R

IN THE HIGH COURT OF KARNATAKA, DHARWAD BENCH

DATED THIS THE 12TH DAY OF NOVEMBER, 2024

PRESENT
THE HON'BLE MR. JUSTICE SREENIVAS HARISH KUMAR
AND
THE HON'BLE MR. JUSTICE T. G. SHIVASHANKARE GOWDA

REGULAR FIRST APPEAL NO.100029 OF 2015 (DEC)
C/W
REGULAR FIRST APPEAL NO.100028 OF 2015 (POS)

IN RFA NO.100029 OF 2015:

BETWEEN :

MADIVALAPPA S/O KARIYAPPA MUGABASAV
SINCE DEASED BY HIS LRS.

1.(A) SMT. LEENA W/O. VISHNUDAS GHODKE
AGE: 44 YEARS, OCC: HOUSEHOLD,
R/O.1604/A WING, PRABHA APARTMENT,
SEJAL PARK, NEAR GOREGOAN OSHIWARA,
DEPOT, GOREGOAN WEST MUMBAI-400104.

...APPELLANTS

(BY SRI DINESH M. KULKARNI, ADVOCATE)

AND :

1. MOHAMMAD JAFAR
S/O HUSSAINSAB KALLIMANI
AGED ABOUT 43 YEARS,
OCCUPATION : AGRICULTURE,
RESIDENT AT KARIKATTI ONI,
MALAPUR, TALUK: DHARWAD-580 001.

2. DHAVALSAB MOHANLAL
S/O HUSSAINSAB KALLIMANI,
AGED ABOUT 41 YEARS,
OCCUPATION : AGRICULTURE
RESIDING AT KARIKATTI ONI,
MALAPUR, TALUKA: DHARWAD-580001.

3. SHAHANAWAZ
S/O HUSSAINSAB KALLIMANI
AGE: 39 YEARS, OCC: AGRICULTURE
RESIDING AT KARIKATTI ONI,
MALAPUR, TALUKA: DHARWAD-580001.

4. AMIRJAN S/O HUSSAINSAB KALLIMANI,
AGE: 33 YEARS, OCC: AGRICULTURE
RESIDING AT KARIKATTI ONI,
MALAPUR, TALUKA: DHARWAD-580001.

5. MOHAMMAD ASHFAQ S/O HUSSAINSAB KALLIMANI,
AGE: 48 YEARS, OCC: AGRICULTURE
RESIDING AT KARIKATTI ONI,
MALAPUR, TALUKA : DHARWAD-580001.

6. SMT. BEENA W/O MALLIKARJUN SHIRAMAGONDA
AGE: 44 YEARS, OCC: HOUSEHOLD,
RESIDING AT FLAT NO.105,
ROSTAN HERITAGE APARTMENTS,
BEHIND AMRUT TAKLIES,
VIDYANAGAR, HUBBALLI-580021.

7. KIRAN S/O MADIVALAPPA MUGABASAV
AGE: 29 YEARS, OCC: AGRICULTURE,
FLAT NO.105,
ROSTAN HERITAGE APARTMENTS,
BEHIND AMRUT TAKLIES,
VIDYANAGAR, HUBBALLI-580021.

8. SHASHIKALA W/O MADIVALAPPA MUGABASAVA
AGE: 72 YEARS, OCC: HOUSEHOLD,
R/O. HOSUR, TQ. SOUNDATTI,
DIST. BELAGAVI.

…RESPONDENTS

(BY SRI R.H. ANGADI, ADV. FOR C/R1-R4;
SRI ARUN L. NEELOPANT, ADV. FOR C/R5;
SRI M.A. DESHPANDE, ADV. FOR R6;
SRI PRAKASH K. JAWALKAR, ADV. FOR RESPONDENT NO.7;
RESPONDENT NOS.6, 7, 8 ARE LRS OF APPELLANT;
NOTICE TO RESPONDENT NO.8 IS SERVED)

THIS REGULAR FIRST APPEAL IS FILED UNDER SECTION 96 OF THE CIVIL PROCEDURE COUDE, 1908, AGAINST THE JUDGMENT AND DECREE DATED 07.11.2014 PASSED IN O.S.NO.72/2011 ON THE FILE OF I ADDITIONAL SENIOR CIVIL JUDGE & C.J.M., DHARWAD, DISMISSING THE SUIT FILED FOR DECLARATION AND RECOVERY OF POSSESSION.

IN RFA NO.100028 OF 2015:

BETWEEN:

KIRAN MADIVALAPPA MUGABASAV
AGE: 29 YEARS, OCC: AGRICULTURE,
FLAT NO.105, ROSTAN HERITAGE APARTMENTS,
BEHIND AMRUT TALKIES,
VIDYANAGAR, HUBBALLI-580021.

...APPELLANT

(BY SRI PRAKASH K. JAWALKAR, ADVOCATE)

AND :

1. MOHAMMAD JAFAR
   SON OF HUSSAINSAB KALLIMANI,
   AGE: 43 YEARS, OCC: AGRICULTURE,
   RESIDING AT KARIKATTI, ONI,
   MALAPUR TALUKA, DHARWAD-580001.

2. DHAVALSAB MOHANLAL HUSSAINSAB KALLIMANI,
   AGE: 41 YEARS, OCC: AGRICULTURE,
   RESIDING AT KARIKATTI ONI,
   MALAPUR TALUKA, DHARWAD-580001.

3. SHAHANAWAZ HUSSAINSAB KALLIMANI
   AGE: 39 YEARS, OCC: AGRICULTURE,
   RESIDING AT KARIKATTI ONI,
   MALAPUR TALUKA, DHARWAD-580001.

4. AMIRJAN HUSSAINSAB KALLIMANI
   AGE: 33 YEARS, OCC: AGRICULTURE,
   RESIDING AT KARIKATTI ONI,
   MALAPUR TALUKA, DHARWAD-580001.

5. MOHAMMAD ASHFAQ HUSSAINSAB KALLIMANI,
AGE: 48 YEARS, OCC: AGRICULTURE,
RESIDING AT KARIKATTI ONI,
MALAPUR TALUKA, DHARWAD-580001.

6. BEENA W/O MALLIKARJUN SHIRAMGOUDA,
AGE: 44 YEARS, OCC: PVT. SERVICE,
R/O.MUMBAI.

7. MADIVALAPPA SON OF KARIYAPPA MUGABASAVA
DECEASED R/BY HIS LEGAL HEARS.

7A. SMT. SHASHIKALA
W/O. LATE MADIVALAPPA MUGABASAV,
AGE: 70 YEARS, OCC: HOUSE WIFE,
RESIDING AT HOSUR VILLAGE,
TALUKA: SAUDATTI,
DISTRICT: BELAGAVI-591126.

7B. SMT. LEELA W/O. VISHNUDAS GHODKE
AGE: 44 YEARS, OCC: HOUSE WIFE,
RESIDING AT 1064/A WING,
PRABHA APARTMENT, SEJAL PARK,
NEAR GORGOAN, OSHIWARA,
DEPOT. GOREGOAN WEST MUMBAI-400008.

…RESPONDENTS

(BY SRI R.H. ANGADI, ADV. FOR C/R1-R4;
SRI ARUN L. NEELOPANT, ADV. FOR C/R5;
SRI M.A. DESHPANDE, ADV. FOR R6;
NOTICE TO RESPONDENT NOS.7(A) & 7(B) IS SERVED)

THIS REGULAR FIRST APPEAL IS FILED UNDER SECTION 96 OF CIVIL PROCEDURE CODE, 1908, PRAYING TO SET ASIDE THE JUDGMENT AND DECREE DATED 07.11.2014 DISMISSING THE ORIGINAL SUIT NO.72/2011 PASSED BY THE LEARNED I ADDITIONAL SENIOR CIVIL JUDGE AND CJM., DHARWAD & ETC.

THESE APPEALS HAVING BEEN HEARD AND RESERVED FOR JUDGMENT ON 21.10.2024 COMING ON FOR PRONOUNCEMENT OF JUDGMENT, THIS DAY, ***SREENIVAS HARISH KUMAR J.,*** DELIVERED THE FOLLOWING:

CORAM: THE HON'BLE MR. JUSTICE SREENIVAS HARISH KUMAR
AND
THE HON'BLE MR. JUSTICE T. G. SHIVASHANKARE GOWDA

CAV JUDGMENT

(PER: THE HON'BLE MR. JUSTICE SREENIVAS HARISH KUMAR)

The judgment in O.S.No.72/2011 on the file of I Additional Senior Civil Judge, Dharwad has given rise to these two appeals, one by the plaintiff and the other by the 7th defendant in the suit. RFA.No.100028/2015 is filed by the 7th defendant and RFA.No.100029/2015 is filed by the plaintiff. After the death of the appellant in RFA.No.100029/2015 his daughter Leena came on record as legal representative. Respondents 6 and 7 namely Beena and Kiran are also treated as legal representatives. Appellant's wife Shashikala was impleaded as Respondent no.8.

2. In RFA No.100028/2015 the plaintiff was arrayed as respondent no.7 and in this appeal, Shashikala and Leena were impleaded as his legal representatives.

3. The material facts pleaded by the plaintiff are like this:

The name of plaintiff's wife is Shashikala. Defendant no.6 Beena is plaintiff's daughter and defendant no.7 Kiran is his

son. The suit properties consist of agricultural lands in Block nos.49, 50, 51, 54, 56, 57 and 142 of Yattinagudda village, Dharwad Taluk. The measurements and boundaries of these properties are shown in the plaint. The plaintiff and defendant no.6 being a minor purchased the suit properties under a registered sale deed dated 21.04.1973. The plaintiff himself represented his minor daughter at the time of purchase. Defendant no.6 attained majority in the year 1993. An entry was made in the revenue records indicating that plaintiff was discharged from the guardianship of his daughter, however his name continued in the revenue records to the extent of his share. The plaintiff's wife, namely Shashikala induced him to enter the name of his minor son i.e., defendant no.7 in the record of rights relating to the suit properties and heeding to his wife's request he gave a report (varadi) to the village account on 08.07.1993 to substitute his name by his son's name and it was carried out. Since the son was a minor, the name of plaintiff's wife Shashikala was shown as the guardian of minor defendant no.7.

4. On 06.02.1995, defendant no.6 who had then become a major, and Shashikala in the capacity of guardian of

defendant no.7 entered into an agreement of sale with one Mahadevappa Sankoji agreeing to sell the suit properties to the latter for sale consideration of Rs.10,00,000/- and received earnest money of Rs.2,00,000/-. But this sale agreement was cancelled and then they executed another agreement of sale in favour of one Mohammad Shafi and Mohammad Ashfaq (defendant no.5) on 09.06.1997 agreeing to sell the suit properties to him for consideration of Rs.11,50,000/-. The purchasers paid Rs.4,00,000/- to them towards earnest money. This Rs.4,00,000/- consisted of Rs.2,00,000/- which was returned to the first agreement holder Mahadevappa Sankoji. Having entered into agreement with Mohammad Shafi and Mohammad Ashfaq, Shashikala and defendant no.6 handed over possession of the suit properties to them. The plaintiff was not a party to both the agreements. The plaintiff came to know that defendant no.6 had executed a general power of attorney on 08.06.1995 in favour of her mother i.e., Shashikala for the purpose of managing the suit properties. He also came to know that defendant no.6 had executed a relinquishment deed in favour of defendant no.7 on 15.06.2006 in relation to her half share in the suit properties, but since that relinquishment was

not under a registered document, no title passed on to defendant no.7 and therefore defendant no.6 continued to be the absolute owner of her half share. On the basis of unregistered relinquishment deed and a report that the plaintiff had already given, defendant no.7 was shown as the only owner and cultivator of the entire suit properties even though he had not become absolute owner.

5. In the last week of March 2011 when the plaintiff casually visited the suit properties, defendants 1 to 4 told him that they had purchased the suit properties from defendant no.7. Thereafter the plaintiff enquired defendant no.7 with regard to the sale transaction and he pleaded ignorance of it. The plaintiff then obtained certified copy of the sale deed dated 21.02.2011 and came to know that defendant no.5 being power of attorney holder of defendant no.7 had executed a sale deed in favour of defendants 1 to 4. The plaintiff also came to know from defendant no.7 that the latter had not executed any general power of attorney in favour of defendant no.5 and that his signature might have been forged. This sale transaction was void, illegal and fraudulent. There was collusion among defendants 1 to 5 in coming into being of sale deed dated

21.02.2011. In fact defendant no.7 had no right to execute the sale deed. Therefore, the plaintiff brought the suit seeking declaration that he and his daughter i.e., defendant no.6 were the absolute owners of the suit properties, for declaration that general power of attorney dated 13.09.2010 and the sale deed dated 21.02.2011 were null and void and for the possession of the suit properties from defendants 1 to 4.

6. Defendant no.5 filed the written statement and this was adopted by defendants 1 to 4. Defendant no.6 was placed ex parte and the written statement of defendant no.7 was rejected as it was not filed within time.

7. Defendant no.5 admitted the purchase of the suit properties by the plaintiff and defendant no.6, but denied the plaint averment that the plaintiff was induced by his wife to give a varadi to the revenue authority to enter the name of defendant no.7. He admitted the two agreements dated 06.02.1995 and 09.06.1997 and delivery of possession of the suit properties under the agreement dated 09.06.1997. He pleaded specifically that these two suit properties stood in the joint names of defendants 6 and 7 in the year 1997. Their

mother i.e., Shashikala offered the suit properties for sale in favour of one Hussainsab Dawalsab Kallimani, the father of defendants 1 to 5 for a sale consideration of Rs.11,50,000/- and at that time she disclosed the former agreement dated 06.02.1995 with Mahadevappa Sankoji. Hussainsab D. Kallimani ascertained all the facts and then agreed to buy the suit properties and accordingly agreement came into existence on 09.06.1997. Then a supplementary agreement was executed by Shshikala on 29.06.1997 in favour of Mohammad Shafi and Mohammad Ashfaq after receiving additional earnest money of Rs.2,50,000/-. Again Shashikala received further amount of Rs.1,00,000/- from Hussainsab D.Kallimani and executed one more supplementary deed on 01.01.1998 in favour of Mohammad Shafi and Mohammad Ashfaq. By 10.09.2000, Shashikala had received total earnest money of Rs.7,80,000/-.

8. It was contended by defendant no.5 that the plaintiff filed O.S.No.449/1997 against his wife and two children i.e., defendants 6 and 7 for permanent injunction to restrain them from transferring the suit properties, but the suit was dismissed. Because of pendency of that suit, sale transaction

could not be completed. Hussaisab D.Kallimani also died on 04.04.2002. Therefore Shashikala executed one more agreement on 29.01.2004 in favour of Mohammad Shafi and Mohammad Ashfaq representing her minor son as a guardian, and representing defendant no.6 in the capacity of general power of attorney holder. She did not execute the sale deed as agreed, instead she demanded for higher consideration because of increase in the market value of the land. Defendants 1 to 5 agreed to pay Rs.20,00,000/- towards consideration. Thereafter the marriage of defendant no.6 was arranged. In order to facilitate execution of the sale deed after the marriage of defendant no.6, Shashikala arranged for a varadi or report being given by defendant no.6 to the Tahasildar, Dharwad to delete her name from the revenue records. After this was effected, Defendant no.7 went on postponing execution of sale deed. In the year 2010 defendants 6 and 7 and their mother Shashikala demanded for increasing the consideration amount and ultimately consideration was fixed at Rs.38,29,000/-. Then defendant no.7 executed a power of attorney in favour of defendant no.5 empowering him to execute the sale deed on his behalf and thus a sale deed in favour of defendants 1 to 4

came into existence. Giving these details it was further stated that the plaintiff had no right to institute the suit because he himself got deleted his name from the revenue records in view of family partition and that's how the name of defendant no.7 was entered in the revenue records. It was stated that defendants 1 to 4 were bonafide purchasers. The judgment in O.S.No.449/1997 attained finality and the suit was hit by res judicata. With these contentions defendant no.5 prayed for dismissal of the suit.

9. Upon appreciation of oral and documentary evidence, the Trial Court answered main issues 1, 5 and 6 and additional issue 1 against the plaintiff and dismissed the suit.

10. The findings of the Trial Court are that there is no dispute that the plaintiff and defendant no.6 purchased the suit properties and for this reason she was the owner to the extent of her half share in them. The plaintiff's version that defendant no.6 could not have relinquished her half share in favour of defendant no.7 just by giving a varadi is not acceptable, for any relinquishment to be made must be through a registered instrument only. But defendant no.6 did not contest the suit.

Despite the fact that there was no relinquishment by defendant no.6 in favour of defendant no.7 according to law, the plaintiff had no locus standi to question the said relinquishment by defendant no.6, for defendant no.7 did not challenge the power of attorney said to have been executed by him in favour of defendant no.5 and the sale deed in favour of defendants 1 to 4. Ex.D.4 shows that the plaintiff lost right over his share of suit property and therefore he cannot question the power of attorney and the sale deed. Ex.D.4 evidences oral partition having taken place. In these circumstances, the challenge to the general power of attorney and the sale deed should have been made by defendants 6 and 7, but they kept quiet. The plaintiff himself has stated that his wife handed over the possession of the suit properties to the purchaser under agreement dated 09.06.1997 and this agreement was executed by her in the capacity of power of attorney holder of her daughter i.e., defendant no.6. Even though plaintiff has stated that his son i.e., defendant no.7 gave an advertisement in Kannada daily news paper dated 15.12.2010 cautioning the public that he had not authorized anybody to deal with suit properties on his behalf, he did not take any action by filing

suit. In this view, when he kept quite, the plaintiff who had lost right over the properties cannot institute suit.

11. Sri Dinesh M.Kulkarni learned counsel for the appellant in RFA No.100029/2015 put forth the grounds that the varadi said to have been given by the plaintiff to delete his name from the revenue records and to enter the name of his son does not stand in the eye of law because no relinquishment can be made just by giving a varadi or report to the revenue officer. Ex.D.4 is a report and it cannot be construed as a document evidencing relinquishment of right. If subsequently defendant no.6 relinquished right over her share in the suit properties in favour of defendant no.7, it was also based on a varadi which does not stand in the eye of law. For these reasons defendant no.7 did not become of the absolute owner of the suit properties. Even if he had executed a power of attorney in favour of defendant no.5, the latter did not derive any right to execute the sale deed in favour of defendants 1 to 4 in the capacity of general power of attorney holder and therefore the sale deed dated 21.02.2011 is void ab-initio. He was thus entitled to file a suit seeking declaration of his title and to recover possession from defendants 1 to 4. The Trial

Court has erroneously held that the plaintiff had no locus standi to file the suit and therefore the appeal deserves to be allowed.

12. Sri Prakash K Jawalkar learned counsel for the appellant in RFA.No.100028/2015 urged the same points put forth by Sri Dinesh M.Kulkarni.

13. Sri Arun Neelopant learned counsel for respondent no.5 / defendant no.5 in both the appeals firstly raised a technical issue that after the death of the plaintiff/appellant during pendency of the appeal, his legal representatives cannot take a different stand in the sense that initially they did not choose to contest the suit being defendants, and in the earlier suit i.e., O.S.No.449/1997, they being defendants therein opposed the plaintiff. Therefore they are precluded from prosecuting the appeals.

13.1 The plaintiff cannot dispute his own varadi to claim the relief of declaration of his title. It was not just a varadi, it also revealed the fact of oral partition of the suit properties effected by him. There is nothing wrong in making family arrangement even orally and Ex.D.4 actually evidences this. By virtue of Ex.D.4 his son i.e., defendant 7 became the absolute

owner of plaintiff's half share in the suit properties. Thus seen, defendant no.7 had right to appoint defendant no.5 as his power of attorney and therefore the sale deed executed by defendant no.5 in favour of defendants 1 to 4 cannot be assailed. The very fact that plaintiff and defendant no.7 filed two separate appeals shows collusion between them to defeat the interest of the purchaser. Defendant no.7 ought to have filed a separate suit if really he had not executed power of attorney. In his father's suit he cannot dispute GPA. When his written statement was rejected, he had no right to contest the suit and to prefer the appeal.

13.2 If defendant no.6 has still right in the properties, she should have filed the suit, but she too did not challenge the sale deed and contest the suit also. The plaintiff cannot seek declaration on her behalf. The Trial Court has noticed all these aspects of the matter to dismiss the suit and there are no infirmities in the well reasoned judgment.

13.3 He further argued that even though the Trial Court has held that the suit was within time, it was actually barred by time in as much as in the written statement filed in

O.S.No.449/1997, the right of the plaintiff was clearly denied and therefore the suit should have been filed within three years from the date of filing of written statement in that suit. Putting forth these contentions he argued for dismissal of the appeals.

14. The above arguments give rise to following points for discussion:

i. Whether the wife and daughter of the plaintiff can be treated as his legal representatives in view of conflict of interest between them?

ii. Whether the appellant in RFA.No.100028/2015 has locus to prefer an appeal?

iii. Is the finding of the Trial Court that the plaintiff lost his right in the suit properties by virtue of an oral partition evidenced by Ex.D.4 correct?

15. **Point No.1 :-** The plaintiff died after he filed the appeal. It is true that his wife and children are his legal representatives being his natural heirs and are entitled to come on record to further prosecute the appeal, but in the peculiar set of circumstances, they cannot claim a right to prosecute the

appeals on the analogy that can be deduced from Order XXII Rule 4(2) of Code of Civil Procedure.

16. Whenever a legal representative of a defendant is brought on record, he is entitled to take defence appropriate to his character, but this right does not permit a legal representative to take a defence inconsistent with defence already taken by the defendant. This proposition is well established. The Hon'ble Supreme Court, in ***Gajraj Vs. Sudha and others [(1999) 3 SCC 109]***, has held as below:

> *"5. After perusing the orders of the trial Court and of the High Court, we are of the view that on the facts of this case, the High Court was not right in observing that the proposed legal representatives can take up all other defences arising from their individual rights. The reason is that the respondents on more than one occasion moved applications under Order 1, Rule 10, C.P.C. raising contention to agitate their individual rights and those applications were dismissed. The trial Court observed thus:*
>
> *The scope of an enquiry under Section 22, Rule 5 of the C.P.C. is very limited. Moreover, this is a suit between landlord and tenant. The plea taken by the proposed LRs is inconsistent with the plea taken by the deceased Vasantrao. They must proceed with the litigation from the stage where the death of Defendant 1 had taken place.*

They are bound by the pleadings of their predecessor in whose place they are to be substituted. A legal representative substituted cannot set up a new or individual right. He cannot take up a new and inconsistent plea contrary to the one taken up by the deceased. The proposed LRs stand in the shoes of the deceased defendant and must accept their position adopted by their predecessor. Besides this, the plea of right in the property by birth in the ancestral property and the male representative are the coparceners was taken by the proposed LRs by moving applications Exhs. 114, 119 and 174 under Order 1, Rule 10, C.P.C. The applications Exhs. 114 and 119 were rejected by my learned predecessor by passing a common order dated 13.2.1992 and Exh. 174 was rejected on 8.3.1994 by my learned predecessor. The said orders were unsuccessfully challenged by the proposed LRs before the Hon'ble High Court in civil revision and thereafter review petition. Thus, the said issue has now become final and cannot be reagitated by the present LRs."

17. There is rationale behind this principle in the sense that if he takes a stand contrary to what is already put forward by the deceased defendant, he cannot agitate it standing in the place of deceased person whom he represents. Now in this case Madivalappa Kariyappa Mugabasava is the appellant in one appeal and respondent no.7 in the other appeal. In the appeal where he was respondent, sub-rule (2) of Rule 4 Order XXII is

applicable and in the appeal, where he was the appellant same analogy can be applied although in Order XXII Rule 3, a provision similar to sub-rule (2) of Rule 4 is not there. Conflict of interest between the deceased and the legal representatives can be demonstrated by referring to previous proceedings. O.S.No.449/1997 was the suit filed by the plaintiff Madivalappa Kariyappa Mugabasava against his wife-Shashikala, son-Kumar Kiran (defendant no.7 in the present suit) daughter-Beena and one Amarappa K.Karadi, for the relief of permanent injunction to restrain them from alienating the properties that are subject matter of the instant case also. In that suit, he narrated the acquisition of the properties by him and his daughter Beena (Reena), and alleged that his wife and children were making attempts to alienate the properties with the help of Amarappa K.Karadi. Shashikala filed written statement mainly contending that her husband had no right, title and interest in the suit properties, and her written statement was adopted by her son and daughter. That means, they opposed Madivalappa. Now in the case on hand, Shashikala was not arrayed as defendant, however son and daughter were arrayed as defendants 7 and 6 respectively. Defendant no.6 was placed *ex parte* and the

written statement of defendant no.7 was rejected as it was filed belatedly. Whatever it is, Shashikala and defendants 6 and 7 being defendants in the former suit opposed the plaintiff by stating that there was absolute need to sell the properties and in fact they denied the plaintiff's right over suit properties. Thereafter properties were sold. So in this context conflict of interest between them can be clearly noticed. Merely for the reason that defendants 6 and 7 did not contest in the case on hand, it can not be said that they indirectly sailed with the plaintiff. Even if it can be presumed so, their defence in the former suit precludes them from supporting the plaintiff and hence Shashikala, defendant no.6 and defendant no.7 lose their right to come on record in the place of the deceased plaintiff. If they are permitted, its resultant effect is permitting them to prosecute the appeal on their independent stand reflected in the former suit, which is in variance with cause of action pleaded by the plaintiff. Contextually reliance may be placed on a judgment of the Supreme Court in the case of ***Smt.Ambalika Padhi and another Vs. Sh.Radhakrishna Padhi and others (AIR 1992 SC 431)*** cited by Sri Arun Neelopant. It is held;

"13. We have heard counsel for the parties and are of the considered opinion that the High Court was wrong in allowing the appeals and dismissing the suit on the so-called "preliminary objection", without going into the merits of the appeals. The trial court has found both the settlement and will in favour of the present plaintiffs true and valid. The present plaintiffs are claiming under the original plaintiff and are continuing the same suit. They have not amended the basis of the suit or the reliefs asked for. We are unable to see how their cause of action is different from the cause of action of the original plaintiff, merely because they are claiming to be legal representatives under a settlement and a will. The Division Bench considers that had the present plaintiffs been natural heirs they would have been entitled to continue the suit but, they say, since the present plaintiffs are claiming on the basis of a deed of settlement and a will, they cannot do so. With respect, we are unable to understand this reasoning. The present plaintiffs were indeed seeking to continue the suit as filed by the original plaintiff and for the same reliefs as were claimed by her. They were not claiming any other or different right. Indeed, the settlement and will executed in their favour were in issue in the suit filed by the original plaintiff herself and findings were recorded affirming both the deeds. The right claimed by the original plaintiff was not a personal right. It was right to property which she settled upon and bequeathed to the present plaintiffs. In such circumstances, the "preliminary objection" raised by the appellants in their appeals, which they did not raise in the

suit, ought not to have been entertained-much less accepted.

14. We may now briefly refer to the decisions relied upon by the High Court in support of its propositions.

15. The first decision cited is in Mahindra Singh Vs. Chander Singh (AIR 1957 Patna 79). The reference of this decision is not given in the body of the judgment and, therefore, it is not possible to deal with the principle of the said judgment. However, two paragraphs from this judgment are quoted in the judgment under appeal which merely reiterate the well-established principle that a legal representative can only prosecute the cause of action as originally framed in the suit and that if it becomes apparent that the original cause of action is being substituted by another cause of action the matter must be directed to be agitated by way of a separate suit……."

(Emphasis supplied)

18. Thus it can be seen that the prohibition applicable for the legal representative of defendant can be equally made applicable to the legal representative of plaintiff although in Rule 3 of Order XXII, there is no provision like sub-rule (2) to Rule 4 of Order XXII. If it is found that the interest of the legal representative of plaintiff is in conflict with cause of action pleaded in the plaint, such a legal representative cannot be permitted to come on record, and even if he comes on record,

at any stage, once conflict is noticed, appropriate inferences can be drawn including recording of abatement of the suit or appeal.

19. For the above reason, in this case Shashikala and defendants 6 and 7 do not become legal representatives to prosecute the appeal further after the death of the plaintiff and only another daughter of the plaintiff namely Leela or Leena, who was not a party in the former suit and is not arrayed a party in the present suit can alone be recognized as legal representative of the plaintiff. Point no.1 is answered accordingly.

20. **Point No.2 :-** Appellant in RFA No.100028/2015 is defendant no.7 in the suit. He filed his written statement, but it was rejected as it was belatedly filed. Order of rejection of his written statement attained finality. Although plaintiff pleaded that defendant no.7 did not appoint defendant no.5 as his power of attorney and for that reason sale deed in favour of defendants 1 to 4 executed by defendant no.5 was bad, from that plea defendant no.7 did not derive a right to prefer an appeal challenging the judgment in the suit, in which he is one

of the defendants and, which is founded on a premise that defendant no.7 did not derive any title under unregistered relinquishment deed. He ought to have filed a separate suit if any right or title existed in him, and therefore he can not maintain a separate appeal. Point No.2 is answered in negative.

21. **Point No.3 :-** Defendants 1 to 5 do not dispute purchase of suit properties by the plaintiff and his daughter i.e., defendant no.6. They do not admit the plaintiff's version that he was induced by his wife to give a varadi or report to revenue officer to delete his name and enter the name of his son i.e., defendant no.7 in the revenue records. In this regard what they have stated is that an oral partition was effected by the plaintiff and pursuant to it, name of defendant no.7 was entered. Defendants 1 to 4 also state that defendant no.6 relinquished all her rights in favour of her brother i.e., defendant no.7 by giving a varadi.

22. Before discussing factual aspects, one legal aspect has to be clarified. Not only in this case, but in many other cases, it has been observed by us that a mere report or varadi was treated as relinquishment of right for entering the name of

a person in whose favour relinquishment was made. This kind of practice is more prevalent in northern Karnataka. In many a judgment, this Court has made the legal aspect very clear that a mere varadi cannot be considered as a document evidencing relinquishment or release of right, title and interest by one person in favour of another. Any release in respect of a immovable property worth more than Rs.100/- must be made through registered instrument only. Or if oral partition is pleaded for effecting change in revenue records, there must be proof for oral partition and it having been acted upon. In the absence of registered instruments, relinquishment or release deed cannot be accepted by the revenue officers for effecting mutation in the revenue records.

23. Now in this case, plaintiff and defendant no.6 purchased the suit properties. Defendant no.6 did not file a separate suit, instead plaintiff sought the reliefs for himself and defendant no.6. Firstly it must be examined whether plaintiff simply made a varadi at the instance of his wife, or it was pursuant to an oral partition as contended by defendants 1 to 5. Ex.D.4 was produced by the defendants to prove that plaintiff made an application to the village accountant to enter

the name of his son based on oral partition. The plaintiff who adduced evidence as PW.1 was suggested in the cross-examination that he himself made a varadi stating that an oral partition had taken place in his family. He denied this suggestion, but however admitted that he gave a varadi. When Ex.D.4 was confronted, he admitted its contents to be true. That means he is bound by his admission. Ex.D.4 by itself does not evidence oral partition having taken place. It bears the date 08.07.1993 and states that an oral partition had been effected by the plaintiff about 6 years prior to 08.07.1993. That means Ex.D.4 is a proof for past oral partition, which is recognized under Hindu Law. By virtue of Ex.D.4, the plaintiff's right, title and interest devolved on defendant no.7 and the latter became the absolute owner and held the suit properties jointly with defendant no.6.

24. But so far as defendant no.6 is concerned, it is stated that she relinquished her right in favour of defendant no.7 by giving a varadi, which is not permitted in law and there by her right was not affected.

25. Whether defendants 1 to 4 became absolute owners of suit properties must be examined in the background of the scenario discussed above. The plaintiff himself stated about two agreements of sale dated 06.02.1995 and 09.06.1997. The first agreement was cancelled, there is no dispute about it. It was pursuant to another agreement of sale dated 09.06.1997, defendants 1 to 4 purchased the suit property, and this aspect is not disputed. Question is whether right, title and interest were acquired by defendants 1 to 4. The second agreement was executed by Shashikala in the capacity of guardian of her minor son i.e., defendant no.7, and defendant no.6. It is not in dispute that possession of suit properties were delivered to defendants 1 to 4 under the agreement, that means delivery of possession was not unlawful. But by the time sale deed was executed on 21.02.2011, defendant no.7 was not a minor; defendants 1 to 5 contend that defendant no.6 relinquished her right in favour of defendant no.7 by giving a varadi, by virtue of which he became absolute owner of all the suit properties and therefore he appointed defendant no.5 as his power of attorney to execute sale deed in favour of defendants 1 to 4. Here two consequences ensue. Firstly defendant no.7 did not acquire any

interest or title on the basis of varadi said to have been given by defendant no.6, thereby her right and title was not affected. Insofar as other half is concerned, he was the absolute owner which he could transfer. But he did not challenge the sale or the power of attorney which is said to have been executed by him in favour of defendant 5. Plaintiff has stated that defendant no.7 did not appoint defendant no.5 as his power of attorney and that signature of defendant no.7 might have been forged. Plaintiff also produced Ex.P.16, a public notice dated 14.12.2010, published in the news paper dated 15.12.2010 to show that defendant no.7 had not appointed anybody as his power of attorney. If it was so, defendant no.7 should have filed the suit instead of plaintiff. The inference to be drawn in these circumstances is that in all probability, defendant no.7 might have executed power of attorney in favour of defendant no.5 who in turn executed sale deed in favour of defendants 1 to 4. In this view, impugned sale deed was not affected in so far as the right and title of defendant no. 7 was concerned.

26. It is true that the right and title of defendant no.6 remained intact. But she parted with possession of the suit properties joining hands with her mother Shashikala who

represented defendant no.7 who was a minor at that time. For this reason she should have taken independent legal action to recover possession if there was no delivery of possession in accordance with Section 53A of Transfer of Property Act. Curiously plaintiff brought the suit not only on his behalf but on behalf of defendant no.6 also. He had no right to sue on behalf of defendant no.6 although she is his daughter. In fact plaintiff had no right at all to file suit in his individual capacity. For these reasons the Trial court is justified in dismissing the suit. It may not have given elaborate reasons, however, its conclusion to dismiss the suit needs no interference in these appeals. Point No.3 is therefore answered affirmatively.

27. Sri Arun Neelopanth also argued that suit was time barred, and in this regard the finding of the Trial Court that the suit was not time barred is to be set aside. This part can definitely be urged without filing cross-objection in terms of Order XLI Rule 22 of CPC. If at all plaintiff had any right over suit properties, he should have filed the suit within 3 years from the date of filing of written statement by the defendants in O.S.No.449/1997 because by that time the plaintiff's title had been eclipsed. In this view suit was time barred.

Therefore from forgoing discussion, the conclusion is that both appeals are to be dismissed and ordered accordingly. Respondents i.e., defendants 1 to 5 are entitled to costs of the appeals.

Sd/-
(SREENIVAS HARISH KUMAR)
JUDGE

Sd/-
(T. G. SHIVASHANKARE GOWDA)
JUDGE

EM
List No.: 1 Sl No.: 1