

**IN THE COURT OF THE PRL. SENIOR CIVIL JUDGE AND
CJM AT RAMANAGARAM**

Dated : This the 11th day of April 2018

Present

Smt. M.ANITHA.,
B.Sc., LL.B.,
Prl. Senior Civil Judge & CJM.,
Ramanagaram.

O.S 313/2014

Plaintiff:- Smt. Venkatalakshamma

(By Sri. N.G., Advocate)

V/s

Defendants:- Smt. Revamma and others

(D-8, 9, 11 & 12 Sri. K.M.M., Advocate)

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**Orders on I.A-5 dated 28.11.2017 filed by the
defendant No.14 U/o 7 Rule 11(d) of CPC**

The prayer made under the present application is to reject the plaint as barred by law.

2. In the affidavit sub-joined with the application, the special power of attorney holder of defendant No.14 deposed that, the defendant No.14 by name D.Raghavendra has been impleaded as

defendant in the present suit. One Sri.Venkatesh S/o late.Seenappa has executed a registered general power of attorney dated 28.12.2007 in favour of defendant No.14. The plaintiff has filed the present suit for partition of properties including the property in respect of which the said general power of attorney has been executed. The plaintiff admitted that her father died before the institution of the suit. As per the proviso to Section 6 of the Hindu Succession (Amendment) Act, 2005 nothing contained in Sub-section 6 shall invalidate any disposition or alienation including any partition or testamentary disposition of property which had taken place before the 20th December 2004. After the death of Doddathimmaiah a partition took place between the heirs of Doddathimmaiah that is between Rangappa and Seenappa and as per the said partition each of them got 24 guntas of land in Sy.No.15/3 and the same was entered in the M.R No.81/1996-97. After the death of Seenappa, the name of his only son Venkatesh was entered in M.R 05/2010-11. The said partition took place long back as on 1996-97 and hence under the proviso to Section 6(1) of the said Act, the said partition does

not get affected by the suit. Further, the Hon'ble Apex Court in the case of Prakash and others V/s Phulvathi and others 2015(11) SCALE 643 has ruled that, the rights under the amendment act are applicable to living daughters of living coparceners as on 19th September 2005 irrespective of when such daughters are born. The disposition or alienation including partition which may have taken place before 28th December 2004 will remain unaffected. The plaintiff has stated that, her father died at the time of filing of the suit, which means he died before partition which was took place in 1996-97. Thus she is not the daughter of a Co-parcener who was alive as on 9th September 2005. Hence, the plaintiff cannot file the suit for partition as coparcener. Wherefore, it is prayed to reject the plaint and dismiss the suit as barred by law.

3. The plaintiff resist the application stating that, the ratio relied upon by the defendant No.14 is not at all applicable to the present case. The partition alleged by the defendant No.14 is false and there is no such partition. The mutation entries are concocted and are disputed. The plaintiff is a Coparcener and the suit schedule properties are

coparcenery properties and as such the plaintiff has share in the properties. The plaintiff can prove her claim only during trial, without trial the legal position involved cannot be considered at this stage. The alleged general power of attorney is not a document of title. The defendant No.14 is a stranger to the family and he is not the member of the family. Therefore, no loss or prejudice will be caused to defendant No.14, if the application is rejected. Suppose the application is allowed, the plaintiff will be put to great loss and injury. Hence, it is prayed to dismiss the application with costs.

4. In view of rival contentions of the parties, the following point emerge for consideration:-

Whether the defendant No.14 made out a ground to reject the plaint invoking Order 7 Rule 11(d) of CPC ?

5. Having heard the arguments of the learned counsel for defendant No.14, the court recorded the arguments of the counsel for plaintiff as Nil, since the counsel failed to address the arguments. The court scrutinized the application in the backdrop of plaint averments. Now, finding of the Court on the point is in the “Negative” for the following:-

REASONS

6. As borne out from the contents of the affidavit, which is annexed to the present application, three grounds are projected to reject the plaint. First ground is that, already a partition has been effected between the two sons of Doddathimaiah namely Rangappa and Seenappa in the year 1996-97 and therefore, in view of proviso to Section 6 of Hindu Succession (Amendment) Act 2005 (herein after called as 'Act' for brevity), the partition which had taken place before 20th day of December 2004 is valid. Therefore the plaintiff who is the daughter of said Doddathimaiah has no right to file the suit for partition. The second ground is that, father of the plaintiff died prior to the institution of the suit meaning that, he died before the partition which was effected in the year 1996-97 and therefore, as per the ruling of Hon'ble Apex Court held in the case of Prakash and others V/s Phulvathi and others, the plaintiff as no cause of action to file the suit, since her father is not alive as on 09.09.2005. The third ground is that, the son of said Seenappa already executed a registered power of attorney dated 28.12.2007 in favour of defendant No.14 with regard

to suit schedule item No.2 property and therefore that alienation cannot be questioned.

7. Absolutely, the court find no substance in all the three grounds urged for rejection of plaint. The special power of attorney for the defendant No.14 has not made clear in his affidavit as to which property the registered general power of attorney has been executed by Venkatesh S/o Seenappa. However, in the written statement filed by defendant No.14, it is stated that, Venkatesh S/o Seenappa has executed registered general power of attorney in respect of item No.2 of suit schedule property. Therefore, it can be safely construed that, the third ground is related to item No.2 property. Be that as it may.

8. It is settled position of law that, while considering the application U/o 7 rule 11 of CPC, the court has to examine the averments in the plaint and the pleas taken by the defendant in the written statement are irrelevant. In the present suit, the plaintiff averred in the plaint that, her father Doddathimaiah and mother Kenchahanumakka are dead and they had three sons and three daughters. All the three sons namely Kenchappa, Seenappa and

Rangappa are dead. The two daughters namely Lakshamma and Thimakka are also dead. She is the only surviving daughter of her father Doddathimaiah. The defendants 1 to 12 are the legal representatives of the three deceased sons of Doddathimaiah. The suit schedule properties are all ancestral and joint family properties of plaintiffs and defendants 1 to 12 and no partition has been effected in respect of the same. The plaintiffs learnt that, the defendants 1, 2 and 4 have created a sale deed dated 23.05.2007 in favour of 13th defendant in respect of item No.4 property and that sale deed is not binding on the plaintiff. Hence, it is prayed to grant 1/6th share to the plaintiffs in suit schedule properties.

9. The suit schedule properties consists of five items of landed properties. The plaintiff though mentioned that, her father Doddathimaiah is dead, but, the date of death of Doddathimaiah has not been mentioned anywhere in the body of plaint. The defendant No.14 has not produced any documents like death certificate to show that, the father of the plaintiff namely Doddathimaiah was not alive as on 09.09.2005. No doubt, as per the ratio laid down in the ruling of Hon'ble Apex Court held in the case of

Prakash and others V/s Phulvathi and others, amendment act are applicable to living daughters of living coparceners as on 09th September 2005 irrespective of when such daughters are born. But, in the current suit, the date of death of the father of plaintiff is not specifically mentioned in the body of plaint. It is not the case of plaintiff that, her father died prior to 09th September 2005. Indeed, in his affidavit, the special power of attorney holder of defendant No.14 made a vague statement that, "as stated by the plaintiff, her father died at the time of filing of the suit, which means, he died before partition, which was made in 1996-97 and therefore she cannot file the suit for partition". But, the plaintiff has not made any such statement as stated above by the defendant No.14. More importantly, the suit is filed in the year 2014 and therefore it cannot be decided with any degree of certainty and under illusion that, the father of the plaintiff died prior to 09th September 2005. That is to say, in the absence of documents, and pleadings in the plaint, the court suomoto are on the basis of plea of the defendant, it cannot be decided that, the father of the plaintiff died prior to 09.09.2005. Even assuming for a moment

that, the father of the plaintiff is not alive as on 09.09.2005, still the plaintiff being daughter is entitled for share in the Notional share of her deceased father invoking Section 6 of Unamended Act. Therefore, on the said ground the plaint cannot be rejected.

10. According to defendant No.14, already a partition has been effected between the two sons of Doddathimaiah in the year 1996-97 and as such the partition is saved under proviso to Section 6 of the Act. At this point, it is significant to mention that, no registered partition deed is produced before court to prove that, already a partition has been effected between the brothers of plaintiffs way back in the year 1996-97. As per the proviso to Section 6 of the Act, partition means a partition effected under registered document or by way of court decree. Wherefore, in the absence of registered document, the court cannot rely upon the theory of defendant No.14 that, partition has been already effected way back in the year 1996-97.

11. More importantly, the case of defendant No.14 is confined only with regard to item No.2 property and

his defence is based on the alleged registered general power of attorney dated 28.12.2007. As per proviso to Section 6 of the Act, the alienation taken place before 20th December 2004 cannot be invalidated. But, the alleged general power of attorney is dated 28.12.2007 and it is related only in respect of item No.2 property. Therefore, the court find no substance in all the three grounds urged by the defendant No.14 for rejection of plaint.

12. Besides, it is not the prayer made by defendant No.14 that, plaint shall be rejected so for it relates to item No.2 property. On the other hand, he made a prayer to reject the plaint at once. As mentioned earlier, the schedule of the plaint consist of five items of landed properties and therefore the plaint cannot be rejected based on the prayer made by defendant No.14 that too in the absence of grounds for rejection of plaint.

13. In total, all the grounds urged for rejection of plaint are indeed the foundation for framing of issues. In other words, issues to be framed with regard to the grounds urged and shall be treated as preliminary issue. Hence, without framing issues with regard to the grounds urged, the plaint cannot be rejected. I

might have emphasize that, the application is devoid of merits and no grounds are made out to reject the plaint. Wherefore, I am inclined to hold the point is in the “Negative” and proceed to pass the following:-

ORDER

I.A-5 dated 28.11.2017 filed by
the defendant No.14 U/o 7 Rule 11(d)
of CPC is hereby rejected.

(Dictated to the Stenographer, transcribed by him, the transcript corrected and then pronounced by me in the open Court on this the 11th day of April 2018)

**Prl., Senior Civil Judge & CJM,
Ramanagaram.**