

IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 27th DAY OF FEBRUARY, 2026

BEFORE

THE HON'BLE MRS. JUSTICE K.S. HEMALEKHA

REGULAR FIRST APPEAL No.316/2017 (RES)

BETWEEN:

1. SRI SRINIVAS
S/O. D RAMAIAH,
AGED ABOUT 57 YEARS,
2. SMT. LAKSHMI
W/O. NARAYANASWAMY,
AGED ABOUT 61 YEARS,
3. SMT. NANJAMMA
W/O. RAJANA
AGED ABOUT 55 YEARS,

ALL ARE CHILDREN OF LATE D. RAMAIAH,
RESIDING AT NO.42,
MUNNESWARA TEMPLE STREET,
B.S.K. IIND STAGE,
KADIRENAHALLI VILLAGE,
BENGALURU-560070.

...APPELLANTS

(BY SRI G.B. NADISH GOWDA, ADVOCATE A/W
SRI V.N. SHANKARE GOWDA, ADVOCATE)

AND:

1. SRI PRASANNA KUMAR
AGED ABOUT 62 YEARS,
S/O A. SITHARAMA SETTY,
RESIDING AT NO.17/1,
SUBRAMANYAPURA ROAD,
KADIRENAHALLI CIRCLE,
PADMANABHANAGAR,
BENGALURU-70.

2. PADMAVATHI
AGED ABOUT 47 YEARS,
W/O. A.S. SATYARANAYARA,
R/AT NO.913, 1ST FLOOR,
I A MAIN, THYAGARAJANAGARA,
BENGALURU-560028.
3. ANANTHARAJU
AGED ABOUT 59 YEARS,
S/O. SREERAMIAH SETTY,
RESIDING AT NO.3/1,
GRAMADEVATHA CROSS ROAD,
CHIKKAMAVALLI, BENGALURU-004.
4. SRI VENKATESHBABU
AGED ABOUT 35 YEARS,
S/O. K. NAGARAJA SETTY,
NO.186/22, 8TH CROSS, II MAIN,
JAYANAGARA II BLOCK,
BENGALURU-011.

...RESPONDENTS

(BY SRI N.R. NAIK, ADVOCATE FOR R-1;
SRI K.R. ASHOK KUMAR, ADVOCATE FOR R-2 TO R-4)

THIS RFA IS FILED UNDER SECTION 96 OF CPC., AGAINST THE JUDGMENT AND DECREE DATED 07.01.2017 PASSED IN O.S. NO.2194/2002 ON THE FILE OF THE XIV ADDL. CITY CIVIL JUDGE, BENGALURU (CCH NO.28), DISMISSING THE SUIT FOR POSSESSION AND MESNE PROFITS.

THIS APPEAL HAVING BEEN HEARD AND RESERVED FOR JUDGMENT ON 11/12/2025, COMING ON FOR PRONOUNCEMENT THIS DAY, THE COURT DELIVERED THE FOLLOWING:

CORAM: HON'BLE MRS JUSTICE K.S. HEMALEKHA

CAV JUDGMENT

This regular first appeal is directed against the judgment and decree dated 07.01.2017 passed in O.S. No.2194/2002 on the file of XIV Additional City Civil Judge, Bengaluru, whereby the suit filed by the plaintiffs for possession of the 'B' schedule property measuring approximately 3 guntas in Survey No.17/1 and for mesne profits came to be dismissed. Aggrieved by the dismissal, the plaintiffs are before this Court.

Plaint averments:

2. The plaintiffs state that the plaintiffs' father was the absolute owner of 1 acre 22 guntas in Survey No.17/1 of Kadirenahalli Village. Under a registered sale deed dated 15.03.1979-Ex.P2 only 9 guntas were sold to defendant No.1. The remaining extent continued to vest with the plaintiffs, during revenue survey conducted in 1990, it was discovered that defendant No.1 was in possession of an excess extent of 3 guntas over and above the 9 guntas purchased. Defendant No.1 had agreed to either pay for the

excess extent or deliver possession, but later resiled. Defendant No.1 thereafter executed sale deed in favour of defendant Nos.2 to 4 in respect of the portion carved out of the encroached area. The plaintiffs state that defendant No.1 had no title beyond 9 guntas and therefore, alienation beyond 9 guntas is illegal and hence, the suit for possession of 'B' schedule property measuring 3 guntas, and for mesne profits.

Written statement averments:

3. Defendant Nos.2 to 4 contended that they are *bonafide* purchasers from defendant No.1. It is stated that they verified title deed dated 15.03.1979 and in their written statement at paragraph No.3, it is stated as under :

"3. The defendants Two to four respectfully submit that they are the bonafide purchasers of the land approximately 2.5 Guntas of land jointly together in Sy.No.17/1 of Kadirenahalli Village from the first defendant Mr. Prasanna Kumar hereinafter having verified the title deed of the first defendant herein and these defendants only having satisfied with the Title and right of their vendor the first defendant herein,

and have perused the registered sale deed dated 14.03.1979 for 09 Guntas of land and for the remaining Four Guntas of land you have executed a registered General Power of Attorney in favour of the first defendant on dated 8.6.1981, and only after having verified and perused the registered documents the land is purchased by defendants Two to Four and the said property was very much in peaceful possession and enjoyment of ownership of first defendant Mr. Prasanna Kumar herein and no defect was found and the sale is as lawful procedure and very much binding on one and all including the plaintiff."

(emphasis supplied)

4. Subsequently, by way of additional written statement, defendant Nos.2 to 4 have stated at paragraph Nos.5, 6, 7, 8, 9 and 10 as under:

"5. It is further denied that the plaintiff continued to prosecute the case in the above suit as if the encroachment was by the 1st defendant neither in his written statement nor in any of the proceedings ever disclosed about the sale effected by him in favour of defendants No.2 to 4. The plaintiffs did not know about the clandestine and suppressed transactions between the first defendant and defendants No.2 to 4 are hereby denied. The sale of Schedule 'B' Property

by the 1st defendant to defendants No.2 to 4 are all illegal and without authority in law is hereby emphatically denied as false. That the 'B' Schedule Property still continued in the possession of 1st Defendant.

6. The allegation that the contention to the 1st defendant herein throughout was that the sales effected to defendants 2 to 4 are within the 9 Guntas of land purchased by him is true and correct but, plaintiff filed an application for appointment of a Court Commissioner to ascertain as to whether there is any encroachment by the 1st defendant and the persons claiming under him to adjudicate upon the real issues at controversy between the parties is borne by record.

7. It is further denied that this Hon'ble Court issued the Commissioner for local investigation and the court commissioner after notice to both the parties made spot inspection measured the land and submitted the report to this Hon'ble Court and that the Commissioner's said report revealed that the defendants No.2 to 4 are in the possession of the 'B' Schedule Property and are claiming under the 1st defendant and Commissioner Report is prepared in the absence of parties and took 10 months to file the report before this Hon'ble Court. Hence, separate

objection filed to made all observations in support of PW2 Commissioner Report.

8. *The allegation the above facts came to the notice of the plaintiff only after reading the contents of the Commissioner's report is false and the plaintiffs put to strict proof of the same.*

9. *Further allegation that therefore, it is just and proper for the plaintiff to amend and alter the pleadings in the plaint and to put the above material facts on record so that it would be relevant and essential for this Hon'ble Court to decide the issues already framed and adjudicate upon the same completely to do justice to the parties is an after thought and to deprive these defendants of their right over the Schedule 'B' Property and the plaintiff be put to strict proof of the same.*

10. *It is pertinent to mention that the plaintiff has full knowledge of the facts and circumstances of the case has admitted that the Defendants 2 to 4 have purchased the property from Defendant No.1 out of 0.09 Guntas of land in the 'A' Schedule Property and accordingly Memo was filed by Defendants No.2 to 4 for having purchased the property from Defendant No.1 in respect of 0.09 Guntas held by Defendant No.1. In the light of the said Memo, the matter in Appeal before the Hon'ble High Court of Karnataka in*

MFA No.7038/2005(CPC) (preferred by the plaintiff against dismissal of the Receiver application) has withdrawn by the plaintiff by virtue of the said Memo and recorded that "in view of the Memo filed by the respondents 2 to 4, the Appeal does not survive for consideration and the appellants be permitted to take necessary steps before the Trial Court", vide order dated 17.12.2009. The said order has become final and the said order has not been challenged by the plaintiff till now. Therefore admission of fact stands on higher footing which does not require any proof or factum of proof does not arise. This aspect of the matter may kindly be taken note in the form of Additional Written Statement for the purpose of proper and effective adjudication of the matter in dispute."

(emphasis supplied)

5. It is stated that the sale deed dated 17.06.1992 Ex.P3 and connected deeds relate to portions carved out of the 9 guntas purchased by defendant No.1 and it is submitted that there is no encroachment as contended by the plaintiffs. It is further stated that the plaintiffs withdrew the earlier MFA and admitted that they have purchased 9 guntas and that the identity of 'B' schedule property is not properly established. Further, it is stated that the

Commissioner's Report is not reliable and the suit is not maintainable.

6. Learned counsel appearing for the appellants-plaintiffs submits that though under Ex.D1 there was an agreement of sale in respect of East-West 60 feet and North-South 240 feet in Survey No.17/1, the registered sale deed subsequently executed under Ex.P2 dated 15.03.1979, conveyed only 9 guntas in favour of defendant No.1. It is contended that Ex.P2 is the document of title, and the extent conveyed therein is strictly 9 guntas, which forms part of the 'A' schedule property. It is further submitted that the registered sale deed Ex.P2, unequivocally demonstrates that defendant No.1 acquired title only 9 guntas and no more. The reliance placed by the defendants on the earlier agreement Ex.D1 cannot enlarge the extent conveyed under the registered instrument.

7. Learned counsel also places strong reliance on the categorical admission made by DW.1 and DW.2, wherein both witnesses have admitted that:

- i. The registered sale deed dated 15.03.1979 pertains only to an extent of 9 guntas.
- ii. They have not conducted any survey of the property either before or after purchase.
- iii. They have seen title deeds only in respect of 9 guntas and not beyond.

It is submitted that these admissions clearly establish that defendant No.1 had documentary title only to an extent of 9 guntas.

8. Learned counsel contends that the present suit for possession and mesne profits pertains to 3 guntas, which forms part of 'B' schedule property and which does not form part of 9 guntas conveyed under Ex.P2. The dispute, therefore is confined to the excess extent allegedly encroached upon beyond the extent of 9 guntas.

9. Further, learned counsel submits that defendant No.1 seeks to justify possession of the additional 3 guntas by relying upon the General Power of Attorney dated 08.06.1981 allegedly executed by the original plaintiffs. It is contended that the said GPA does not pertain to the suit 'B' schedule property and that it was cancelled on 21.04.1989; further, a GPA would not convey title.

10. Learned counsel appearing for respondent Nos.2 to 4-defendant Nos.2 to 4 submits that the defendants have lawfully purchased their respective portion under Ex.P3 and connected sale deeds, executed by defendant No.1. It is contended that the said purchases were made strictly out of 9 guntas of land, which defendant No.1 had acquired under the registered sale deed dated 15.03.1979 Ex.P2. It is further submitted that the recitals in Ex.P3 clearly indicate that the vendor derived title under the registered sale deed dated 15.03.1979 and the property conveyed to respondent Nos.2 to 4 forms part of that 9 guntas. Therefore, according

to the respondents, their possession is lawful and traceable to a valid chain of title.

11. Learned counsel also places strong reliance on the memo filed by respondent Nos.2 to 4 in the earlier MFA proceedings, wherein it was stated that they have purchased their respective shop portions from defendant No.1 out of 9 guntas of land owned and held by him, under the registered sale deed dated 15.03.1979 in Survey No.17/1. It is contended that in view of the said memo, the appellants-plaintiffs submitted before this Court in MFA that they would take necessary steps before the Trial Court and the appeal came to be disposed of as not surviving. According to the respondents, the plaintiffs having withdrawn the MFA in light of the memo cannot now turn around and contend that the property purchased by respondent Nos.2 to 4 does not fall within 9 guntas. It is submitted that the plaintiffs are estopped from taking inconsistent stands and cannot approbate and reprobate and in support of his contention, relies upon the decision of the Apex Court in the case of

Mumtaz Yarud Dowla Wakf Vs. M/s. Badam Balakrishna Hotel Pvt. Ltd., and others¹ (Mumtaz Yarud Dowla).

12. In this context, learned counsel for the appellants submits that the said memo merely stated that respondent Nos.2 to 4 had purchased respective shop portions from defendant No.1 out of 9 guntas of land owned and held by him under the registered sale deed dated 15.03.1979 in Survey No.17/1. In view of the said memo, the appellants had submitted that he would take necessary steps before the Trial Court, and the appeal came to be disposed of. It is emphatically contended that the said memo or submission cannot be constituted as an admission by the appellants that:

- i. Defendant No.1 had lawful title to more than 9 guntas or
- ii. 'B' schedule property claimed in the suit forms part of 9 guntas conveyed under Ex.P2 or

¹ (2023) 15 SCR 984

- iii. The purchase made by defendant Nos.2 to 4 is necessarily confined in the 9 guntas.

13. It is submitted that the earlier MFA was directed only against rejection of I.A. No.5 filed under Order XLIII Rule 1 (s) read with 151 CPC seeking appointment of a receiver to collect rents from tenants in respect of 'B' schedule property. The disposal of the appeal on the basis of the memo was confined to the interlocutory issue and did not involve adjudication of title or demarcation of 9 guntas. Therefore, it is argued that doctrine of approbate and reprobate has no application and the appellants cannot be said to have conceded the defendants' title beyond 9 guntas.

14. Learned counsel for the respondents submits that, by not pursuing the earlier proceedings and by permitting MFA to be disposed of, appellants have implicitly accepted that defendant Nos.2 to 4/respondent Nos.2 to 4 had purchased their respective portion out of 9 guntas belonging to defendant No.1. In addition, respondent Nos.2 to 4 rely

upon the General Power of Attorney dated 08.06.1981 executed in favour of defendant No.1. It is contended that the said GPA conferred authority upon defendant No.1 in respect of the remaining extent, and that the possession of the disputed property by defendant No.1 and subsequently by defendant Nos.2 to 4 is traceable to lawful authority under the said instrument. It is submitted by the learned counsel for respondent Nos.2 to 4 that the purchases under Ex.P3 and connected sale deeds are valid and fall within 9 guntas conveyed under Ex.P2. The memo filed in MFA proceedings operates against the plaintiffs. The GPA supports the authority of defendant No.1 over additional extent and that the plaintiffs have failed to establish the 'B' schedule property lies outside the 9 guntas. On these grounds, learned counsel submits that the Trial Court was justified in dismissing the suit and the appeal deserves to be dismissed.

15. This Court has carefully considered the submissions and perused the material on record.

16. The point that arises for consideration is:

"Whether the defendants/respondent Nos.2 to 4 have established that the property purchased by them under Ex.P3 and the connected sale deeds fall strictly within the 9 guntas conveyed to defendant No.1 under the registered sale deed dated 15.03.1979 Ex.P2 or whether the possession is sought on the basis of an alleged authority claimed over the additional extent of 3 guntas through a General Power of Attorney dated 08.06.1981 and consequently, whether the plaintiffs are entitled for possession and mesne profits in respect of the 'B' schedule property?"

17. At the outset, it is necessary to cull out the findings recorded by the Trial Court. The Trial Court upon appreciation of the oral and documentary evidence recorded findings to the following effect:

- i. The Court observed that though Ex.P2 is a registered sale deed dated 15.03.1979, conveying 9 guntas in Survey No.17/1 in favour of defendant No.1, Ex.D1-agreement pertaining to 13 guntas (East-West 60 feet and North-South 240 feet). The Court further noted that the measurements in feet mentioned in Ex.P1

indicate that the earlier understanding between the parties contemplated a larger extent.

- ii. The Trial Court further held that the plaintiffs failed to establish precise identity and demarcation of 3 guntas described as 'B' schedule property. Though a Commissioner was appointed and report was submitted, the Court found that the report did not conclusively establish that defendants' constructions fell outside the 9 guntas conveyed under Ex.P2 and Ex.P3.
- iii. The Trial Court also relied upon the sale deeds executed in favour of defendant Nos.2 to 4 (Ex.P3, P4 and P29) and observed that the purchasers were in possession of the shop carved out of the property purchased by defendant No.1. It held that the defendants are the *bonafide* purchasers.
- iv. With regard to the memo filed in MFA, the Trial Court observed that since the plaintiffs had not pursued the earlier appeal and had submitted that they would take

steps before the Trial Court, the same would weaken the plaintiffs' case, the Trial Court ultimately concluded that:

- a. The plaintiffs failed to prove encroachment of 3 guntas;
- b. The plaintiffs failed to establish that 'B' schedule property lies outside 9 guntas.
- c. Defendants' possession was not shown to be unlawful.
- d. Consequently, plaintiffs were not entitled to possession or mesne profits and the suit was therefore dismissed.

18. The findings recorded by the Trial Court is legally unsustainable for the following reasons:

- i. The Trial Court erred in treating Ex.D1, an agreement in respect of 13 guntas, as relevant for determining title. It is trite law that title passes only under a registered conveyance. Ex.P2, the registered sale deed dated 15.03.1979, unequivocally conveys only 9 guntas. By giving

weight to Ex.D1 and the alleged earlier understanding, the Trial Court allowed an agreement to enlarge the registered conveyance, which constitutes a fundamental error of law. The Trial Court failed to appreciate the categorical admission of DW1 and DW2. The burden of proof had shifted on defendants to prove their lawful possession within that of 9 guntas, since the plaintiffs had proved that original ownership of 1 acre 22 guntas and that conveyance under Ex.P2 was only 9 guntas, the Trial Court ought not to have casted the burden upon the plaintiffs to prove the exact demarcation, which in fact, the defendants had to prove. The Commissioner's report was not considered, and the Trial Court failed to appreciate that the defendants had not demonstrated any correlation between the carved-out shop and the 9 guntas conveyed under Ex.P.2. The approach of the Trial Court is legally untenable and that the Trial Court has erred in dismissing the suit of the plaintiffs.

ii. Ex.P2 is the admitted registered sale deed dated 15.03.1979 and it conveys 9 guntas to defendant No.1.

Therefore defendant No.1's title cannot extend beyond 9 guntas unless there is a further registered conveyance for the alleged additional extent. So the very foundation of defendant Nos.2 to 4 must necessarily be tested against the limit of 9 guntas.

iii. The central issue is not the validity of Ex.P2 insofar as it conveys 9 guntas, but whether the shops / portions purchased by defendant Nos.2 to 4 under Ex.P3 and connected deeds fall strictly within those 9 guntas. Even their own pleadings in paragraph No.3, extracted above, reveals that reliance on Ex.P2 for 9 guntas and on a GPA for the remaining extent. This, *'infact, makes the burden on them heavier and they must correlate their shops measurements' (in feet) with the 9 guntas (measured in guntas)* by producing credible evidence of demarcation. The admission of DW1, wherein he has categorically stated as under:

"It is true that on 15.03.1979 Ramaiah executed a registered sale deed in respect of 9 guntas of land in Sy. No.17/1 only. It is true that on 14.11.1979 I have sold the property measuring East to West: 66 ft., and North to South: 30 ft, in favour of

one Sri. Rathnaiah Shetty through registered sale deed. It is false to suggest that, I have purchased the suit schedule property measuring East to West : 66 ft. and North to South : 148 ft. It is true that in my sale deed Ex.P-2, the measurement of the suit schedule property is not mentioned in feet. It is true that Ramaiah had not mentioned the measurement of the suit schedule Property in feet and mentioned only in guntas. Witness voluntaries states that as there was bar under law to sell the revenue land in feet, he has mentioned the measurements in guntas. I cannot say the exact measurement of suit schedule property in feet."

(emphasis supplied)

19. Further, DW1 in categorical terms admitted in the cross-examination that the registered sale deed dated 15.03.1979 (Ex.P2) is only for 9 guntas and also admits inability to state the exact measurements in feet and admits the absence of survey correlation, the relevant portion reads as under:

"It is true that under Ex.P-29 dated: 14.11.1979 I sold the northern portion of entire 11 guntas of property in favour of one Sri. Rathnaiah Shetty. It is true that since from the date of sale deed

i.e., 14.11.1979 Sri. Rathanaiah Shetty has been in possession of the said portion and he has constructed several shops and let out them to various tenants. Now I see a photograph, in the said photograph shops by name Mahadev Electricals and Bhagawan Timber & Plywood can be seen. The said shops have been let out to the tenants by Sri. Rathnaiah Shetty. The photograph admitted by the witness is marked as Ex.P-36. It is true that I am in possession of the southern portion of the aforesaid property. It is true that I have constructed several shops and residential premises.

Now I see another photograph the shops appearing in the sad photograph are belonging to me I have let out them to several tenants. The photograph admitted by the witness is marked as Ex.P-37. Now I see another photograph. In the said photograph a shop by name Sri. Devi Juice & Condiments and it is being run by me. The neighboring shops belong to defendants 2 to 4. The photograph admitted by the witness is marked as Ex.P-38. It is false to suggest that, the shop premises appearing in Ex.P-38 sold to defendants 2 to 4 by virtue of the GPA alleged to have been executed by Ramaiah in my favour. It is true that defendants 2 to 4 are in possession of the suit schedule premises as shown in Ex.P-38 on the basis of three sale deeds executed by me in their favour.

It is true that I had filed a suit in O.S.No.124/1989 against Sri. Ramaiah for the relief of permanent injunction and it came to be decreed. It is true that Ramaiah also had filed a suit in O.S.No.3681/1989 against me for the relief of permanent injunction and it came to be dismissed for non-prosecution.

Question: Had you filed O.S.No.124/1989 against Ramaiah on the basis of registered sale deed dated: 13.03.1979 in respect of 9 guntas only?

Answer: I had filed the said suit for the relief of permanent injunction in respect of 9 guntas along with 4 guntas of land.

I do not know whether as per Ex.P-1 in O.S.124/89 I amended the plaint in the year 1993 and also included remaining four guntas in the schedule to the said plaint. I know the schedule mentioned in the GPA dated: 08.06.1981. The said property is bounded on the East by : My property, West by: Property of Ramaiah, North by: 28 Sq.ft. belonging to Ramaiah and South by: The property of one Sri.Dasappa. It is true that towards western side of the shops shown in Ex.P-36 the property acquired by me through the GPA is situated. It is true that I appeared in

O.S.3681/1989 filed by Ramaiah. I do not remember what are the documents filed and what were the contentions taken by Ramaiah in the said suit. Now I see Ex.P-32, it does not bear my signature. It is false to suggest that, the signature appearing on Ex.P-32 is mine. Now I see Ex.P-1. I cannot say whether the signature found on Ex.P-1 pertains to me. Now I see Ex.P-3 plaint. I cannot say whether the signatures appearing in Ex.P-3 are mine. Definitely I cannot say that the signature appearing in Ex.P-1 on all pages are mine, since the documents is very old."

(Emphasis supplied)

20. DW2, the other witness in his cross-examination stated as under:

"It is true that I have constructed a building in 'A' schedule property. I have obtained construction permission from Kadirenahalli Gram Panchayath. I have not produced the said construction permission. I have no impediment to produce the construction permission before the court. I did not get my property surveyed from the competent authority before or after purchasing it. I do not know whether the 1st defendant retained 14 guntas of land in Sy.No.17/1 and he sold southern portion of his property in favour of me and defendants 2 to 4. As the 1st defendant told us that the 14 guntas of land in Sy.No.17/1 was purchased by

him and hence, on the basis of his version I stated that 14 guntas of land is called as 'A' schedule property. I have not seen any title deeds of 1st defendant in respect of 14 guntas of land but I have seen title deeds of 1st defendant only in respect of 9 guntas."

21. DW2 admits that he has seen the title deeds only in respect of 9 guntas, did not conduct any survey before or after the purchase, and relied on the vendor's version. He has further categorically admitted that, towards the western side of the shop shown in Ex.P36, the property acquired by him through the GPA is situated.

22. These admissions, read with Ex.P2, materially probabalise the plaintiffs' case that the defendants have not established lawful possession strictly within the 9 guntas, particularly when the purchase is described in terms of shop portions measured in feet, without chain of link to the 9 guntas parcel.

23. Defendant Nos.2 to 4 rely on the alleged GPA said to be executed in favour of defendant No.1, which has been

stated in the pleadings as well as in the evidence. A GPA is not a conveyance. It does not transfer ownership in an immovable property. Unless there is a registered sale deed executed pursuant to such authority for the specific additional extent, the GPA cannot enlarge defendant No.1's title beyond Ex.P2. Therefore, the attempt to support the defendants' possession through the GPA fails both in law and proof on the ground that the GPA itself has not been produced. Even otherwise that cannot be a valid document for conveyance of title.

24. The respondents' reliance on the memo filed by respondent Nos.2 to 4 in the earlier MFA and that the plaintiffs withdrew or did not press the MFA, this Court finds that the MFA proceedings arose from an interlocutory order (relating to appointment of a receiver and collection of rents) and not from a final adjudication of title. The memo, (at best), states that the respondents stand that they had purchased shop portions '*out of 9 guntas owned and held by defendant No.1.*' It does not adjudicate the factual question

as to whether the present 'B' schedule property, i.e., the alleged excess 3 guntas, forms part of the 9 guntas.

25. The plaintiffs' submission in MFA that they would take steps before the Trial Court cannot be equated into a concession with regard to the physical location / demarcation of the 'B' schedule property. Hence, the memo cannot foreclose the plaintiffs' substantive rights in the present suit or in the appeal.

26. Respondents' reliance on **Mumtaz Yarud Dowla's** case regarding the doctrine of approbate and reprobate is not applicable, because there was no conscious election resulting in any adjudicated benefit concerning title. The earlier disposal of the MFA did not amount to a final determination of the issue of title / identity of the property. The question in the appeal is the demarcation and correlation of respondents' respective portions with the 9 guntas conveyed under Ex.P2, which issue was never finally decided in the MFA proceedings. At this outset, it is relevant to

extract the portion of the order passed in MFA for ready reference, which reads as follows:

"1. A memo is filed by respondent Nos.2 to 4, who are defendants-2 to 4 in the trial Court, inter alia stating that, they have purchased respective shop portions from respondent No.1 (defendant No.1) out of 9 guntas of land owned and held by defendant No.1 under registered sale deed dated: 15.03.1979 in Sy.No.17/1, Kadirenahalli Village, Uttarahalli Hobli, Bangalore South Taluk, which forms part of 'B' schedule property.

2. In view of the memo filed by the respondents 2 to 4, learned Counsel appearing for the appellants submits that, the appeal does not survive for consideration and the appellants be permitted to take necessary steps before the trial court."

(Emphasis supplied)

27. The respondents cannot invoke or use the doctrine of approbate and reprobate to avoid discharging their burden of proving that their purchase is only within the 9 guntas.

28. In **Muddasani Venkata Narsaiah (D) through Lrs. vs. Muddasani Sarojana**² (Muddasani Venkata Narsaiah) it has been held at paragraph No.12 as under:

"12. In the aforesaid background of facts, we come to the question whether it was necessary to seek relief or declaration of title. In our opinion, the plaintiff has filed the suit for possession on the strength for title and not only on the basis of prior possession. It was not a summary suit for ejectment filed under Section 6 of the Specific Relief Act, 1963. Thus, plaintiff could succeed in suit for possession on the strength of the title. The issue had been framed on the question of title of the plaintiff as well as on the question of adoption of defendant No.3. On the basis of title claimed in the suit, both the parties have adduced their evidence in support of their respective cases. The main plea of defendant No.3 that she was an adopted daughter of Yashoda has not been found to be established by the trial court, the first Appellate Court or by the High Court. Thus, in our opinion, there was no serious cloud on the title of the plaintiff so as to force him to seek the relief for declaration of title in the instant case which was in fact based on the strength of the sale deed executed by Buchamma,

² AIR 2016 SC 2250

who was the sole surviving heir of Balaiah as such succeeded to the property and had the right to execute the sale deed in favour of the plaintiff."

29. Supporting the contention of the principles that where title is clear and possession is sought, the plaintiffs cannot be forced to seek the relief of declaration of title, as in this present case, the title of the plaintiffs is not in dispute. The issue was whether the purchase made by defendant Nos.2 to 4 was within the 9 guntas of land sold to defendant No.1 under the registered deed, which defendant Nos.2 to 4 have failed to establish.

30. In **Anil Rishi vs. Gurbaksh Singh**³ (Anil Rishi), it has been held at paragraph Nos.19 to 22 as under :

"19. There is another aspect of the matter which should be borne in mind. A distinction exists between burden of proof and onus of proof. The right to begin follows onus probandi. It assumes importance in the early stage of a case. The question of onus of proof has greater force, where the question is, which party is to begin. Burden of proof is used in three ways: (i) to indicate the duty of bringing forward

³ AIR 2006 SC 1971

evidence in support of a proposition at the beginning or later; (ii) to make that of establishing a proposition as against all counter-evidence; and (iii) an indiscriminate use in which it may mean either or both of the others. The elementary rule in Section 101 is inflexible. In terms of Section 102 the initial onus is always on the plaintiff and if he discharges that onus and makes out a case which entitles him to a relief, the onus shifts to the defendant to prove those circumstances, if any, which would disentitle the plaintiff to the same.

20. In *R.V.E. Venkatachala Gounder v. Arulmigu Viswesaraswami & V.P. Temple and another* (2004) 6 JT (SC) 442), the law is stated in the following terms:

"29. In a suit for recovery of possession based on title it is for the plaintiff to prove his title and satisfy the court that he, in law, is entitled to dispossess the defendant from his possession over the suit property and for the possession to be restored to him. However, as held in *A.Raghavamma v. A.Chenchamma* there is an essential distinction between burden of proof and onus of proof: burden of proof lies upon a person who has to prove the fact and which never shifts. Onus of proof shifts. Such a shifting of onus is a

continuous process in the evaluation of evidence. In our opinion, in a suit for possession based on title once the plaintiff has been able to create a high degree of probability so as to shift the onus on the defendant it is for the defendant to discharge his onus and in the absence thereof the burden of proof lying on the plaintiff shall be held to have been discharged so as to amount to proof of the plaintiff's title."

21. For the reasons aforementioned, the impugned judgment cannot be sustained. The order reframing the issue is set aside thus reviving the issue originally framed. The trial court will be free to frame any additional issue if it is felt necessary.

22. The appeal is allowed as above."

31. The Apex Court in the ***Raghavam and Another versus A. Chenicham and Another***⁴ (Raghavam), held that once the plaintiff, upon whom the burden lies, discharges that burden, the burden of proof shifts on the defendants to justify their possession strictly within the limits of their lawful title.

⁴ AIR 1964 SC 136

32. In **Avadh Kishore Dass vs. Ram Gopal and others**⁵ (Avadh Kishore Dass), has held at paragraph No.23, as under :

"23. Further, what is more important, in cross-examination, the defendant was confronted with this declaration in the will. He unreservedly admitted that what was stated in the will, was correct. It is true that evidentiary admissions are not conclusive proof of the facts admitted and may be explained or shown to the wrong, but they do raise an estoppel and shift the burden of proof on to the person making them or his representative-in-interest. Unless shown or explained to be wrong, they are an efficacious proof of the facts admitted. Here, the defendant, far from explaining the admission or declaration made by the deceased Mahant, under whom he (defendant) claims, has affirmed it, that the entire property in suit is the absolute property of the God, Thakurji as a juristic person. It is, therefore, too late in the day for the defendant to wriggle out of the same. It cannot be said that the defendant had inadvertently affirmed the correctness of the admission/declaration made in the aforesaid Will by the deceased Mahant. It was a conscious admission. The defendant himself repeatedly admitted this position with regard to the

⁵ AIR 1979 SC 861

ownership of the land being exclusively of the idol, Thakurji Maharaj, in the applications filed for receiving annuity under the provisions of the U.P. Zamindari Abolition and Land Reforms Act, 1952, which was granted to the idol, in respect of the Trust property."

33. For the foregoing reasons, this Court holds that Ex.P2 confines to defendant No.1's title to an extent of 9 guntas. Defendant Nos.2 to 4 have failed to establish, by way of prior reliable demarcation or correlation evidence, that the purchase under Ex.P3 and connected documents lies strictly within the said 9 guntas. Their reliance on an alleged GPA, is legally inadequate to convey title and cannot defeat the plaintiffs' claim, particularly when no registered conveyance in respect of any additional extent is shown and the GPA itself is not satisfactorily proved or produced on record. Further, the memo filed in MFA does not operate as an admission that the suit 'B' schedule property forms part of the said 9 guntas, and the doctrine of approbate and reprobate is not applicable to these facts. Accordingly, the

point framed for consideration is answered in favour of the appellants-plaintiffs and this Court pass the following:

ORDER

- i. The regular first appeal is ***allowed***.
- ii. The judgment and decree dated 07.01.2017 passed in O.S. No.2194/2002 are ***set aside***.
- iii. The suit of the plaintiffs for possession of 'B' schedule property is ***decreed***.
- iv. Defendants Nos.2 to 4 shall deliver vacant possession of the 'B' schedule property to the plaintiffs within three (3) months from the date of receipt of a certified copy of this order.
- v. It is needless to state that the plaintiffs are at liberty to file necessary application under Order XX Rule 12 CPC for determination of mesne profits.

Sd/-

JUSTICE K.S. HEMALEKHA