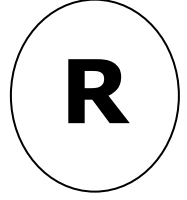


IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 16TH DAY OF FEBRUARY, 2024

BEFORE

THE HON'BLE MR. JUSTICE H.P. SANDESH



R.S.A. NO.1037/2006 (DEC)

BETWEEN:

RAMAIAH S/O BASAPPA
AGED ABOUT 62 YEARS,
WORKING IN POST OFFICE
OF LAKSHMIPURA,
R/AT HOLALKERE HOBLI
KANAKATTE HOBLI
ARSIKERE TALUK
HASSAN DISTRICT

... APPELLANT

(BY SRI B.ROOPESHA, ADVOCATE)

AND:

1 . BASAPPA S/O KADAPPA
SINCE DEAD REP. BY LRS

1(a) RAJAMMA
W/O GANESHAPPA
DEVANOR HOSURU VILLAGE
CHIKKADEVANOR POST
KADUR POST & TALUK
CHIKKAMAGALURU DISTRICT

1(b) KAMALAMMA
W/O LATE RAVI
R/AT BENNENAHALLI VILLAGE
GURUDHALLI POST, TIPUTER TALUK
TUMKUR DISTRICT

- 1(c) NAGARATHNA @ NAGAVENI
W/O ASHWATHAPPA
R/AT SALADIMMANAHALLI VILLAGE
BANAVARA POST
ARSIKERE TALUK
HASSAN DISTRICT
- 1(d) RATHNA
W/O MALLIKARJUNA @ MALLIKANNA
R/AT BITTENAHALLI VILLAGE
KANKATTE POST & HOBLI
ARSIKERE TALUK
HASSAN DISTRICT
- 1(e) JAYAMMA
W/O BASAPPA
R/AT KANKATTE VILLAGE
KANKATTE POST & HOBLI
BITTENAHALLI ROAD
ARSIKERE TALUK
HASSAN DISTRICT
- 1(f) HARISH K.B.
S/O BASAPPA
R/AT KANKATTE VILLAGE
KANKATTE POST & HOBLI
BITTENAHALLI ROAD
ARSIKERE TALUK
HASSAN DISTRICT
- 1(g) MAYAMMA
W/O GOWRISH
R/AT KANKATTE VILLAGE
KANKATTE POST & HOBLI
ARSIKERE TALUK
HASSAN DISTRICT

2. SRI C.V.MARULASIDDAPPA
S/O SRI VEERANNASHETTY
AGED ABOUT 57 YEARS
R/AT DODDAMETTIKURKE VILLAGE
KANAKATTE HOBLI
ARSIKERE TALUK
HASSAN DISTRICT. ... RESPONDENTS

(BY SRI A.V.GANGADHARAPPA, ADVOCATE FOR R1[a - g] & R2)

THIS R.S.A. IS FILED UNDER SECTION FILED U/S 100 OF CPC AGAINST THE JUDGEMENT AND DECREE DT. 23.12.2005 PASSED IN R.A.NO.62/2002 ON THE FILE OF THE CIVIL JUDGE (SR.DN.) ARASIKERE AND ETC.

THIS R.S.A. HAVING BEEN HEARD AND RESERVED FOR JUDGMENT ON 23.01.2024 THIS DAY, THE COURT PRONOUNCED THE FOLLOWING:

J U D G M E N T

This appeal is filed challenging the judgment and decree dated 23.12.2005 passed in R.A.No.62/2002 by the Civil Judge (Sr. Dn.), Arasikere.

2. The parties are referred to as per their original rankings before the Trial Court to avoid confusion and for the convenience of the Court.

3. The factual matrix of the case of the plaintiff in O.S.No.169/1995 that the plaint schedule property bearing

Sy.No.19/7 to the extent of 2 acres 7 guntas is situated at Kanakatte hobli of Holalkere village. The said property is morefully described in the plaint as schedule property. It is contended by the plaintiff that the said property originally belongs to Julalingappa who is the husband of the plaintiff's father's sister. The said Julalingappa and his wife Mallamma had only one son by name Ningappa. The said Julalingappa, Mallamma and their son Ningappa were residing together with the plaintiff and his father during their lifetime. The suit schedule property was enjoyed by him and his family members during their lifetime. After his death, the plaintiff's father Basappa became the lawful owner and was in possession and enjoyment of the suit schedule property for a period of 41 years to the knowledge of entire locality. The defendant had filed a suit in O.S.No.261/1987 against the plaintiff alleging that he is in possession and enjoyment of the suit schedule property by means of sale deed dated 27.05.1974 having purchased from one Kariyamma who is the wife of Ningappa. In the said suit, he has filed an application under Order 39 Rule 1 and 2 and sought for grant of temporary injunction and the same was granted in

favour of the defendant vide order dated 25.05.1987 and the defendant has taken the possession of the suit schedule property by force based on the interim order.

4. It is contended by the plaintiff that the defendant is in illegal possession. It is further contended that the said Kariyamma is a fictitious person and Malamma and Ningappa are the persons who had succeeded after the death of Julalingappa. After his death, Basappa and his son i.e., the plaintiff are in possession and enjoyment of the suit schedule property being lawful owners. Hence, the plaintiff is entitled for the relief of declaration and possession. The suit filed by the defendant in O.S.No.261/1987 was dismissed and against the said judgment and decree, an appeal was preferred in R.A.No.75/1990 wherein the First Appellate Court confirmed the order of the Trial Court and against the judgment and decree of the First Appellate Court, Regular Second Appeal was filed in R.S.A.No.996/1992 and the said RSA was also got dismissed. The plaintiff had requested the defendant to hand over the possession of the suit

schedule property but he declined for the same. Hence, the suit is filed for the relief of declaration and possession.

5. In pursuance of the suit summons, defendant appeared and filed the written statement denying the averments made in the plaint contending that the plaintiff and his father are not the relatives of Julalingappa. The defendant also denied that Basappa had a sister by name Mallamma. The plaintiff nor his father had paid the kandayam in respect of the suit schedule property. It is contended in the written statement that the said Julalingappa had two wives by name Kariyamma and Mallamma among whom the Kariyamma was the first wife. As Kariyamma had no issues, she got married Mallamma to Julalingappa. Through the second wife Mallamma, Julalingappa had a son by name Ningappa who died unmarried. Among the family members, Julalingappa predeceased his wife Mallamma wherein Kariyamma was alive and the said Kariyamma was the aunt of the defendant's father as she was alone, she was looked after by the family of the defendant.

6. It is also the case of the defendant that said Kariyamma sold the property in favour of the defendant by means of registered sale deed dated 27.05.1974. On the very same day, the possession of the suit schedule property was also handed over in favour of the defendant, hence, he continued to be in possession of the suit schedule property as the lawful owner. The defendant also denied the possession of the suit schedule property by the plaintiff for nearly 40 years and also denied the averments that based on the temporary injunction, possession was taken. It is also contended that in the earlier suit in O.S.No.261/1987, the legality of the registered sale deed dated 27.05.1974 was not considered and no ownership was questioned as the said suit was only for bare injunction. It is further contended that the defendant is in possession and enjoyment of the suit schedule property and acquired the same by means of a registered sale deed thus, the plaintiff cannot seek any relief against the defendant.

7. Based on the pleadings of the parties, the Trial Court has framed the following:

ISSUES

1. Whether the plaintiff proves that he is the owner of the suit schedule properties?
2. Whether the plaintiff proves that in the proceedings in O.S.No.261/1987 on the basis temporary injunction he was dispossessed?
3. Whether the plaintiff is entitled for the possession of the suit schedule property?
4. Whether the plaintiff is entitled for the mesne profits as prayed for?
5. Whether the plaintiff is entitled for the relief sought for?
6. What order of decree?

8. In order to prove the case of the plaintiff, he himself examined as PW1 and also examined one witness as PW2 and got marked the documents at Ex.P1 to P32. On the other hand, the defendant examined himself as DW1 and also examined two witnesses as DW2 and DW3 and got marked the documents at Ex.D1 to D6. The Trial Court having considered both oral and documentary evidence placed on record answered Issue Nos.1 to 5 as affirmative in coming to the conclusion that the plaintiff is the owner of the suit schedule property and the plaintiff was

dispossessed from the suit schedule property in view of the temporary injunction granted in O.S.No.261/1987 and so also comes to the conclusion that the plaintiff is entitled for the relief of possession of the suit schedule property and mesne profits and granted the relief as sought in the plaint. Being aggrieved by the judgment and decree of the Trial Court, an appeal was preferred in R.A.No.62/2002 before the First Appellate Court.

9. The First Appellate Court having reassessed both oral and documentary evidence placed on record formulated the points that whether the plaintiff proves that she is the owner of the property, whether the plaintiff is entitled for the relief as sought and whether the judgment and decree of the Trial Court requires interference. The First Appellate Court having reassessed the evidence available on record, answered Point Nos.1 and 2 as negative and answered Point No.3 as affirmative reversing the finding of the Trial Court and dismissed the suit of the plaintiff. Being aggrieved by the divergent finding, the present appeal is filed by the plaintiff questioning the judgment and decree of the First Appellate Court.

10. The main contention of the counsel for the appellant before this Court that the lower appellate Court was committed an error in reversing the finding in not holding that the defendant was estopped from denying the title of the plaintiff and setting title even though his suit in O.S.No.261/1987 was dismissed and the same has been confirmed in the appeal as well as in the second appeal. The Trial Court passed detailed judgment decreeing the suit of the plaintiff. In spite of it, the First Appellate Court committed an error in reversing the finding since the defendant has already suffered an order of dismissal of the suit filed by him. The First Appellate Court failed to see that defendant has not established his title and possession to the suit land since 1974 and in the earlier suit, already definite finding was given that defendant had not proved the sale deed dated 27.05.1974 but the lower appellate Court failed to see that mere possession of defendant during a short span of time, which was only unauthorized and without a semblance of title, dispossessed from the suit schedule property hence, the First Appellate Court committed an error in reversing the finding of the Trial Court in

holding that plaintiff has failed to prove his title, even though the title and possession of Julalingappa, his wife Mallamma and Ningappa had been categorically admitted by the defendant, which was subsequently inherited by the plaintiff's father and himself. The First Appellate Court fails to consider the pleading of the plaintiff that Julalingappa, his wife and their son Ningappa and the plaintiff and his father were in joint possession of the suit schedule property and after their death, the plaintiff and his father were in joint possession of the suit schedule property and they have inherited the property. The First Appellate Court erred in relying on certain entries in revenue records in preference to Ex.P12 which had been rebutted by reliable oral and other evidence. The First Appellate Court reasons arrived on Point No.3 at paragraph 17 of its judgment was unwarranted and unjustified.

11. This Court while admitting the appeal, framed the substantial question of law, which reads as follows:

Whether the lower appellate Court was justified in holding that the plaintiff has failed to establish his title of the property ignoring

the earlier proceedings initiated by the defendant in which he was held not to have title to the suit schedule property?

12. The counsel for the appellant in his argument would vehemently contend that the property originally belongs to Julalingappa is not in dispute. The plaintiff's father is the brother of Malamma who is the wife of said Julalingappa is also not in dispute. The learned counsel for the appellant would vehemently contend that the defendant claims the title and possession based on the sale deed dated 27.05.1974 alleging that the first wife of Julalingappa i.e., Kariyamma sold the said property in his favour. The counsel also would vehemently contend that the defendant, earlier he had filed a suit in O.S.No.261/1987 and the same was got dismissed and the said dismissal order was confirmed in the regular appeal as well as in the second appeal. The counsel would vehemently contend that the said finding of this Court has attained its finality since the same has not been challenged by filing an appeal. The counsel also would vehemently contend that Section 15(d) of CPC attracts since the father of the plaintiff

is the brother of Mallamma and he inherited the property from Mallamma who is the successor of her husband Julalingappa.

13. The counsel in support of his arguments relied upon the judgment reported in **AIR 1998 SC 1132** in the case of **TIRUMALA TIRUPATI DEVASTHANAMS vs K M KRISHNAIAH**. The counsel referring this judgment brought to notice of this Court paragraph 10 of the said judgment with regard to answering point No.1 held that we rejected the contention of the learned counsel for the respondent-plaintiff and hold that the TTD could rely on the judgment in O.S.No.51/37 as evidence to prove its title in regard to the suit property, even though the present plaintiff was not a party to that suit. The counsel referring this judgment would vehemently contend that when the defendant was unsuccessful throughout, cannot claim any right.

14. The counsel also relied upon the judgment reported in **AIR 2001 RAJASTHAN 147** in the case of **UDIT GOPAL BERI AND OTHERS vs STATE** and brought to notice of this Court paragraph 7 wherein discussion was made with regard to

the principle of res-judicata is applicable since the Court has given finding against the defendant in the earlier suit filed by him and the same cannot be reopened in the present suit.

15. The counsel also relied upon the judgment reported in **AIR 2002 KERALA 133** in the case of **RAMAN PILLAI KRISHNA PILLAI AND OTHERS vs KUMARAN PARAMESWARAN AND OTHERS** and brought to notice of this Court paragraph 7 wherein discussion was made with regard to framing of substantial question of law governing admission and also brought to notice of this Court paragraphs 41 and 42 and in terms of Section 40 of the Evidence Act, are admissible for between the plaintiff and the defendant recitals made in judgment between predecessor of plaintiff and defendant regarding rights to suit schedule property.

16. Per contra, the counsel for the respondent in his argument, would vehemently contend that one Kariyamma who claims to be the wife of Julalingappa executed the sale deed in favour of the defendant in the year 1974. The counsel also would vehemently contend that the sale deed is marked as Ex.P9

and the very recital of the document is clear with regard to handing over the possession in favour of the defendant. The counsel also would vehemently contend that PW2 who has been examined in support of the plaintiff categorically admits that he does not know anything about the property and also the relationship. Hence, his evidence is not a material evidence. The counsel would vehemently contend that PW1 denies the fact of two wives. But the material clearly discloses that particularly in the sale deed of the year 1974, there is a recital that Kariyamma is the wife of said Julalingappa. The counsel also would vehemently contend that in the plaint, details of death of Julalingappa, Mallamma and his son is not given. The material has not been placed to that effect. The counsel also brought to notice of this Court paragraphs 3 and 4 of the plaint wherein what the plaintiff has pleaded. Though contend that defendant has dispossessed the plaintiff based on the interim order, no complaint was given. The counsel also would vehemently contend that according to the plaintiff he was dispossessed in the year 1987, the suit was filed in the year 1995. The counsel also would vehemently contend that earlier suit filed by the

defendant is only for permanent injunction and not for declaration. The counsel also brought to notice of this Court that cause of action arose in the year 1987 wherein it is stated that he was illegally dispossessed the plaintiff. The counsel would vehemently contend that Section 6 of the Specific Relief Act applies and within six months suit ought to have been filed seeking the relief of declaration and possession.

17. The counsel also brought to notice of this Court to the prayer made in the plaint and contend that not sought any relief of cancellation of sale deed. The counsel also would vehemently contend that though the plaintiff relies upon the revenue entries and the entry is not as successor but revenue entries are made based on the earlier order of the Land Tribunal. The counsel would vehemently contend that the same was challenged in writ petition and this Court remanded the matter and thereafter, the claim of the plaintiff was dismissed. The counsel would vehemently contend that the plaintiff not claims as owner but claims as tenant before the Land Tribunal and now cannot contend that the plaintiff has inherited the property. The

dismissal of tenancy right has not been questioned and the same has attained its finality.

18. The counsel would vehemently contend that the defendant is in possession in terms of the sale deed of the year 1974 and also as on the date of suit, the plaintiff was not in possession as on the date of suit. The plaintiff in an ingenious method pleaded in the plaint that the plaintiff was dispossessed based on the interim order obtained by the defendant in the earlier suit. The dispossession has not been proved. But the Trial Court committed an error in coming to the conclusion that the plaintiff was dispossessed without any material evidence on record. The counsel also would vehemently contend that if really the plaintiff was dispossessed in terms of the earlier suit, he would have pleaded in the written statement in the earlier suit. But no such pleading was made. The First Appellate Court has taken note of all these material available on record and reversed the finding and the reasons given by the First Appellate Court is well founded.

19. In reply to the arguments of the respondent counsel, the counsel for the appellant would vehemently contend that the plaintiff has inherited the property and hence, he becomes the owner of the property and the Trial Court rightly granted the relief of declaration and possession but the First Appellate Court committed an error in reversing the finding of the Trial Court.

20. Having heard the learned counsel appearing for the respective parties and also on perusal of the material available on record and also considering the principles laid down in the judgments referred supra by the counsel for the appellant, this Court has to reanalyse the material available on record in the light of the substantial question of law framed by this Court.

21. Having perused the material available on record, it discloses that the plaintiff and the defendant not disputes the fact that the property which is morefully described in the schedule of the plaint originally belongs to Julalingappa. It is the claim of the plaintiff that the said Julalingappa married Mallamma who is the sister of the plaintiff's father. Though denied the said relationship by the defendant, it is emerged in

the evidence of the parties that the said Mallamma is the sister of plaintiff's father. Though it is contended that the Mallamma is not sister of the father of the plaintiff, the document which has been produced by the plaintiff at Ex.P9, the sale deed executed by one Kariyamma, in her sale deed it is declared that Mallamma is the wife of said Julalingappa, but claims that Kariyamma is also the wife of Julalingappa. It is also emerged in the evidence that both Julalingappa and Mallamma had a son by name Ningappa. There is no dispute to that effect. It is also not in dispute that Julalingappa died earlier and his wife Mallamma also passed away and afterwards, the son Ningappa also passed away as bachelor.

22. Having perused the pleadings and evidence it is emerged that Mallamma is the wife of Julalingappa. But defendant's claim that Kariyamma is the first wife of Julalingappa and through the Kariyamma, the Julalingappa was not having any issues. Hence, the said Kariyamma got married Mallamma to Julalingappa. The said contention of the defendant is in dispute. When there is no dispute with regard to the fact that Mallamma

is the wife of Julalingappa, the only question is whether title has been passed in favour of the defendant by executing a sale deed by Kariyamma in the year 1974. No doubt, there is a registered document of Ex.P9 in favour of the defendant through Kariyamma. It is also not in dispute that defendant had filed earlier suit in O.S.No.261/1987 and the said suit is for the relief of permanent injunction and the same was dismissed. It is also important to note that in the said suit, an issue is framed that whether the plaintiff proves that he is the owner of the suit schedule property. Even though the suit is filed for the relief of permanent injunction, the said issue is framed. It is important to note that the second issue framed in the said suit is whether the plaintiff proves that he is in lawful possession of the suit schedule property and third issue is whether the plaintiff proves the alleged interference by the defendant. It is important to note that though the suit is for the relief of permanent injunction and issue is framed with regard to the ownership of the plaintiff in the said suit and issue has not been recasted and the Trial Court given the finding as negative while answering all the issues against the defendant in respect of ownership and also

the lawful possession and interference. It is also not in dispute that an appeal was filed against the judgment and decree passed in O.S.No.261/1987 and the said decree in O.S.No.261/1987 is marked as Ex.P1 in the present suit. The appeal filed against the judgment and decree passed in O.S.No.261/1987 is numbered as R.A.No.75/1990 and the judgment of the First Appellate Court also marked as Ex.P3. The First Appellate Court dismissed the said appeal confirming the judgment passed at Ex.P1.

23. It is also not in dispute that second appeal was filed against the concurrent finding of the Trial Court and the First Appellate Court and the same is numbered as R.S.A.No.996/1992 and the same was also got dismissed. While dismissing the second appeal, this Court observed that the suit was filed by the appellant for declaration and injunction and in the alternative for possession of Sy.No.19/7, measuring 2 acres 7 guntas. Both the Courts have held concurrently that the plaintiff has no title. The plaintiff has claimed title from one Kariyamma. On the basis of the material available on record, this

Court held that both the Courts have held that Kariyamma is a fictitious person and that Kariyamma had no title at all. On the other hand, the Courts below have come to the conclusion that the property belonged to one Julalingappa, the predecessor in tile of the defendant. It is also observed that another point that was canvassed by the learned counsel for the appellant is that in an application filed in Form No.VII, before the Land Tribunal, Arasikere, the defendant had admitted that the plaintiff was the owner of the suit property. The Courts below have held that there was no such admission. It is further observed that the application was withdrawn by the defendant. Even assuming that there was such an admission, alone cannot confer title on the plaintiff. Having perused the order passed by this Court in the second appeal it is clear that the defendant has not proved the title and also the sale deed executed by one Kariyamma is a fictitious person and that Kariaymma had no title at all.

24. The Trial Court, First Appellate Court as well as this Court given definite finding with regard to the contention of the defendant that the said sale deed of the defendant cannot be

relied upon since the very executant of the said sale deed is a fictitious person. The defendant also claimed the title based on the said sale deed and the same has not been accepted by any of the Courts. The counsel for the respondent herein would vehemently contend that suit is only for bare injunction. I have already pointed out that an issue is framed with regard to the ownership of the plaintiff in the said suit and the said issue has not been recasted and a judicial adjudication was made with regard to the contention of the defendant in the present suit is concerned in the present suit. Hence, there is a force in the contention of the counsel for the appellant that the principles of res-judicata is applicable to the facts of the case on hand with regard to the claim made by the defendant as he is the owner based on the said sale deed has been negatived. Though the suit is for bare injunction, title is also considered in the earlier suit, regular appeal as well as in the second appeal and said order has attained its finality in coming to the conclusion that the vendor of the defendant in this suit is fictitious person.

25. Having perused the material available on record it discloses that there is no dispute with regard to the fact that the property was originally belongs to Julalingappa and also though contend that his name is not Julalingappa, but throughout in the evidence it is emerged that he is also called as Julalingappa and the same is admitted by the defendant. But the counsel contends that his name is not Julalingappa, but during the course of cross-examination even suggestion was made by the defendant counsel that original propositus name is Julalingappa and hence, submission of counsel for defendant cannot be accepted. The other contention that Mallamma is not the wife of Julalingappa also cannot be accepted in view of the material available on record, there is an admission. It is not in dispute that the father of the plaintiff is the brother of said Mallamma and though denied but admitted. It is the claim of the defendant that the said Kariyamma is the first wife but in order to prove the said fact, no material is placed before the Court.

26. DW1 and other two witnesses who have been examined in support of the case of the defendant also have

admitted that they have not seen any document showing that she is the wife of said Julalingappa. There is also no any document to accept the contention of the defendant. I have already pointed that regarding relationship of Kariyamma and Julalingappa, a definite finding was given in the earlier suit in O.S.No.261/1987 and also in the regular appeal and so also in this Court in the second appeal comes to the conclusion that both the Courts have given concurrent finding that said Kariyamma is a fictitious person hence, the contention of the defendant that he had derived title and he has been in possession of the suit schedule property cannot be accepted.

27. It is also important to note that in O.S.No.261/1987, the Trial Court comes to the conclusion that the defendant is not in possession of the suit schedule property and the said finding is affirmed in the regular appeal as well as in the second appeal. Then, the defendant has to prove that how he came into possession of the property. But the very claim of the plaintiff in the present suit is that based on the interim injunction granted in the earlier suit filed by the defendant in O.S.No.261/1987, he

was dispossessed. The defendant also not disputes the fact that there was an interim order in his favour in O.S.No.261/1987. No doubt, it is rightly pointed out by the counsel for the defendant that no complaint was given and also not sought for any relief of possession in the suit of the defendant which was filed earlier. The counsel for the defendant also would vehemently contend that when the plaintiff was dispossessed, Section 6 of the Specific Relief Act attracts and in order to seek the relief of possession, the suit ought to have been filed within six months.

28. It is also important to note that when the plaintiff has filed the suit for the relief of declaration and possession, no need to file again separate suit immediately after dispossession since already defendant had filed the suit earlier for permanent injunction as well as alternatively for possession within six months as contended. But the question is, the suit was filed in the year 1995, after disposal of other matters in all the Court. The other contention that the plaintiff has not sought for the relief of cancellation of sale deed and the said circumstances is not warranted since very sale deed was relied upon in the earlier

suits and all the Courts comes to the conclusion that sale deed is by a fictitious person and no validity can be attached to the same. I have already pointed out that the said finding has attained its finality. The very contention of the plaintiff is that he succeeded to the property of said Mallamma and the said Mallamma is his maternal aunt. It is also his case that Mallamma, after the death of Julalingappa, was staying along with the plaintiff. In order to prove the said factum, no document is placed before the Court except producing tax paid receipt in respect of the suit schedule property.

29. It is also not in dispute that the suit was filed on 20.07.1995 and when this Court, First Appellate Court and also the Trial Court have given definite finding that the said Kariyamma is a fictitious person and based on the said execution of document of sale deed dated 27.05.1974, the defendant cannot claim title as well as possession since the possession also was not considered in the earlier suit and possession also not proved. The very case of the plaintiff that he was dispossessed in the year 1987. In order to prove the fact that the plaintiff

was dispossessed, in the evidence of PW1 he has reiterated the same. The plaintiff also relied upon the document of earlier orders passed in O.S.No.261/1987, R.A.No.75/1990 as well as R.S.A.No.996/1992 that is judgment and decree at Ex.P1 to P6. The plaintiff also claims that there is an entry in the pahani and relies upon the documents at Ex.P13 and P14. I have already pointed out that there is no dispute with regard to the fact that the property belongs to Julalingappa.

30. It is also important to note that the plaintiff categorically admitted that no testamentary document executed in favour of his father or his favour and also there is no any sale deed and no any settlement deed also in their favour. PW1 categorically admits that his father died in the year 1983. PW1 also categorically admits that he also made claim before the Land Tribunal as tenant and records reveal that ultimately, no land has been granted declaring that the plaintiff is the tenant. PW1 denies the fact of the suggestion that Kariyamma was the first wife of Julalingappa. It is also important to note that he was working in the postal department from 1976. PW1 also

categorically admits that no document to show that he was residing along with Julalingappa and his wife Mallamma. Though relies upon the evidence of PW2, his evidence is only that Mallamma was having a son and she is not the second wife of Julalingappa. PW1 also admits that Mallamma died 40 to 50 years ago. He also says that Julalingappa was passed away 70 years ago but he claims that Ningappa passed away 30 years ago. He also admits that for having performed the last rituals of Ningappa by the father of the plaintiff, no invitation is printed. It is suggested that suit schedule possession was taken 25 years ago by the defendant and same was denied. PW2 claims that possession was taken 4 to 5 years ago.

31. The other witness is DW1 and in his evidence he admits the name of Julalingappa and Mallamma having a son by name Ningappa through Julalingappa. But he claims that Mallamma died earlier and also claims that both Mallamma and Kariyamma were in possession. He claims the possession from the date of sale deed. In the cross-examination, he admits the earlier decree passed in O.S.No.261/1987 and banking upon the

reference made in the sale deed in Ex.P9 wherein it is stated that Kariyamma is the wife of Julalingappa. It is categorically admits that the details of Julalingappa's family is not mentioned in the sale deed and also categorically admits that Kariyamma is residing in Kanakatte but she used to visit Holalakere and also categorically admits that he is not having any document to show that Kariyamma was in possession of the property and his witnesses also admits that no document to show that Kariyamma was in possession. When such admission is given, the question of handing over the possession in favour of the defendant on the date of sale deed does not arise.

32. It is important to note that DW1 admits that he has not produced any documents to show that Kariyamma is the wife of Julalingappa. DW1 also categorically admits that plaintiff is the resident of Holalakere along with his family from his ancestors. Though he denies that the Mallamma is not the sister of the father of the plaintiff but he admits that Mallamma was given in marriage to Julalingappa and also admits her son Ningappa. He also categorically admits that after the death of

Julalingappa, Mallamma and Ningappa, no katha was transferred but he admits that in Ex.D6 name of the plaintiff's father and also the son of Julalingappa i.e., Ningappa is found in the document. When suggestion was made that after the death of Julalingappa, his wife Mallamma and his son were residing in the house of plaintiff and witness says that he is not aware of the same and says that may be they were living together and this admission is very clear that he has not specifically denied the said suggestion. It is also suggested that after the death of Mallamma and Ningappa, the plaintiff and his father were cultivating the property and that suggestion also denied saying that he is not aware of the same and not denied positively that they are not cultivating the property. Having considered this admission on the part of the DW1 wherein he has given an admission that he has not produced any document to show that Kariyamma was in possession of the suit schedule property, the question of handing over the property in favour of the defendant does not arise. The very admission of the DW1 that after the death of Mallamma, Ningappa and Julalingappa, he is not aware that whether the plaintiff is in possession or not and the said

answer supports the case of the plaintiff. He also admits that when his name in the pahani striked out and he did not challenge the same. He also admits that in the pahani, family is cultivating. He admits that in Ex.D6, the name of Ningappa and the name of father of plaintiff is shown. In Ex.D5 also the name of Ningappa is found. The answer elicited that after the death of Julalingappa, his wife and son Ningappa were staying in the house of plaintiff, but says that not aware of it, but may be residing. Even with regard to cultivation is concerned, he says not aware of it.

33. No doubt, the defendant examined other two witnesses i.e., DW2 and DW3 and their evidence is not supported the case of the defendant instead of, it supports the case of the plaintiff wherein they deposed that the plaintiff and his father are residing at Holalakere and also they deposed that they are not aware of the fact that how Kariyamma got the suit schedule property. DW1 categorically admits that said Kariyamma is the resident of Kanakatte and distance between Kanakatte and Holalakatte is 8 km. DW1 also categorically

admits that he has not seen any document to show that Kariaymma was in possession of the property. When such admissions are given and also when specific pleading was made that the plaintiff was dispossessed based on the strength of temporary injunction granted in the suit in O.S.No.261/1987 filed by the defendant, it is clear that at no point of time, defendant was in possession of the suit schedule property and her vendor Kariyamma was also not in possession. But, now, he claims that he is in possession. The contention of the plaintiff supports his case having considered the admission of DW1. Having perused the material available on record it discloses that the plaintiff was dispossessed. Unless the defendant proves his possession and the said possession is lawful, the claim of the defendant cannot be accepted. Already in the earlier suit, all the Courts have given definite finding that the defendant has not proved the possession, thus, an inference can be drawn that the plaintiff was in possession and he was dispossessed based on the temporary injunction granted in the suit in O.S.No.261/1987. The plaintiff also specifically pleaded in the written statement in O.S.No.261/1987 that the plaintiff was dispossessed. Hence, the

contention that the defendant in the said suit that the plaintiff has not pleaded that he was dispossessed cannot be accepted when there is a specific pleading in this regard in the written statement. The suit is also filed within 12 years of dispossession i.e., immediately after disposal of earlier original suit, regular appeal and second appeal. The factual material supports the case of plaintiff.

34. Now, this Court would like to consider the question of law since it is the claim of the plaintiff while seeking the relief of declaration that the property devolves upon the plaintiff who is the brother's son of mallamma and he was taken care of said Mallamma and his son Ningappa during their lifetime. The counsel for the appellant also contends that Section 15(d) of the Hindu Succession Act, 1956 applies to the case on hand. Hence, this Court would like to refer Section 15 of the Hindu Succession Act, 1956 which reads as follows:

“15. General rules of succession in the case of female Hindus. - (1) The property of a female Hindu dying intestate shall devolve according to the rules set out in section 16,—

- (a) firstly, upon the sons and daughters (including the children of any predeceased son or daughter) and the husband;
 - (b) secondly, upon the heirs of the husband;
 - (c) thirdly, upon the mother and father;
 - (d) fourthly, upon the heirs of the father; and
 - (e) lastly, upon the heirs of the mother.
- (2) Notwithstanding anything contained in sub-section (1),—
- (a) any property inherited by a female Hindu from her father or mother shall devolve, in the absence of any son or daughter of the deceased (including the children of any pre-deceased son or daughter) not upon the other heirs referred to in sub-section (1) in the order specified therein, but upon the heirs of the fathers; and
 - (b) any property inherited by a female Hindu from her husband or from her father-in-law shall devolve, in the absence of any son or daughter of the deceased (including the children of any predeceased son or daughter) not upon the other heirs referred to in sub-section

(1) in the order specified therein, but upon the heirs of the husband.”

35. Having considered the general rules of succession in the case of female Hindus, this Court has to take note of the fact that Julalingappa passed away leaving behind his wife as well as son-Ningappa. It is also not in dispute that wife also passed away and son Ningappa also passed away as bachelor. Hence, this Court also would like to refer Section 8 of the Hindu Succession Act, 1956 which is relevant for consideration to the general rules of succession in the case of males. Section 8 of the said Act reads as follows:

“8. General rules of succession in the case of males.— The property of a male Hindu dying intestate shall devolve according to the provisions of this Chapter:—

- (a) firstly, upon the heirs, being the relatives specified in class I of the Schedule;
- (b) secondly, if there is no heir of class I, then upon the heirs, being the relatives specified in class II of the Schedule;
- (c) thirdly, if there is no heir of any of the two classes, then upon the agnates of the deceased; and

(d) lastly, if there is no agnate, then upon the cognates of the deceased.”

36. Having read the Section 8 of the Hindu Succession Act, it is clear that the property of a male Hindu dying intestate shall devolve according to the provisions of this Chapter, firstly, upon the heirs, being the relatives specified in class I of the schedule; secondly, if there is no heir of class I, then upon the heirs, being the relatives specified in class II of the Schedule.

37. Having read the provisions of Section 8 of the Hindu Succession Act also this Court has to take note of the schedule of the heirs in class I and class II. This Court having taken note of class II, column No.9 of the schedule, it is clear that mother's brother, mother's sister. Class II of the schedule and also the general rules of succession with regard to Section 15 of the Hindu Succession Act has to be read conjointly to consider the case of the plaintiff.

38. Though the learned counsel for the appellant would vehemently contend that Section 15(d) of the Hindu Succession

Act applies which is upon the heirs of the father and the women as per general rules of succession. The fact that the plaintiff also claiming declaration based upon the heirs of father that means the Mallamma is the sister of plaintiff's father and the said fact is not in dispute. It is also important to note that the property succeeded by wife Mallamma and her son Ningappa from said Julalingappa and the said fact is also not in dispute. The general rules of succession in the case of female Hindus is very clear that firstly, upon the sons and daughters (including the children of any pre-deceased son or daughter) and the husband; secondly, upon the heirs of the husband, but no heirs as stipulated in class (a) of Section 15 and so also in respect of heirs of husband, no legal heirs. Thirdly, upon the mother and father, but in the case on hand, both of them also not alive; fourthly, upon the heirs of the father, that is father of the plaintiff is the brother of Mallamma. Hence, there is a force in the contention of the counsel for the appellant/plaintiff that plaintiff being the legal heir of class II of the brother of Mallamma, the property devolves upon the appellant as per Section 15(d) of the general

rules of succession in the case of female Hindus of Hindu Succession Act, 1956 which Mallamma succeeded.

39. I have already taken note of Section 8 of the Hindu Succession Act in the case of male Hindu dies leaving without any legal heirs in terms of class I. Admittedly, the said Ningappa passed away as bachelor and this Court also discussed in detail regarding no heirs as specified in class I of the schedule having taken note of the general rules of succession in the case of males. Admittedly, the said Ningappa died intestate and his property shall devolve according to the provisions of this Chapter and no legal heirs firstly upon the heirs as specified in class I of the schedule and the Court has to look into Section 8(b) of the said Act and secondly, if there is no heir of class I, then upon the heirs, being the relatives specified in class II of the schedule. This Court also taken note of the schedule in view of Section 8 of the Act wherein mother's brother come under class II heir in column No.IX and though explanation is that in this schedule, references to a brother or sister do not include references to a brother or sister by uterine blood. But here is a case that the

father of the plaintiff is the brother of Mallamma and he is a direct brother and now the said Basappa (plaintiff's father) is also no more and the property devolves upon the legal heir of said Basappa that is the plaintiff herein.

40. Having taken note of the conjoint reading of Section 15 in respect of general rules of succession in the case of female Hindus that is in respect of Mallamma as well as general rules of succession in the case of males that is in respect of Ningapp, in detail discussion is made and comes to the conclusion that the suit schedule property devolves upon the plaintiff and the Court can grant the relief of declaration in favour of the plaintiff as sought in the suit.

41. This Court would like to rely upon the judgment of the Apex Court reported in **1992 SUPP (3) SCC 108** in the case of **STATE OF PUNJAB vs BALWANT SINGH AND OTHERS** wherein the Apex Court discussed with regard to Section 29, Escheat, operates only in the event of total absence of any heir to the intestate. The Apex Court also discussed Section 15(1), (2) and 14 and so also effect of sub-section (2) of Section 15 of

Hindu Succession Act, it intended only to change the order of succession specified in sub-section (1) and not to eliminate other categories of heirs set out in sub-section (1). Consequently, by virtue of sub-section (2), property should first go to heirs of father or husband as the case may be, female Hindu, inheriting property from her husband, dying intestate after commencement of the Act leaving behind no issue nor any heir from her husband's side, but respondent (plaintiff) grandson of her brother claiming succession to her property, held respondent/plaintiff's claim sustainable as he falls under sub-section (1)(e) of Section 15. In the case on hand also, I have already pointed that the plaintiff is the son of brother of Mallamma and in view of the principles laid down in the aforesaid judgment, the plaintiff is entitled to become the owner of the suit schedule property as per general rules of succession under Section 15 of the Act. I have already discussed in respect of the property of the son of Hindu male i.e., the son of Julalingappa through Mallamma died intestate and as bachelor and when there are no other legal heirs, the property devolves upon the

plaintiff as discussed. Hence, substantial questions of law is answered accordingly.

42. In view of the discussions made above, I pass the following:

ORDER

The appeal is allowed.

The impugned judgment and decree 23.12.2005 passed in R.A.No.62/2002 is set aside and the judgment and decree dated 13.03.2002 passed in O.S.No.169/1995 is restored.

**Sd/-
JUDGE**

SN