

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.1247/2023 (PAR)

R

BETWEEN:

- 1 . SRI PAPANNA A.,
S/O LATE ANNAIAH,
AGED ABOUT 77 YEARS,
HINAKAL VILLAGE, KASABA HOBLI,
MYSURU TALUK
MYSURU DISTRICT-570 017. ... APPELLANT

(BY SRI C.M.NAGABHUSHAN, ADVOCATE FOR
SRI ANANDA K., ADVOCATE)

AND:

- 1 . SMT. B.N. SIDDESHWARI
W/O SHIVASHANKARAIHAH,
D/O LATE B.S. NAGARAJ,
AGED ABOUT 70 YEARS,
R/AT NO. 284, 22ND MAIN ROAD,
20TH CROSS, VIJAYANAGAR III STAGE,
'C' BLOCK, MYSURU - 570 017.
- 2 . SMT. B.N. CHAMNDRAPBHA,
W/O JAGANNATH PELLAGAR,
D/O LATE B.S. NAGARAJ,
AGED ABOUT 68 YEARS,
R/AT NO. 53/1, 5TH A CROSS,
RANGA RAO ROAD,
SHANKARAPURAM,
BENGALURU - 560 004.

- 3 . SRI S.P. KARTHIK,
S/O LATE P. SHREEKANTA PRASAD AND
LATE. B.N. BHUVANESHWARI
AGED ABOUT 44 YEARS,
R/AT NO.284, 22ND MAIN ROAD,
20TH CROSS VIJAYANAGAR III STAGE,
C BLOCK, MYSURU- 570 017.

- 4 . SMT. B.N. LEELAVATHI,
W/O. H.S. VISHWANATH
D/O LATE B.S. NAGARAJ,
AGED ABOUT 63 YEARS,
R/AT NO.102, 9TH MAIN ROAD,
SWIMMING POOL ROAD,
SARASWATHIPURAM,
MYSURU- 570 009.

- 5 . SMT. B.N. GIRIJESHWARI,
W/O. DR. G.S. DILEEP KUMAR
D/O LATE B.S. NAGARAJ
AGED ABOUT 60 YEARS,
R/AT NO. 403/75, GOWRI NILAYA,
7TH CROSS, 1ST BLOCK,
JAYANAGAR,
BENGALURU - 560 011

- 6 . SMT. NAGARAHNAMMA GURUDATT
W/O LATE. GURUDATT,
AGED ABOUT 83 YEARS,
R/AT NO.2897,
BEHIND LAW COURT,
SARASWATHIPURAM,
MYSURU- 570 009.

- 7 . SRI. S.G. SIDDESH,
D/O. LATE GURUDATT,
AGED ABOUT 69 YEARS,

R/AT NO.2897,
BEHIND LAW COURT,
SARASWATHIPURAM,
MYSURU-57 009.

- 8 . SRI. S. SHIVAPRAKASH,
S/O. LATE GURUDATT,
AGED ABOUT 67 YEARS,
R/AT NO.2897,
BEHIND LAW COURT,
SARASWATHIPURAM,
MYSURU-57 009
- 9 . SMT. PRAPULLA SHANKAR
D/O LATE B.S. NAGARAJ,
AGED ABOUT 64 YEARS,
R/AT NO. 2897,
BEHIND LAW COURT,
SARASWATHIPURAM,
MYSURU-57 009
- 10 . SMT. GOWRAMMA KUMARASWAMY
W/O S. KUMARASWAMY,
AGED ABOUT 69 YEARS,
R/AT NO. 179/A,
"SAPTHAGIRINIVASA",
2ND A MAIN ROAD,
OPP. GANAPATHI TEMPLE ROAD,
GOKULAM II STAGE,
MYSURUR- 570 002.
- 11 . SMT. SHAMANTH K.,
D/O S. KUMARASWAMY,
AGED ABOUT 49 YEARS,
R/AT NO. 179/A,
"SAPTHAGIRINIVASA",
2ND A MAIN ROAD,
OPP. GANAPATHI TEMPLE ROAD,

GOKULAM II STAGE,
MYSURUR- 570 002.

12 . SRI. S.K. LINGARAJ,
S/O S. KUMARASWAMY,
AGED ABOUT 47 YEARS,
R/AT NO. 179/A,
"SAPTHAGIRINIVASA",
2ND A MAIN ROAD,
OPP. GANAPATHI TEMPLE ROAD,
GOKULAM II STAGE,
MYSURUR- 570 002.

13 . SRI. K. SIDDARAJ,
s/O S. KUMARASWAMY,
AGED ABOUT 45 YEARS,
R/AT NO.179/A,
"SAPTHAGIRINIVASA",
2ND A MAIN ROAD,
OPP. GANAPATHI TEMPLE ROAD,
GOKULAM II STAGE,
MYSURUR- 570 002.

14 . SMT. SIDDALINGAMMA @ K.SHOBHA,
D/O S. KUMARASWAMY,
AGED ABOUT 42 YEARS,
R/AT NO.179/A,
"SAPTHAGIRINIVASA",
2ND A MAIN ROAD,
OPP. GANAPATHI TEMPLE ROAD,
GOKULAM II STAGE,
MYSURUR- 570 002.

... RESPONDENTS

(BY SRI M.R.VIJAYA KUMAR, &
SRI G.BALAJI NAIDU, ADVOCATES FOR C/R13;
R1 TO R5, R10 TO R12 & 14, VIDE ORDER DATED 26.10.2023,
SERVICE OF NOTICE TO R6 TO R9 DISPENSED WITH)

THIS R.S.A. IS FILED UNDER SECTION 100 OF CPC, AGAINST THE JUDGMENT AND DECREE DATED 10.04.2023 PASSED IN R.A.NO.68/2022 ON THE FILE OF THE IV ADDITIONAL DISTRICT AND SESSIONS JUDGE, MYSURU, DISMISSING THE APPEAL AND CONFIRMING THE ORDER DATED 03.07.2020 PASSED IN F.D.P.NO.82/2013 ON THE FILE OF THE PRINCIPAL SENIOR CIVIL JUDGE, AND CJM, MYSURU ALLOWING THE PETITION.

THIS R.S.A. HAVING BEEN HEARD AND RESERVED FOR ORDERS ON 06.02.2024 THIS DAY, THE COURT PRONOUNCED THE FOLLOWING:

J U D G M E N T

1. This matter is listed for admission. Heard the learned counsel for the appellant and also the learned counsel for the respondents and reserved for orders.

2. The factual matrix of case is that the respondent Nos.1 to 5 who are the legal representatives of one Sri.B.S.Nagaraj have filed FDP No.82/2013 before the Trial Court under Order 20 Rule 18 R/w Section 151 of CPC contending that they have instituted the suit against the respondents in O.S.No.93/2001 for the relief of partition

and separate possession of his 1/3rd share in respect of the suit schedule properties and also for permanent injunction. The said suit came to be decreed in favour of the petitioner/plaintiff on 16.03.2007 entitling the plaintiff for 1/3rd share in the suit 'A' and 'B' schedule properties by metes and bounds. It was further ordered and decreed that the defendant Nos. 5 to 9 together were entitled for 1/3rd share in the suit 'A' and 'B' properties. It was further ordered that the sale deed executed by Gurudatt in favour of the defendant No.10 who is the appellant herein in this appeal is not binding upon the plaintiff and the defendant Nos.5 to 9. The prayer of defendant Nos.2 and 3 was dismissed. The appellant herein has filed an appeal in R.F.A.No.1215/2007 challenging the judgment and decree passed in O.S.No.93/2001, which came to be dismissed on 12.12.2012. Thereafter, they have initiated the FDP proceedings i.e., F.D.P No.82/2013 seeking for final decree

consequent upon the judgment and decree passed in O.S.No.93/2001.

3. The Trial Court having taken note of the petition filed for final decree and also considering the finding of the High Court passed in R.F.A.No.1215/2007 confirming the judgment of the Trial Court. The Tahasildar of Mysuru taluk was appointed as a Court commissioner to demarcate the property as per the preliminary decree as per the order dated 07.08.2017 and accordingly the Court commissioner has submitted his report to the Court on 22.02.2018. Thereafter, the commissioner report was rejected by the Court by its order dated 23.10.2018 with a direction to the Court commissioner to submit the fresh report after strictly following the memo of instructions of all the parties and their counsel in their presence. An enquiry into mesne profits claimed by the respondent Nos.5 to 9 by way of I.A No.13 came to be dismissed on 23.10.2018. Thereafter, the respondent Nos.5 to 9 had filed I.A.No.30 and I.A.No.31

under Section 151 of CPC to recall the order dated 23.10.2018. I.A.No.30 was allowed and I.A.No.31 which was filed to recall the order dated 23.10.2018 rejecting the commissioner's report was dismissed. Thereafter, fresh commission warrant was issued and the Court commissioner after completion of commission work has submitted his report on 22.11.2019.

4. The legal heirs of the deceased petitioner have filed a memo stating that they have not objections to the commissioner's report and the same may be accepted. The counsel for the petitioner has filed another memo on 14.02.2020 seeking allotment of 'B' share as per the commissioner's sketch. The respondent No.10 has filed objections to the commissioner's report. The same was also considered by the Trial Court. The respondent No.10 has filed another memo on 17.02.2020 seeking the allotment of share as per the commissioner's report. Thereafter,

commissioner was also called before the Court and he was examined as CW1 and got marked Ex.C1.

5. The Trial Court having taken note of the commissioner's report and also the evidence for having divided the properties as part A, B and C considered the same and in detail discussed in paragraph No.19 and commissioner report is in respect of the making part A , B and C. The appellant herein raised his contention that eastern, western and southern boundaries of 'A' schedule property and boundaries of 'B' schedule property in the petition differs from the decree, but not led any evidence in order to substantiate the same. Having considered this and also discussion made in respect of commissioner report and commissioner report is accepted. The portion of the property described as part B, the commissioner sketch is allotted to share of original petitioner. The portion of the property described at part C is allotted to the share of

respondent Nos.5 to 9 together leaving the property described as part A to the respondent No.10.

6. Being aggrieved by the said allotment the appeal is filed by the appellant herein in R.A.No.68/2022 and appellate Court having considered the grounds urged in the appeal and also an application was filed under Order 41 Rule 27(b) R/w Section 151 of CPC and formulated the points as:

- 1) *Whether the application filed by the appellant under Order 41 Rule 27(b) R/w Section 151 of CPC, deserves to be allowed?*
- 2) *Whether the impugned order dated 03.07.2020 of F.D.P No.82/2013 passed by the Trial Court calls for interference with the finding giving by the Trial Court?*
- 3) *What Order?*

7. The First Appellate Court having re-assessed the material available on record, answered both the points as

negative. Hence, this second appeal is filed before this Court. The main contention of the appellant's counsel before this Court is that both the Courts have failed to consider that either the plaintiff or his LRs' i.e., the respondent Nos.1 to 5 nor the defendant Nos.5 to 9 i.e., the respondent Nos.10 to 14 herein never raised any objections when the appellant made constructions and thus, they have waived all objections regarding constructions made by the appellant and as such, the respondent Nos.1 to 5 and 10 to 14 are entitled for 1/3rd share in the vacant land and not in the building constructed in the suit schedule property. It is also contended that both the Courts have failed to consider that, the partition is to be equitable. The suit schedule properties were vacant when the same were purchased by Gurudatt i.e., the husband of respondent No.6 and father of respondent Nos.7 to 9, B.S.Nagaraju i.e., the father of respondent Nos.1, 2, 4 and 5 and grand father of respondent No.3 and Kumarswamy i.e., husband

of respondent No.10 and father of respondent Nos.11 to 14 and each of them are entitle for 1/3rd share in the vacant land. If one co-sharer has constructed buildings which was not objected by the other co-sharer, the portion of the land on which the construction is made is to be allotted to the share who constructed the buildings. Therefore, the appellant is entitle for the properties shown as part C in the Court commissioner's report. Both the Courts fail to take note of the said fact into consideration and construction of immovable property is an improvement in the property believing in good faith that, he is entitled for the same absolutely, in such a situation, he must be asked to pay the value of the land to the other co-owners and in this case, what Gurudatt, i.e., the husband of respondent No.6 and father of respondent Nos.7 to 9 and others have purchased only vacant land and construction and amount spent by the appellant ought to have taken note of by both the Courts.

8. The learned trial Judge had decline to allot the same on the ground that, the appellant has raised any contention regarding the constructions either in the suit or in the R.F.A and without raising such contentions in the said proceedings, the appellant cannot raise such contention in the Final Decree proceedings which is totally incorrect and without verifying the records, the Trial Court passed the said order. As a matter of fact, the plaintiff i.e., the father of respondent Nos.1, 2, 4 and 5 and grand father of respondent No.3 in O.S.No.93/2001 at the time of filing the suit had also filed an I.A under Order 39 Rule 1 and 2 of CPC seeking temporary injunction against defendant No.10 i.e., Appellant herein and to the said application, the appellant had filed his objection on 06.10.2003 itself wherein appellant had taken the specific contention regarding the constructions in the land in question. Hence, the said finding is against the records.

9. The counsel also would submits that the appellant has constructed the shops in the suit schedule property and the same was within the knowledge of the respondents herein. They themselves have taken the contention that construction was made and let out the same on rent and made an application under Order 20 Rule 12 of CPC. Thus, it is very clear that the appellant has made construction in the suit schedule properties. Most of the constructions are located in the property shown as part C of Court commissioner report. The Trial Court also while passing an order on I.A.No.30, made an observation with regard to the existence of constructions in the suit schedule properties.

10. It is also contended that said Gurudatt has executed an sale agreement dated 30.09.1991 and thereafter, he had also executed a registered general power of attorney on 16.02.1995 both are marked as exhibits before the trial Court in O.S.No.93/2001 and based on the

said documents, the appellant is in possession of the suit schedule property right from the year 1991 and based on the registered GPA, the appellant is entitle to construct the buildings in the suit schedule properties. Accordingly, he has raised several commercial buildings and shops. Both the Courts committed an error in not considering the same. Hence, the impugned order dated 03.07.2020 is not sustainable as the learned trial Judge has failed to consider all the materials. When the respondents themselves have admitted regarding the constructions is made by the appellant in the suit schedule properties, the learned trial Judge has erroneously given a finding that, the appellant has not raised any contention regarding construction which is not sustainable. The learned trial Judge while passing the impugned order at paragraph 23 of the order has erroneously observed that the priority has to be given to the appellant and respondent Nos.5 to 9 while allotting the

share as per preliminary decree, nowhere in the judgment and decree, the same is observed.

11. On the other hand, both in original suit and in Regular First Appeal held that, the sale deed executed by Gurudatt in favour of the appellant is not binding on the respondent Nos.1 to 5 and 10 to 14 in respect of their 1/3rd share each in the suit schedule property. Hence, the appellant has right to claim a particular portion of the property as per the sketch prepared by the Court commissioner. The counsel also would vehemently contend that both the Trial Court as well as the First Appellate Court have not considered the same and ought to have allotted the part C schedule property in favour of the appellant. The counsel also would vehemently contend that while allotting the share also the Court ought to have taken the law of equity.

12. The counsel also would vehemently contend that when the order passed on I.A.No.13 and I.A.No.30

matter was taken before this Court by filing the writ petitions and stay was granted and later on permission was given to file appeal and accordingly, an appeal was filed and disposed of. The counsel would vehemently contend that that properties are not the joint family property but only purchased the property jointly. The counsel would vehemently contend that the appellant is not party to encumber the property and also specific contention was taken that the sale agreement was executed and based on said sale agreement, O.S.No.494/2018 is also filed. The claim is made based on the unregistered sale deed. The plaint and written statement has also produced along with an application before this Court. Hence, this Court has to consider the same.

13. The counsel also would vehemently contend that this Court has to frame substantial question of law whether both the Courts are justified in ignoring the evidence on record that the appellant has raised several

constructions, whether both Courts are justified in declining to allot part C portion of the property to the appellant, though he proved that he has raised several constructions, whether both the Courts are justified in allotting part C portion of the property to the respondent Nos.10 to 14 in believing the oral statement of respondent Nos.10 to 14 regarding alleged litigations though there is no evidence on record in that regard. The First Appellate Court committed an error in not invoking not Order 41 Rule 31 of CPC.

14. The counsel has also filed memo along with citations, judgment of Privy Council dated 28.01.1937 in case of ***Nutbehari Das V/s Nanilal Das*** and referring this judgment, the counsel brought to notice of this Court discussion made in page 421 that perhaps the most ordinary method when one co-sharer has put up buildings on the land is to allot to him for his share a portion of the land which contains his building. When this cannot be done or would not be fair, it may nevertheless be unreasonable

and unnecessary to treat such co-sharer exactly as the others.

15. The counsel also relied upon the judgment reported in ***AIR 1962 Patna 300 in case of Abdul Sattar V/s Mohammad Zahoo*** and brought to notice of this Court paragraph No. 6 wherein discussion was made that in such a case, the improver stands as a mere volunteer and cannot, without the consent of his co-owner, lay the foundation for such an owner will be given an allotment, so far as is possible, that may enable him to keep the advantage of his improvements. But it requires a special case and a very strong case for a Court to go any further than that.

16. The counsel also relied upon the judgment reported in ***AIR 1965 KERALA 207 in case of Mammathu and others V/s Kathijumma Umma and others*** and brought to notice of this Court paragraph No.3 wherein discussion made with regard to the law declines to

compel one co-tenant to pay for improvements made without his authorization; but it will not, if it can avoid so inequitable a result, enable a co-tenant to take advantage of the improvements for which he has contributed nothing. When the common lands come to divided, an opportunity is offered to give opportunity is offered to give the co-tenant who has enhanced the value of a parcel of the premise the fruits of his expenditures and industry, by allotting to him the parcel so enhanced in value, or as much thereof as represents his share of the whole tract. It is the duty of equity to cause these improvements to be assigned to their respective owners so far as can be done consistently with an equitable partition. This lays down a general rule of equity, but is subject to the condition, that no injustice is caused to the other co-tenants.

17. The counsel also relied upon the judgment reported in **(2011) 4 Supreme Court Cases 240 in case of H.Siddiqui (Dead by LRs') V/s A.Ramalingam** and

brought to notice of this Court paragraph No.21 wherein discussed with regard to Order 41 Rule 31 of CPC the said order and rule provide guidelines for the appellate Court as to how the Court has to proceed and decide the case. The provision should be read in such a way as to require that the various particulars mentioned therein should be taken into consideration. Thus, it must be evidence from the judgment of the appellate Court that the Court has properly appreciated the facts/evidence, applied its mind and decided the case considering the material on record. It is mandatory for the appellate Court to independently assess the evidence of the parties and consider the relevant points which arise for adjudication and the bearing of the evidence on those points. The counsel referring this judgment would contend that the Trial Court as well as First Appellate Court have not considered the same.

18. The counsel relied upon the judgment of Karnataka in ***ILR 2012 KAR 1020 in case of***

Bangarappa V/s Rudrappa and another wherein this Court made an observation in paragraph No.7 with regard to Order 41 Rule 31 of CPC. The appellate Court, at the first instance is expected to re-appreciated or re-assess the evidence and apply its mind to the facts of the case in the light of the arguments advanced by learned counsel for the parties, it would not amount to substantial compliance of these provisions under Order 41 Rule 31 of CPC, if not assessed the material on record, an independent assessment of relevant evidence on all points. The First Appellate Court has to frame the points for determination and examine same independently in the light of the material available on record. Merely asking the question as to whether the judgment and decree is correct or legal or valid is hopelessly an inadequate method of meeting the requirement of this legal provision. The counsel referring these judgments would vehemently contend that both the Courts have committed error. The counsel has also filed a

memo and framing additional substantial question of law vide memo dated 06.02.2024.

19. Per Contra, the counsel appearing for the respondents has also filed synopsis and also the document before the Court and contend that the property was purchased on 04.06.1964 i.e., A and B schedule property was jointly by B.S.Nagaraj, Gurudatt and Dr.S.Kumaraswamy under a registered sale deed is not in dispute. It is the contention of the respondents that the said Gurudatt has executed an agreement to sell on 30.09.1991 and also appellant claims to have obtain the registered sale deed in respect of both the suit schedule A and B properties alone on 04.12.2000. It is not in dispute that the suit is filed by one late B.S.Nagaraj for claiming 1/3rd share in respect of A and B schedule properties in O.S.No.93/2001 and also defendant No.10 i.e., appellant herein has filed written statement without any counter claim admitting that he has been put into possession of

entire suit schedule A and B property as on 30.09.1991 under sale agreement, as such there is no any such pleading that he has developed entire suit schedule A and B property either before filing the suit or as on the date of filing of the suit. During the pendency of the suit, an application was filed under Order 39 Rule 1 and 2 i.e., on 26.09.2003 restraining the appellant from carrying out any construction in the suit schedule A and B properties pending disposal of the suit. An order of status quo to be maintained was passed by the Trial Court. However, the said order was not continued as admitted by the appellant.

20. The appellant has led his evidence 24.05.2005 admitting the possession of entire suit A and B schedule property and marked the photographs as Ex.D16(a) to Ex.D19(a) in respect of suit schedule A and B properties which are vacant lands as on 24.05.2005. The Trial Court passed judgment and decree granting 1/3rd share in the year 2007. Being aggrieved by the order an appeal was

filed and it was dismissed in the year 2012 and S.L.P has also filed, the same was also dismissed. The decree attained its finality in the year 2013. The final decree proceedings was initiated in the year 2013. The statement of objections also filed with an intention to frustrate the decree contending that MUDA is the necessary party. It is also contended that at the instance of appellant, KIADB made an attempt to implead themselves in the FDP proceedings and their applications came to be rejected. On the instance of the appellant, the member of MUDA, A.Krishna who is nephew to the appellant influenced MUDA to file application for impleading, the same also rejected. The appellant has failed to succeed in the attempt to drag the proceedings by influencing MUDA to impleading themselves and also appellant made his nephew A.Krishna to come on record on fabricated documents on 02.04.2018 and I.A was rejected on 24.04.2018. Being aggrieved by the order said A.Krishna preferred writ petition and the

same came to be disposed of confirming the rejection of this application.

21. The respondent Nos.5 to 9 have filed an application under Order 39 Rule 1 and 2 of CPC against which the appellant had undertaken before the Court below that he has not constructing any building and in the petition schedule property and also he will not lease the said property to the any other person till the disposal of the case i.e., on 29.05.2018. One Gopal Chowdari and Cheeragi Perbia claiming to be a lessee under A.Krishna from 01.02.2018 filed an application to implead them and also allowed his brother's son A.Krishna to make use of northern portion of suit schedule property for augmenting his income. He also admitted that he permitted the said Krishna to enter upon the northern portion of the FDP schedule proceedings. The impleading application also rejected on 20.09.2018. Being aggrieved by the said order, writ petition was also filed, the same came to withdrawn.

The commissioner warrant was issued to expedite the commissioner work. The commissioner has submitted the report and objections are filed to the same. The commissioner was also summoned and examined before the Trial Court. The appellant has filed a memo for allotment of his share in respect of C portion described in the commissioner report. Ultimately, the Trial Court allotted A to C schedule properties to the parties. The order passed by the executing Court in F.D.P.No.82/2013 is well justified and in accordance with law. Though the writ petition was filed before the Court, the same was dismissed as withdrawn by order dated 07.02.2022 and filed an appeal. The appeal also dismissed. Being aggrieved by the order of dismissal, the present Regular Second Appeal is filed.

22. The counsel would vehemently contend that the Court has to take note of a conduct and stand of the appellant in interfering with due process of law, the same nothing but an abuse of process of law, which is apparent

on the face of it, as he intend only to drag on the proceedings on one or the other way only to deprive the valuable rights and benefits of the order of the Courts. The appellant before this Court unnecessarily dragging on the proceedings, he will arrive for a settlement, he even files an application before the executing Court for adjournment stating that the matter is likely to be settled.

23. The counsel would vehemently contend that in order to substantiate the contention, the documents are also placed before this Court along with the synopsis, the same has to be looked into. The counsel also in support of his argument he relied upon the judgment reported in ***AIR 1977 SC 292 in case of Muthangi Ayyanna V/s Muthangi Jaggarao and others*** wherein Apex Court held that in a case of partition and final decree cannot amend or go beyond the preliminary decree on a matter determined by the preliminary decree and brought to notice of this Court paragraph No.5 wherein an observation is made that

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

24. The counsel also relied upon the judgment reported in ***AIR 1978 Allahabad 178 in case of Prabhuo V/s Doodh Nath and other*** wherein held that while exercising the power under Section 39 an observation is made that for demolition of construction made on joint land by a co-owner without the consent of other co-owners, factors to be considered by the Court. One co-owner has not in law any right to appropriate land to himself out of joint land against the consent of his co-owner. High handed action by one co-owner cannot be encouraged by Courts of law. Unless some special equity is shown in favour of the

defendant in a suit for demolition of constructions, which are in the process of being made by him without the consent of the co-owners a decree for demolition should not be refused especially when the co-owners have come to Court at the earliest.

25. The counsel also relied upon the judgment reported in ***AIR 1970 ALLAHABAD 648 in case of Mohd. Ismail V/s Ashiq Husai*** and brought to notice of this Court Section 52 wherein held that otherwise dealt with, includes raising of constructions wrongfully, suit for possession of vacant land-defendant putting up superstructure after filing of suit- cannot claim advantage out of the buildings wrongfully put up.

26. The counsel also relied upon the judgment reported in ***AIR 1985 MADRAS 283 in case of Rukmani and others V/s H.N.Thirumalai Chettiar*** wherein held that rights of co-owners inter se, a co-sharer cannot be allowed to cause prejudice to the other co-sharers by

putting up a substantial construction during the pendency of suit for partition filed by the co-sharers.

27. The counsel also relied upon the judgment of Bombay High Court reported in **AIR 2008 (NOC) 2884 (BOM.) in case of Anoop V/s MOhta** wherein held the Court has taken note of Section 2 and 3, in a suit for partition, defendant carrying out the construction on the said plot pending suit, it would be at his own risk, party marking such construction pending litigation cannot claim benefit of partition act unless agreed by both the parties, specifically at stage of execution of decree.

28. The counsel also relied upon the judgment reported in **AIR 1991 MADHYA PRADESH 15 in case of Smt.Lalita James and others V/s Ajit Kumar and other** wherein held that suit for separate possession of undivided property, maintainability, A purchaser from co-owner of a portion of undivided property, not entitled to possession of any particular part of joint property, his right,

if any, would be joint ownership or co-ownership and not to exclusive ownership of any particular part of joint property, purchaser, transferee only entitled to enforce a partition of joint estate nothing more.

29. The counsel also relied upon the judgment reported in **AIR ONLINE 2009 SC 648** and brought to notice of this Court paragraph No.5 wherein an observation is made that as the partition had never been effected, the question of handing over the possession either to the present appellant/plaintiff or her vendee could not arise. Therefore, her possession was merely a forcible possession and was not valid the suit was dismissed vide judgment and decree dated 19.12.1991.

30. The counsel also relied upon the judgment reported in **AIR 2009 SUPREME COURT 2735 in case of Ramdas V/s Sitabai and others** wherein held that purchase of undivided share of co-sharer, right of purchaser to claim possession under Section 54. A purchaser cannot

have a better title than what vender had. An undivided share co-sharer may be a subject matter of sale, but possession cannot be handed over to the vendee unless the property is partitioned by metes and bounds amicably and through mutual settlement or by a decree of the Court.

31. The counsel also relied upon the judgment dated 09.04.2019 in the High Court of Judicature at Madras and brought to notice of this Court paragraph No.18 wherein discussed the though there is no right for the co-owner to transfer his undivided share, but the purchaser cannot claim any exclusive possession based on the specific boundaries and his rights will be dependent on the shares that may be allotted to his vendor in the partition suit. However, considering the fact that the second defendant has taken a different stand and sold the properties and the purchaser step into the shoes of the vendor and whatever rights his vendor gets in the property, out of which he has to workout the same in the final decree proceedings.

Accordingly, the petitioner is at liberty to get himself impleaded in the final decree proceedings and workout his remedy as per law. It is for the Trial Court to analyse and take a decision as to whether the pendent lite purchaser can seek for any equity or not and decide the issue on merits.

32. In reply to the arguments of respondents' counsel, the appellant's counsel also placed a sketch prepared by the counsel and the property can be re-adjusted having taken note of construction made by the party and placed his separate sketch, the same is taken on record. The counsel also in his reply would vehemently contend that the KIADB and MUDA not came in the record at the instance of the appellant and contentions of the respondents cannot be accepted.

33. Having heard the appellant's counsel and also the counsel appearing for the respondents, this Court has to consider the material on record as to whether this Court

can frame substantial question of law as contended by the appellant's counsel in keeping the substantial question of law raised by the appellant in this appeal and whether the Court can invoke Section 100 of CPC.

34. The counsel also filed an application under Order 41 Rule 27 of CPC seeking permission to produce additional documents. Whether this Court can entertain an application filed under Order 41 Rule 27 of CPC.

35. Having heard the learned counsel for the appellant and also the learned counsel for the respondents and also the application filed under Order 41 Rule 27 R/w Section 151 of CPC and additional documents which are produced are unregistered sale deed dated 10.01.1992 executed by Sri.B.S.Nagaraj and Sri.Gurudatt and Sri.S.Kumaraswamy and also produced certified copy of plaint in O.S.No.494/2018 filed by Sri.A.Krishna based on the unregistered sale deed dated 10.01.1992 and also the copy of the written statement filed in the said suit and also

I.A.No.7 filed under Order 7 Rule 11(d) and objections are also filed to the said I.A and also filed certified copy of the order dated 11.07.2022. These are the documents pertaining to alleged unregistered sale deed dated 10.01.1992 and based on the said alleged sale deed the suit is filed and defenses were taken in the written statement. I.As' are also filed and orders are passed on the said I.As'. The additional documents are not required to consider the present Regular Second Appeal which has been arised out of order passed in final decree petition by the Court below. Admittedly, already the suit is filed based on alleged unregistered sale deed and the same is pending for consideration and in respect of unregistered sale deed, the Trial Court has to decide the issues and scope of FDP proceedings is very limited and in the FDP proceedings, the same cannot be decided. Hence, I do not find any ground to allow the application along with documents. Apart from that similar application has filed before the First Appellate Court.

The First Appellate Court also formulated the point as whether those documents are necessary to decide the issue involved between the parties. The First Appellate Court has given the finding in respect of the said application also in paragraph No.44 that the additional documents produced without any bonafide ground. The FDP proceedings arising out of judgment and decree passed in O.S.No.93/2001 i.e., with regard to the preliminary decree and nothing remains for the Trial Court to adjudicate the same, the documents which have been produced before the First Appellate Court have also clearly discloses that the same are not relevant for consideration and this R.S.A. Hence, I do not find any error committed by the First Appellate Court in coming to a conclusion that those documents are not necessary to decide the issues involved between the parties and the present application is also cannot be entertained and those documents are not necessary to decide the present R.S.A.

36. Now with regard to passing of an order impugned in FDP No.82/2013 dated 03.07.2020, the Trial Court while taking into consideration, accepted the commissioner report. The main contention of the counsel appearing for the appellant that building was constructed and invested huge money for the same and the same was not taken note of by the Trial Court as well as by the First Appellate Court. It is also the contention of the appellant's counsel that both the Courts fails to take note of the same. It has to be noted that the issue with regard to allotment of share and the claim of the appellant's counsel also ought to have allotted share in respect of part C as shown in the commissioner's sketch. It is the contention of the appellant that he had put up the construction and invested money. The commissioner report is clearly discloses that there is a building and the claim of the appellant also that the building was let out to the tenants and also records reveals that number of applications are filed by MUDA, KIADB and

tenants and also one A.Krishna who has filed the suit for the specific performance based on unregistered sale deed. All attempts were failed before the FDP Court rejecting the applications filed by all of them.

37. It is the contention of the respondents that those applications are filed at the instance of the appellant and appellant's counsel submits that the same are not filed at the instance of the appellant. But, material discloses that all attempts are made before the Trial Court to stop the proceedings in the FDP No.82/2013, the said applications are rejected, the same are challenged and ultimately attained finality. It is also not in dispute that earlier writ petitions are also filed before this Court and the writ petitions are also withdrawn. In another writ petition permission is given to file the appeal and appeal has also dismissed.

38. Having considered the factual aspects of the matter is also concerned, it is not in dispute that the

property was originally purchased by three persons. It is the claim of the appellant that he had purchased the property by way of sale agreement in the year 1991 and power of attorney was executed in the year 1995 and ultimately sale deed was executed on 04.12.2000. It is also important to note that the suit was filed in the year 2001 itself for partition. The Trial Court taken note of the fact with regard to the construction is concerned and comes to the conclusion that not made the construction immediately. Only during the pendency of the suit, construction was made. No doubt the counsel appearing for the appellant relies upon judgment of the Privy council judgment referred supra, an observation is made that perhaps the most ordinary method when once co-sharer has put up buildings on the land is to allot to him for his share, a portion of the land which contains his building. But in the case on hand it has to be noted that the persons who have purchased the property jointly have not put up the construction. The

present appellant contend that he had purchased the property from one of the co-sharer and all the other co-owners have not joined in executing the sale deed. Apparently, the very title is very defective. He would get the share in respect of only his vendor share.

39. It is important to note that the counsel also relied upon another judgment of Patna High Court wherein also an observation is that prima facie such a owner will be given an allotment, so far as is possible, that may enable him to keep the advantage of his improvements and other principles are also laid down invoking Order 41 Rule 31 of CPC and also to take note of the improvement. No dispute with regard to said fact is concerned. But, the material is very clear that only after filing of the suit, the alleged construction is made by the appellant. No doubt the existence of the building is also reported in the commissioner report as contended by the appellant's counsel.

40. The counsel for respondent has also relied upon several judgments of the Apex Court and also the judgment of different High Courts. The Apex Court in judgment referred supra reported in **AIR 1977 SC 292** held that final decree cannot amend or go beyond the preliminary decree on a matter determined by the preliminary decree. Hence, it is clear that in FDP proceedings, the Court has to proceed based on the preliminary decree, not beyond the preliminary decree. The judgment of the Allahabad High Court referred supra reported in **AIR 1978 ALL 178** held that if any construction is made on joint land by a co-owner without consent of other co-owners, unless the special equity is shown in favour of the defendant in a suit for demolition of constructions there cannot be any lenience. The other judgment of Allahabad High Court is also very clear with regard to " otherwise dealt with " includes raising of constructions wrongfully. But in case on hand, it has to be noted that the property purchased is unidentified and he

purchased the property from one co-owner and construction was made after filing of suit. He cannot claim advantage of out of buildings wrongfully put up. The said judgment is aptly applicable to the case on hand. The other judgment of Madras High Court is also very clear that a co-sharer cannot be allowed to cause prejudice to the other co-sharer by putting up a substantial construction during the pendency of a suit for partition filed by the co-sharers. It is admitted fact that the suit was filed in the year 2001 itself for the partition and also relief is sought, the sale deed is not binding. The Bombay High Court also held that the defendant carrying constructions on said plot pending suit, it would at his own risk, party making such construction pending litigation cannot claim benefit of partition unless agreed by both the parties. In the case on hand the plaintiff and other defendants have not given any consent. The other judgments which have been relied upon by the counsel for respondents are also aptly applicable to the

case on hand. The Supreme Court also in the case reported in **AIR 2009 SCC 2735** held that invoking Section 54 that purchase of undivided share of co-sharer if he claims any possession, he cannot have a better title than what Vendor had and if any construction is made, he cannot seek for the particular constructed area.

41. The Trial Court also while considering the material on record, taken note of the fact that particularly in paragraph No.22 if any construction is made, the same is done at his own risk and on that basis, he cannot claim the portion of the property where the constructions have been made to his share. The Trial Court also taken note of part A, B and C portions which have been marked by the commissioner and taken note of admittedly the appellant has purchased undivided 1/3rd share of Gurudatt. He cannot claim the property described as part C to his share as of right. The Trial Court also taken note of the factual aspects in paragraph No.23 and also in paragraph No.26 and in

detail discussed with regard to the allotment of share is concerned. The First Appellate Court also on re-appreciation of both oral and documentary evidence while answering point No.2 considered the ground urged in the appeal, wherein the appellant specifically contended that he continued to be in possession of entire schedule property and there is necessity to allot part C property in his favour as he has raised various structure and only on the ground of construction, he seeks the said remedy.

42. The First Appellate Court also taken note of the fact that final decree cannot go beyond the preliminary decree and one of the several co-sharers of joint undivided property has no right to erect the building on land which forms part of such property so as to materially alter the conditions thereof without consent of his co-sharer.

43. It is important to note that if such prayer is considered, it is nothing but a person who is having money and power if it starts construction in the property which is

convenient to him and having potentiality since part C schedule property surrounded with road on three sides. Hence, the appellant is particular about the said part C portion of the property. He cannot take the advantage of misusing his powers and continuing the construction even after filing of the suit. No doubt the allotment of share is based on law of equity and there is no any equity in favour of the appellant herein since, he had put up the construction wrongfully when the property was not identified and property what he has purchased is undivided property. Apart from that sale is also not by all the owners. When such being the case, the appellant cannot be placed in better place and his intention is to take the advantage of the construction made by him, the same is in violation of the rights of the other parties and also in order to knock of the property which is very potential property and hence, the very contention that both the Courts have committed an error in not allotting part C schedule property in favour of

the appellant cannot be accepted. The person who seeks the better relief based on law of equity and the Court has to take note of his conduct and if he has not put up the construction and enjoyed having constructed the building and got the benefit, then there would have been force in the contention of the appellant's counsel. The wrong doer cannot be given advantageous position and Court cannot shut its eyes and pass an order in favour of him. Hence, I do not find any error committed by the Trial Court in allotting the shares and the commissioner also taken note of the fact.

44. The counsel appearing for the appellant in his argument also placed the sketch which is prepared by him before the Court and the same cannot be accepted, the same will also cause inconvenience to others. It is also the contention of the respondents that the suit is filed by one A.Krishna based on unregistered document, he is none other than the relative of the appellant herein. The said suit

is also at the instance of the appellant. Whether the same is at the instance of the appellant or not has to be decided in suit filed by the said A.Krishna in O.S.No.494/2018. This Court cannot express any opinion. I do not find any merit to interfere with the findings of the Trial Court and also the First Appellate Court in not considering the grounds which have been urged by appellant herein. Hence, I do not find any substantial question of law to frame and admit the same as contended by the appellant's counsel. This is not a case for invoking Section 100 of CPC. The appellant has questioned the earlier judgment and decree before the appellate Court and he was unsuccessful. Thereafter when the FDP proceedings has been initiated, all attempts have been made to scuttle the fruits of the decree. The same is taken note of by the Trial Court and also by the First Appellate Court. Hence, it is not a fit case to invoke Section 100 of CPC.

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

ORDER

The appeal is ***dismissed***.

**Sd/-
JUDGE**

RHS