a need to remand the case to the trial court.

57. Now, for all the discussions made herein before, I hold that the impugned judgment and decree passed by the learned trial judge is perverse, illegal and capricious and contrary to the materials placed by the parties. Therefore, it is a clear case which needs a remand for fresh disposal by the trial court. So, on looking to the trial court records and also on the grounds put forth in these two appeals, I find that it is a fit case for being remanded for fresh disposal after framing of addl. Issues.

58. The grounds urged by the appellant and respondents, as stated in the appeal memo cannot be decided without proper findings and framing of issues as required in the set of facts of the case. So, without proper issues there cannot be a judgment on merits. Therefore, I find that this is a fit case for being remanded to meet the ends of justice. In the result, the

impugned judgment of the trial court is hereby set aside and I answer point No.2 to 6 accordingly.

**59. Point No.7:** For the reasons stated above, I proceed to pass the following

**ORDER**

The appeal in R.A.25/2013 and R.A.34/2013 is disposed of as follows:

The impugned judgment and decree dated 01-03-2013 passed in O.S.21/2012 on the file of the Senior Civil Judge, Channapatna, is hereby set aside.

Consequently, suit is remanded to the trial court to frame addl. Issues and for fresh disposal as provided under law.

Send the copy of this order along with the original records to the trial court.

The original judgment shall be kept in R.A.25/2013 and a copy of the same shall be kept in R.A.34/2013.

(Dictated to Stenographer, transcribed and computerized by her, corrected, revised and then pronounced by me in the open court on 28<sup>th</sup> day of April 2016)

**(S.Nagashree)**  
III Addl. Dist & Sessions Judge,  
Ramanagara.

Date: 28-04-2016  
Aplt. By Sri.B.R., Adv.  
R1 by Sri.K.V.M., Adv.  
R2 to 6 by Sri.S.N., Adv.  
For judgment

Judgment pronounced in the open court and the following order is passed

**ORDER**

The appeal in R.A.25/2013 and R.A.34/2013 is disposed of as follows:

The impugned judgment and decree dated 01-03-2013 passed in O.S.21/2012 on the file of the Senior Civil Judge, Channapatna, is hereby set aside.

Consequently, suit is remanded to the trial court to frame addl. Issues and for fresh disposal as provided under law.

Send the copy of this order along with the original records to the trial court.

The original judgment shall be kept in R.A.25/2013 and a copy of the same shall be kept in R.A.34/2013.

**III Addl. District & Sessions Judge,  
Ramanagara.**

Date: 28-04-2016  
Aplt. By Sri.K.V.M., Adv.  
R1 by Sri.B.R., Adv.  
R2 to 6 by Sri.S.N.,  
For judgment

Judgment pronounced in the open court and the following order is passed

**ORDER**

The appeal in R.A.25/2013 and R.A.34/2013 is disposed of as follows:

The impugned judgment and decree dated 01-03-2013 passed in O.S.21/2012 on the file of the Senior Civil Judge, Channapatna, is hereby set aside.

Consequently, suit is remanded to the trial court to frame addl. Issues and for fresh disposal as provided under law.

Send the copy of this order along with the original records to the trial court.

The original judgment shall be kept in R.A.25/2013 and a copy of the same shall be kept in R.A.34/2013.

**III Addl. District & Sessions Judge,  
Ramanagara.**