

169-189

IN THE HIGH COURT OF KARNATAKA AT BANGALORE.

Dated this the 23rd day of March, 1998.

BEFORE

THE HON'BLE MR. JUSTICE T.N. VALLINAYAGAM

R.S.A. No. 212 OF 1997 C/W

R.S.A. No. 213 OF 1997

Between:

J. Nanjamma W/o K. Laxmi-
narayan, D/o late Javare
Gowda, major, occ. Agril.
r/o Hirode Street, Panda-
vapura town, Mandya Dist.

... Appellant common
in both the RSAs.

(By Sri Ajit J. Gunjal, Adv.)

And:

1. Javare Gowda @ Krishne
Gowda, s/o late Eregowda,
since deceased by L.Rs;
- 1a) Leelavathamma W/o Javare
Gowda, major, r/o Kennalu
village, Kasaba Hobli,
Pandavapura Tq.
Mandya Dist.
- 1b) Yashoda, major, W/o
K.T. Venkatesh, R/o
2548, 13th Main, II Stage,
Kumaraswamy Layout,
Bangalore.
- c) J. Chandrashekhar, s/o
Javaregowda @ Krishnegowda,
major, r/o Kennalu, Pandava-
pura Tq. Mandya Dist.

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- d) J. Premalatha W/o Rama-krishnaiah, D.No. 5536, 3rd Cross, 14th Main, (Near M.U.D.A. Office) Vijayanagar, Mysore.
 - e) J. Hemalatha D/o late Javaregowda, @ Krishnegowda, major, W/o M.P.Shivaprasad, R/o D. No. 126, 7th Cross, I Stage, Gokulam, Mysore.
 - f) K.J. Nanjundaswamy s/o late Javaregowda @ Krishnegowda, major, r/o Kennalu village, Kasaba Hobli, Pandavapura Tq. Mandya Dist.
 - g) K.J. Chandrakala d/o Javaregowda @ Krishnegowda, major r-o -do-
 - h) Laxamma w/o late Javaregowda, major, Kennalu village, Kasaba Hobli, Pandavapura Tq. Mandya Dist.

... Respondents common in both the RSAs.

(By Sri K.V. Narasimhan, Adv. for R.1(a) to (g)
Smt. Shanta W. Joshi, Adv. for R.2)

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This Regular Second Appeal filed U/s 100 of CPC against the judgment and decree dt. 21-11-1996 passed by the District Judge, Mandya, in R.A. 2/90, confirming the judgment and decree dt. 28-2-1986 passed by the Civil Judge, Srirangapatna in O.S. 9/81.

RSA 213/97 is filed U/s 100 of CPC against the judgment and decree dt. 21-11-1996 passed by the Dist. Judge, Mandya in R.A. 60/89, setting aside the judgment and decree dt. 28-2-1986 passed by the Civil Judge, Srirangapatna in O.S. 9/81.

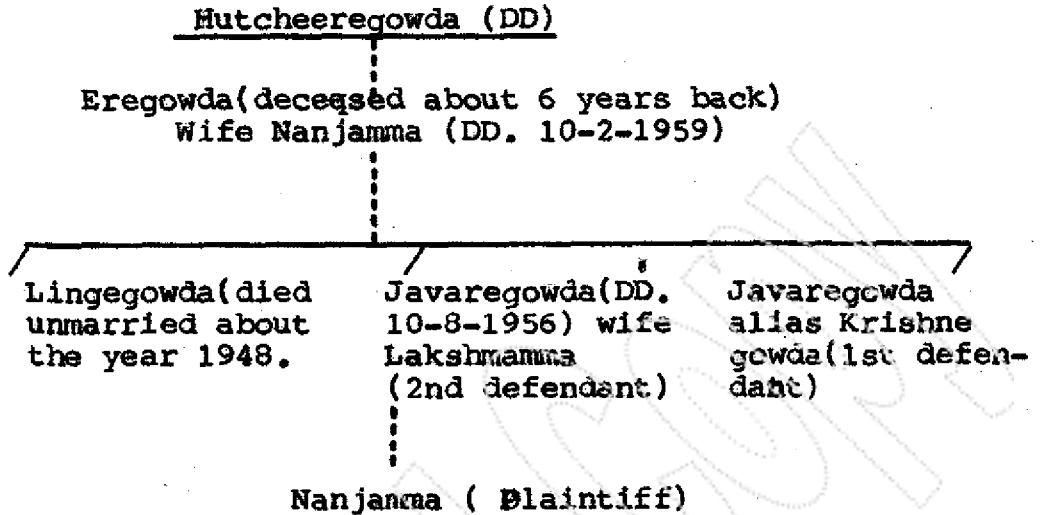
These two second appeals, having been reserved for judgment, coming on for pronouncement of judgment this day, the Court delivered the following:

J U D G M E N T

The Plaintiff is the appellants in both the second appeals. The suit in O.S. No. 9/1981 was a suit for partition claiming 22/81 share in 'A' schedule property and 4/9th share in 'B' schedule property, the suit came to be decreed in part holding that the plaintiff is entitled to 22/81 share in 'A' schedule property and the claim of the Plaintiff in 'B' schedule was dismissed. As against such decree the plaintiff has preferred R.A. No. 2/1990 and the 1st defendant preferred R.A.No. 60/1989. By a common Judgment rendered, the appeal of the 1st defendant was allowed and the appeal of the plaintiff was dismissed holding that the plaintiff is not entitled to any share in suit schedule property. Therefore, the two second appeals came to be filed by the plaintiff in R.S.A. 212/1997 being against R.A. No. 9/1981 and R.S.A. 213/1997 being against R.A.No. 60/1989. A common Judgment rendered in both the second appeals.

2. The geneological table of the parties as follows:-

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3. Hutcheeregowda had 3 sons out of whom the Lingegowda died in 1948 un-married ^{and} issueless. The 1st defendant is the other son by name of Javaregowda @ Krishnegowda and the another son by name Javaregowda who died on 10-8-1956 leaving behind his widow lakshamma whose daughter is the plaintiff Nanjamma. Hutcheeregowda, Krishnegowda and Javaregowda each ^{are} ~~is~~ entitled to 1/3 share in the 'A' schedule property. On the death of Javaregowda leaving behind ^{him} his surviving wife and his ~~mother~~ ^{daughter} Nanjamma, Wife Lakshamma and daughter Nanjamma each ^{will} ~~be~~ ^{become} entitled to 1/3 share - that is 1/9th share in the entire 'A' suit schedule properties. Nanjamma died on 10-2-1959 leaving behind her surviving her husband and the 1st defendant's son and the 2nd defendant. Her 1/3 share will again ^{get} ~~be~~ divided upon the Plaintiff, 1st defendant and the father

Hiregowda that is each will get 1/27th share. Therefore her husband Eregowda, gets 1/27th share, the 1st defendant gets another 10/27, and the plaintiff and defendants getting ~~10/27~~^{10/27} share each. 10/27 share respectively in the Eregowda died about 6 years back during ~~the~~ 1975 leaving behind plaintiff and defendants as his heirs. On his death his 10/27th share shall be inherited by the plaintiff and defendants by each getting 1/3 share in it. After the death of Eregowda, the plaintiff and defendants have become the owners of 22/81, 40/81 and 19/81 share respectively in the 'A' schedule properties.

4. The 'B' schedule property were the Sridhana properties of Eregowda's wife Nanjamma. On her death these properties were inherited by her husband Eregowda, son Javaregowda @ Krishnegowda and the 1st defendant and deceased son's daughter Nanjamma in equal share, each thus became entitled to 1/3 share and on the death of Eregowda, his 1/3 share ~~was~~^{was} ~~transferred~~^{transferred} upon the plaintiff and the defendant; therefore the plaintiff became the owner of 4/9th share in 'B' schedule property. All of them ~~is~~^{are} deemed to be in joint possession. The Plaintiff was married on 5-6-1969 and the plaintiff is entitled to her share.

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The 2nd defendant who is the mother of the plaintiff remained ~~ex~~ ex-parte and the 1st defendant, her uncle while admitting the relationship contended that the maintenance was arranged to both the defendants and the plaintiff. There was a registered settlement deed dated, 22-6-1959 by the 2nd defendant not only for herself but as the guardian of the plaintiff who was under the care and protection of the 2nd defendant. After the settlement, the 2nd defendant and the plaintiff were being paid the amount mentioned therein and the celebration of the marriage of the plaintiff was done as provided for in the settlement. Consequently the plaintiff is not entitled any share in 'A' schedule property.

5. In respect of 'B' schedule properties, there was an ~~un~~ un-registered Will executed by mother Nanjamma on 21-9-1957 in which the entire property bequeathed in his favour and he was in possession and enjoyment thereof. Consequently the 'B' schedule properties are not available for partition.

6. The trial Court on the basis of the above pleading and the evidence adduced by the parties ^{Prima} held that the plaintiff is entitled to 22/81 share

in 'A' schedule properties. The settlement deed dated, 22-6-1959 is not valid nor binding on the plaintiff, and the Will dated, 21-9-1957 concerning only to 'B' schedule properties is valid. Consequently the suit was decreed only in respect of 'A' schedule properties.

7. On appeal, the first appellate Court held that the settlement deed is valid and binding and the Will dated, 21-9-1957 is also valid and binding. Consequently the suit was dismissed. The appellate Court has strained itself to uphold the validity of the settlement deed and held that notwithstanding non provision of the share of the properties to the plaintiff who was the minor then, the settlement deed is valid and ultimately dismissed the claim of the plaintiff for partition.

8. It is now contended before me that the Will dated, 21-9-1957 has not been proved. The recital of the Will does not show that Nanjamma had even thought of other close relatives. The non-mention of the names and as to why she choose only one of her sons alone in preference to the plaintiff's father is suspicious circumstances. That would nullify the validity and

genuiness of the Will. The evidence of D.W-3 concerning the execution of the Will Ex-D-104 was " The right side of Nanjamma ^{was} ~~was~~ attacked with partial paralysis; her right hand was not in her control." The Will was also not presented before the Sub-Registrar's office by her, but by the Krishna Gowda and Jawaregowda, the legatee. Therefore such Will cannot be construed as valid Will at all. No attesting witnesses have been examined to prove the Will. So far as the settlement is concerned, the appellate Court omitted to note the unfairness of the settlement deed. The father of the plaintiff and the husband of defendant No-2 died in 1956 and the settlement has come about in 1959. The plaintiff was aged about six years and the 2nd defendant is an young widow, the 1st defendant who was the sole male member of the family took advantage of the situation and had the alleged settlement deed registered. The very reading of the deed would show that ~~the~~ keeping all the properties with himself, the 1st defendant provided a meagre amount of Rs. 125/- per month and after the death of defendant-2 one land measuring 1 Acre only would be given to plaintiff. The settlement of the family arrangements is un-fair . In any event the settlement cannot deal with the shares

of other persons which have become vested in ^{on their} supported law. The respondents ~~submitted~~ the Judgment and contended that the plaintiff is not entitled to any share at all.

9. After hearing the arguments, I am convinced that the suit should have been decreed in favour of the plaintiff granting her all the relief sought by her. The relationship of the parties are not disputed. The settlement deed and the Will are the only ^{documents} put as a barrier to the partition.

10. So far as the Will is concerned, I have no hesitation to hold that the Will is not proved and even otherwise as per the dictum of Supreme Court, exclusion of other lawful heirs from the pervue of the Will would cloud the Will with a suspicious circumstances. The testatrix was affected ^{with} ~~the~~ paralysis; the Will was not presented by her directly to the Registrar and the Plaintiff was an un-educated and innocent ^{submissibile} woman by standard, to all these machination.

11. So far as the settlement deed is concerned, prima facie it is un-fair and here again ^N the settlement cannot deal with other property

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and if at all he can deal with only with his own properties.

In this view setting aside the Judgment decree of the first appellate Court and modifying the decree of the trial Court, the second appeals ^{are} allowed. The suit is decreed as prayed for with cost granting all the relief prayed for therein.

Sd/-
Judge

/Nge/