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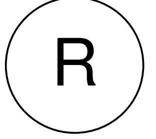
NC: 2023:KHC:23875
RSA No. 443 of 2009



IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 10TH DAY OF JULY, 2023

BEFORE

THE HON'BLE MR JUSTICE SHIVASHANKAR AMARANNAVAR

REGULAR SECOND APPEAL NO. 443 OF 2009 (PAR)

BETWEEN:

1. N.L. MANJUNATHA
S/O LATE N.H. LINGAPPA,
R/O OLD POST OFFICE ROAD,
NAGAMANGALA TOWN – 571 432.

THIS APPELLANT DIED ON 26.11.2020,
IN OBIDIANCE OF THE HON'BLE COURT,
DIRECTION DTD: 19.03.2021,
THE CAUSE TITLE IS AMMENDED

1(A) LEELAVATHI W/O LATE N.L. MANJUNATH,
AGED ABOUT 62 YEARS,

1(B) N.M. SATISH S/O N.L. MANJUNATH,
AGED ABOUT 46 YEARS,

1(C) RAVIKANTH S/O N.L. MANJUNATH,
AGED ABOUT 44 YEARS,

1(D) N.M. CHANDRASHEKARA
S/O N.L. MANJUNATH,
AGED ABOUT 40 YEARS,

ALL ARE RESIDENT OF,
OLD POST OFFICE ROAD,
NAGAMANGALA TOWN,
MANDYA DISTRICT-571 432.

2. SMT. JAYALAKSHMI D/O LATE N.H. LINGAPPA
W/O DEVEGOWDA,
AGED 50 YEARS,

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R/O NELAMANE VILLAGE, KASABA HOBLI,
PANDAVAPURA TALUK.

...APPELLANTS

(BY SRI. SYED AKBAR PASHA, ADVOCATE FOR
A-1 (A-C) AND A-2)

AND:

B.L. ANANDA @ B.L. ANATHA SHANKARA
S/O LATE B.K. NANJEGOWDA @ BAVIHATTI,
THAMMANAGOWDA, AGED 51 YEARS,
R/O BINDIGANAVILE VILLAGE,
NAGAMANGALA TALUK,
MANDYA DISTRICT – 571 432.

...RESPONDENT

(BY SRI. GANGADHARAIAH A.N, ADVOCATE)

THIS RSA IS FILED U/S. 100 OF CPC AGAINST THE JUDGEMENT & DECREE DATED:31.10.2008 PASSED IN R.A.NO.11/2008 ON THE FILE OF THE CIVIL JUDGE (SR. DN.) JMFC, NAGAMANGALA, DISMISSING THE APPEAL CONFIRMING THE JUDGEMENT AND DECREE DATED12.12.2007 PASSED IN OS.NO.153/1999 ON THE FILE OF THE CIVIL JUDGE (JR.DN.) AND JMFC, NAGAMANGALA.

THIS APPEAL COMING ON FOR DICTATING JUDGEMENT THIS DAY, THE COURT DELIVERED THE FOLLOWING:

JUDGMENT

This appeal is filed for praying to set aside the judgment & decree passed in RA No.11/2008 dated 31.10.2008 by learned Civil Judge, (Sr.dn.) & JMFC, Nagamangala and judgment and decree dated 12.12.2007

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passed in OS.No.153/1999 by learned Civil Judge (Jr.Dn.) & JMFC, Nagamangala and prayed to dismiss the appeal.

2. The parties will be referred to as per their rankings in the trial Court.

3. The appellants were defendants No.1 & 3 and respondent No.1 was plaintiff in- O.S.No.153/1999. The defendant No.2-N.L.Srikanta son of Late N.H. Lingappa has not been arraigned as party in this second appeal. He was arraigned as respondent No.1 in the first appeal. Plaintiff had filed a suit for the relief of partition and separate possession of his 1/3rd share in all the suit schedule properties by meets and bounds and mesne profits. The plaintiff and defendants No.1 & 2 are brothers and their father died about six years prior to filing of suit leaving behind plaintiff and defendants No.1 to 3 as legal heirs to succeed his properties. The mother of the plaintiff and defendants also died five years prior to the filing of the suit. It is stated that during the life time of father they were living together in joint family and after death of parents,

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defendant No.1 continued to be the manager of the joint family. It is stated that the suit schedule properties are ancestral and joint family properties of the plaintiff and defendants and they fallen to the share of father of plaintiff and defendants under partition and revenue records came to be changed in the name of defendant No.1 without consent of the plaintiff. It is stated that defendant No.1 was mismanaging the joint family properties and therefore, plaintiff requested to allot his share. The defendants did not give share to the plaintiff. Therefore, the plaintiff convened the panchayat but nothing happened in the said panchayat. The plaintiff got issued notice to the defendants dated 28.08.1999, seeking his share as the defendants did not give share. The plaintiff filed the suit for partition.

4. Defendant No.1 in his Written Statement has admitted the relationship but contended that the plaintiff has been adopted by B.K.Nanjegowda who is the matrimonial uncle i.e., brother of their mother as he had no issues. It is stated that the plaintiff left the company of his

natural parents when he was aged seven years and performed all ceremonies of giving and taking by natural father and to that of the adoptive father. The daughter Jayalakshmi who is sister of plaintiff & defendant No.1 is also necessary party and she is not impleaded and therefore, the suit is of bad for non-joinder of necessary parties.

5. It is stated that B.K.Najegowda, adoptive father of plaintiff has executed the Registered Will dated 22.01.1983 bequeathing his properties to the plaintiff. After adoption plaintiff severed his relation with his natural parents and was enjoying the properties of his adoptive parents and living in the family of adoptive parents. It is stated that defendants No.1 & 2 are living separately and are enjoying their properties separately after partition. Defendant No.2 did not get the katha changed to his name as he was not in good terms with his wife. It is stated that item No.4 of the suit schedule property was standing in the name of grandfather of the defendants. The Grandfather of

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the defendants had 3 brothers and therefore, father of the defendants is entitled only for 1/3rd share in item No.4. Item No.5 of suit schedule property measuring 2 guntas situated in Sy.No.39/1 was sold by the defendants father long back and it is not a joint family property. So defendant No.1 for the purpose of performing marriage of his daughter sold 20 guntas of land out of item Nos.1 to 3 of the suit schedule property. Sale deed came to be executed by defendant No.1 in favour of Kempaiah on 28.07.1999 and it is binding on the interest of plaintiff. The said alienation is made as manager of the family for legal necessity and benefit of the family and therefore, it is binding on the plaintiff. The income of the suit schedule property was not sufficient. The father of the deceased has created usufructuary mortgage deed in respect of Sy.No.77/1, 2 & 3 and another property measuring 12 guntas in favour of Mudalagirigowda and Halagegowda for Rs.26,500/- & Rs.12,500/-. The said properties are still in possession of the said persons. Suit schedule item No.9 is also mortgaged by the father of the defendants in favour of

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S.Siddagangaiah for Rs.12,000/- with this he prayed to dismiss the suit.

6. The plaintiff impleaded his sister Jayalakshmi as defendant No.3 and also the purchasers as defendant Nos.4 to 7. They did not contest the suit. On the basis of the pleadings, the trial Court has framed the following issues:

1) *Whether the plaintiff proves that the suit schedule properties are ancestral and joint family properties of the plaintiff and defendants?*
2) *Whether the plaintiff proves that, the first defendant being kartha of joint family is not properly managing the property in the interest of joint family?*
3) *Whether the suit is bad for non-joinder of necessary parties?*
4) *Whether the defendant proves that the plaintiff adopted by his maternal uncle Sri. K.B.Nanjegowda, hence he has no right to the property of his natural father?*
5) *Whether the defendant proves that the item No.1, 2 and 3 sold by first defendant for the*

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marriage of N.H.Shobha hence it is binding on the plaintiff interest?

6) *Whether the plaintiff entitle for the relief of partition and separate possession of 1/3rd share in the suit schedule property?*

7) *What order or decree?*

7. The plaintiff has been examined as PW1 and got marked the documents as Exs.P1 to P13. Defendant No.1 has been examined as DW1 and examined DW.2 & DW.3 and got marked the documents as Exs.D1 to D14. The trial court after hearing the arguments and appreciating the evidence has answered issue No.1 & 2 in the affirmative, issue No.6 partly in the affirmative and issue Nos.3 to 5 in the negative and decreed the suit in part holding that the plaintiff is entitled for 1/4th share in the suit schedule properties and claim for mesne profits has been rejected. Aggrieved by the said judgment and decree of the trial Court the defendant Nos.1 and 3 filed an appeal in R.A. No. 11/2008 on the file of Civil Judge (Senior Division), JMFC, Nagamangala (first appellate Court). The first appellate

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Court after hearing arguments has formulated the following points for consideration:

> i. *Whether the judgment and decree of the trial Court needs to be interfered?*
> ii. *What order or decree?*

8. The first appellate Court answered point No. 1 in the negative and dismissed the appeal confirming the judgment and decree of the trial Court. Defendant Nos. 1 and 3 have filed this second appeal challenging the judgments and decrees passed by the trial Court and first appellate Court.

9. This second appeal came to be admitted to consider the following substantial question of law.

> *Whether the courts below are justified in not accepting the adoption merely because there is no document when performance as per custom is proved?*

10. Heard arguments of learned counsel for appellants and learned counsel for respondent.

11. Learned counsel for appellants would contend that plaintiff has been given in adoption to his maternal uncle, namely, Sri. Nanjegowda @ Thammanna Gowda who is the brother of his mother Smt. Sundaramma @ Lakshmama. Said adoption has taken place when the plaintiff was 7 years old and after adoption the plaintiff resided in the house of his adopted father. In the voter list the plaintiff has been described as son of said Sri. Nanjegowda. The plaintiff performed the rituals. Said Sri. Nanjegowda has executed a Will (Ex.D.14) in favour of the plaintiff bequeathing his properties. The witness, namely, D.W.3 has stated regarding adoption and his evidence establishes the factum of adoption. He submits that execution of adoption deed is not a must but the ceremony and other conditions are required to be proved. The evidence of D.W.3 establishes the factum of adoption. The trial Court and the first appellate Court only on the ground that adoption is not witnessed by a deed have rejected the contention of the appellants. Therefore, the judgments of the trial Court and the first appellate Court are erroneous.

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12. Learned counsel for respondent would contend that the plaintiff is the faster son of Sri. Nanjegowda. Plaintiff has not been adopted by the said Sri. Nanjegowda but he has taken care of the plaintiff as his faster son. In the Will (Ex.D.14) it is stated that the plaintiff is the faster son of Sri. Nanjegowda who is the testator of the said Will. Evidence of D.W.3 does not establish the ceremonies, giving and taking of the child and consent of the parents. He also submits that in the absence of deed, defendant No.1 has to establish ceremonies, giving and taking of the child and consent of parents to prove adoption. Same is lacking in the instant case and considering the same both the Courts rejected the contention of the appellants and rightly decreed the suit.

13. Plaintiff, defendant No.1 and defendant No.2 are the sons and defendant No.3 is the daughter of late Lingappa and Smt. Sundaramma @ Lakshmamma. Plaintiff claimed partition and separate possession of his share in the properties of late Lingappa after his death. Defendant

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No.1 has not disputed the relationship but contended that the plaintiff has been adopted by Sri. Nanjegowda who is his maternal uncle when he was aged 7 years. Admittedly there is no document witnessing the said adoption deed. The first appellate Court has held that in the absence of registered adoption deed any amount of oral evidence will hot help the appellants – defendant Nos. 1 and 3 to prove adoption. Admittedly there is no adoption deed. Section 16 of the Hindu Adoption and Maintenance Act, 1956 (for short `the Act') reads as under:

> *"16. Presumption as to registered documents relating to adoption. — Whenever any document registered under any law for the time being in force is produced before any court purporting to record an adoption made and is signed by the person giving and the person taking the child in adoption, the court shall presume that the adoption has been made in compliance with the provisions of this Act unless and until it is disproved."*

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Section 16 of the Act provides presumption as to registered documents relating to adoption. Provisions of the Act does not provide that the adoption is not valid in the absence of adoption deed. Section 16 of the Act only provides that if any document registered is produced before the Court purporting to record an adoption made and is signed by the person giving and the person taking the child in adoption, the Court shall presume that adoption has been made in compliance with the provisions of the Act unless and until it is disproved. The presumption has to be raised under Section 16 of the Act if the following ingredients are established:

i. there must be a document;
ii. it must be registered under the law in force;
iii. it must purport to record an adoption;
iv. the document must be signed by both the giver and taker of the child in adoption;
v. it must be produced before the Court.

Therefore, what is provided under Section 16 of the Act is presumption regarding the registered adoption deed that

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the adoption has been made in compliance with the provisions of the Act unless and until it is disproved. The persons who are capable of giving in adoption is provided under Section 9 of the Act which reads thus:

> *"9. Persons capable of giving in adoption.—(1) No person except the father or mother or the guardian of a child shall have the capacity to give the child in adoption.*
>
> *(2) Subject to the provisions of sub-section (4), the father or the mother, if alive, shall have equal right to give a son or daughter in adoption:*
>
> *Provided that such right shall not be exercised by either of them save with the consent of the other unless one of them has completely and finally renounced the world or has ceased to be a Hindu or has been declared by a court of competent jurisdiction to be of unsound mind.]*
>
> *3* * * * **
>
> *[(4) Where both the father and mother are dead or have completely and finally renounced*

the world or have abandoned the child or have been declared by a court of competent jurisdiction to be of unsound mind or where the parentage of the child is not known, the guardian of the child may give the child in adoption with the previous permission of the court to any person including the guardian himself.]

(5) Before granting permission to a guardian under sub-section (4), the court shall be satisfied that the adoption will be for the welfare of the child, due consideration being for this purpose given to the wishes of the child having regard to the age and understanding of the child and that the applicant for permission has not received or agreed to receive and that no person has made or given or agreed to make or give to the applicant any payment or reward in consideration of the adoption except such as the court may sanction."

The person who may be adopted is provided under Section 10 of the Act which reads thus:

"10. Persons who may be adopted.— No person shall be capable of being taken in adoption

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unless the following conditions are fulfilled, namely:—

(i) he or she is a Hindu;

(ii) he or she has not already been adopted;

(iii) he or she has not been married, unless there is a custom or usage applicable to the parties which permits persons who are married being taken in adoption;

(iv) he or she has not completed the age of fifteen years, unless there is a custom or usage applicable to the parties which permits persons who have completed the age of fifteen years being taken in adoption.”

The other conditions of valid adoption are provided under Section 11 of the Act which reads thus:

“11. Other conditions for a valid adoption. — In every adoption, the following conditions must be complied with:—

(i) if the adoption is of a son, the adoptive father or mother by whom the adoption is made must not have a Hindu son, son’s son or son’s son’s

son (whether by legitimate blood relationship or by adoption) living at the time of adoption;

(ii) if the adoption is of a daughter, the adoptive father or mother by whom the adoption is made must not have a Hindu daughter or son's daughter (whether by legitimate blood relationship or by adoption) living at the time of adoption;

(iii) if the adoption is by a male and the person to be adopted is a female, the adoptive father is at least twenty-one years older than the person to be adopted;

(iv) if the adoption is by a female and the person to be adopted is a male, the adoptive mother is at least twenty-one years older than the person to be adopted;

(v) the same child may not be adopted simultaneously by two or more persons;

(vi) the child to be adopted must be actually given and taken in adoption by the parents or guardian concerned or under their authority with intent to transfer the child from the family of its birth or in the case of an abandoned child or a child whose parentage is not known, from the

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place or family where it has been brought up to the family of its adoption:

Provided that the performance of datta homam shall not be essential to the validity of adoption."

14. The effect of adoption is provided under Section 12 of the Act which reads thus:

"12.Effects of adoption. — An adopted child shall be deemed to be the child of his or her adoptive father or mother for all purposes with effect from the date of the adoption and from such date all the ties of the child in the family of his or her birth shall be deemed to be severed and replaced by those created by the adoption in the adoptive family:

Provided that—

(a) the child cannot marry any person whom he or she could not have married if he or she had continued in the family of his or her birth;

(b) any property which vested in the adopted child before the adoption shall continue to vest in such person subject to the obligations, if any, attaching to the ownership of such property,

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including the obligation to maintain relatives in the family of his or her birth;

(c) the adopted child shall not divest any person of any estate which vested in him or her before the adoption."

15. Parties are Hindus. Plaintiff was aged 7 years when his maternal uncle took him. Plaintiff was not married at that time. The only point that defendant No.1 has to establish is that there were ceremonies of giving and taking the adoptive child by his natural parents to the adoptive parents and there was consent of natural parents and wife of adoptive father. The only material witness who has been examined to prove the adoption is D.W.3. D.W.3 in his chief examination has only stated that in the house of one Manjunath of Nagamangala in a function plaintiff – Ananda has been taken by K.B. Nanjegowda @ Thammannagowda as his adoptive son and after the death of K.B. Nanjegowda @ Thammannagowda the plaintiff has performed the rituals as a son. At the time of adoption the plaintiff was aged 6 – 7 years and he has attended the function wherein lunch was

arranged. In the cross-examination D.W.3 has admitted that as said Sri. Nanjegowda had no sons and he took the plaintiff and he fostered him. D.W.3 has not stated the ceremony of giving and taking of the plaintiff by his natural father and taking of the plaintiff by adoptive parents, i.e. Sri. Nanjegowda and his wife. Admittedly said Sri. Nanjegowda had two wives – Smt. Nanjamma and Smt. Kallamma. Defendant No.1 who has been examined as D.W.1 and the witness D.W.3 have not stated that there was consent of Smt. Sundaramma @ Lakshmamma – natural mother of the plaintiff and Smt. Nanjamma and Smt. Kallamma – wives of Sri. Nanjegowda. Even there is no evidence regarding the presence of said natural mother and adoptive mothers at the time of adoption function. Therefore, the evidence on record does not establish the ceremony of giving and taking and consent of the natural mother and adoptive mothers. More so in the Will (Ex.D.14) executed by Sri. Nanjegowda the plaintiff Ananda has been described as faster son (ಸಾಕು ಮಗ). If really Sri.

Nanjegowda had adopted the plaintiff – Ananda, he ought to have described in the Will (Ex.D.14) as his adoptive son. Said statement of Sri. Nanjegowda in the Will (Ex.D.14) is relevant under Section 32(5) of the Indian Evidence Act, 1862. The Said provision reads thus :

> *"32.* ***Cases in which statement of relevant fact by person who is dead or cannot be found, etc., is relevant****. – Statements, written or verbal, of relevant facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence, or whose attendance cannot be procured without an amount of delay or expense which, under the circumstances of the case, appears to the Court unreasonable, are themselves relevant facts in the following cases:-"*
>
> *" (1) xxxx*
>
> *(2) xxxx*
>
> *(3) xxxx*
>
> *(4) xxxx*
>
> *(5)* ***or relates to existence of relationship****.- When the statement relates to the existence of any relationship (by blood, marriage or adoption) between persons as to whose relationship (by blood, marriage or adoption) the person making the statement had special means of knowledge, and when the statement was made before the question in dispute was raised."*

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16. Said statement of Sri. Nanjegowda made in the Will (Ex.D.14) executed by him disproves the existence of any relationship by blood or adoption. Said statement made by said Sri. Nanjegowda was made before the question in dispute was raised. Therefore, said statement made by Sri. Nanjegowda in the Will (Ex.D.14) will clearly establish that the plaintiff is not the adopted son of Sri. Nanjegowda and he is the faster son of said Sri. Nanjegowda.

17. It is the act of adoption and not the adoption deed which confers the status of the adopted son. A perfectly valid adoption deed can be made without an adoption deed and any status which the adopted son gets by virtue of adoption is due to the proper ceremonies being performed and not any deed passed as evidence of that adoption.

18. Even Section 17 of the Registration Act, 1908 does not provide for compulsory registration of an adoption deed. Therefore adoption deed or registered document is

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not must to prove the adoption. If conditions of valid adoptions as required under the Act are established it is sufficient to prove the adoption. In the case on hand there is no adoption deed. Even the evidence led has not established that ceremonies of giving of the adopted child by the natural father and taking of child by the adoptive father. Even there is no whisper regarding the consent of the natural mother and adoptive mothers either in the pleadings or in the evidence. Therefore, the trial Court has rightly held that defendant No.1 has failed to prove the adoption of plaintiff by the said Sri. Nanjegowda. The first appellate Court is even though right in dismissing the appeal has erred in holding that the registered adoption deed is a must for a valid adoption. Hence, the substantial question of law is answered accordingly and the appeal is dismissed.

Sd/-
JUDGE

DS,LRS
List No.: 1 Sl No.: 21