



IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 7TH DAY OF OCTOBER, 2015

B E F O R E

THE HON'BLE MR. JUSTICE A.N. VENUGOPALA GOWDA

WRIT PETITION NO.52988/2013 (GM-CPC)

BETWEEN:

1. SRI ABU SALEH KHAN
S/O LATE S.M.KHAN
AGED ABOUT 71 YEARS
R/AT 2ND BLOCK
SITE NO.178, KATIPALLA
SURATHKAL
MANGALORE - 575 003.
2. SMT. RAHIMUNNISA SHARIEFF
W/O NOOR MOHAMMED SHARIEFI
AGED ABOUT 67 YEARS
R/AT S.A.S. APARTMENT
BEHIND KANKANADY MARKET
KANKANADY
MANGALORE - 575 003.
3. SRI ABDUL HAMEED KHAN
S/O LATE S.M. KHAN
AGED ABOUT 67 YEARS
R/AT NEAR HILL BREEZE LODGE
OOTY
TAMILNADU - 643 001.

4. SMT. KAMARUNNISA SAYED
W/O LATE SAYED IQBAL
AGED ABOUT 63 YEARS
R/AT D.NO.16 – 89 – 17, KULSHEKAR
MANGALORE - 575 003.
5. SMT. SHARIFUNNISA S. BASHEER
W/O ABDUL BASHEER
AGED ABOUT 62 YERAS
R/AT OPP. MADINA MASJID
NEAR TALUK OFFICE
KARKALA – 574 201.
6. SMT. MAHERUNNISA KHANUM
W/O LATE ABDUL AZEEZ KHAN
AGED ABOUT 55 YEARS
R/AT 'RIVER VIEW'
POST AZHIKODE, KANNANORE
KERALA STATE - 670 009.
7. SRI ADIL KHAN
S/O LATE ABDUL AZEEZ KHAN
AGED ABOUT 30 YEARS
R/AT 'RIVER VIEW'
POST AZHIKODE, KANNANORE
KERALA STATE - 670 009.
8. MISS ABID A. KHAN
D/O LATE ABDUL AZEEZ KHAN
AGED ABOUT 25 YEARS
R/AT 'RIVER VIEW'
POST AZHIKODE, KANNANORE
KERALA STATE - 670 009.
9. MISS AMREEN A. KHAN
D/O LATE ABDUL AZEEZ KHAN
AGED ABOUT 23 YEARS
R/AT 'RIVER VIEW'
POST AZHIKODE, KANNANORE
KERALA STATE - 670 009.

(BY SRI S.VISHWAJITH SHETTY, ADV.)

... PETITIONERS

AND:

1. SRI ABDUL KARIM KHAN
S/O LATE S.M.KHAN
R/AT BEERI KOTEKAR POST
MANGALORE TALUK - 575 003
2. SRI ABDUL RAUF KHAN
S/O LATE S.M.KHAN
R/AT BEERI KOTEKAR POST
MANGALORE TALUK - 575 003.
3. SMT. SHAMSUNNISA SALIM
W/O LATE Dr. U.SALIM
R/AT ADAM DAVOOD BUILDING
BADAGAPET
UDUPI - 576 101.
4. SRI SHEIK ABDUL RAHIM
S/O LATE SHEIK AHMED &
LATE JAIBUNNISSA
C/O. ABDUL RAFI KHAN
BEERJ, KOTEKHAR
MANGALORE - 575 003.
5. Dr. MOHAMMED NISSAR
S/O. LATE SHEIK AHMED &
LATE JAIBUNNISSA
C/O. ABDUL RAFI KHAN
BEERJ, KOTEKHAR
MANGALORE - 575 003.

...RESPONDENTS

(BY SRI G.RAVISHANKAR SHASTRY, ADV. FOR R1;
R2 AND R3 ARE SERVED BUT UNREPRESENTED
NOTICE TO R4 AND R5 IS DISPENSED WITH)

THIS WRIT PETITION IS FILED UNDER ARTICLES 226
AND 227 OF THE CONSTITUTION OF INDIA PRAYING TO QUASH
THE ORDER VIDE ANNEXURE-A DATED 05.11.2012 MADE ON
MEMO DATED 27.03.2010 IN O.S.NO.696/2008 BY THE COURT
OF PRINCIPAL CIVIL JUDGE, MANGALORE, D.K.

THIS PETITION COMING ON FOR PRELIMINARY HEARING IN 'B' GROUP, THIS DAY, THE COURT MADE THE FOLLOWING:

ORDER

The petitioners have instituted O.S.No.696/2008 in the Court of Prl. Civil Judge, Mangalore, D.K., to pass a decree for partition and separate possession of the plaint schedule properties against the defendants. Suit has been contested by filing written statement. Issues have been raised on 04.02.2010. A Memo was filed by defendant No.1, on 27.03.2010, to decide issue Nos.8 and 9 as preliminary issues. The said Memo was opposed by the plaintiffs by filing statement of objections on 03.04.2010. The trial Judge having allowed the said Memo and decided to treat the issue Nos.8 and 9 as preliminary issues vide 05.11.2012, this writ petition was filed.

2. Sri S.Vishwajith Shetty, learned advocate, contended that issue Nos.8 and 9 cannot be treated and decided as preliminary issues, since the same are not pure questions of law. He submitted that the suit having been instituted to pass a decree of partition and separate

possession and the plaintiffs being in joint possession and enjoyment of the suit properties, have valued the suit properties for the purpose of payment of court fee, under Section 35 of the Karnataka Court fees and Suits Valuation Act, 1958. Learned counsel contended that the evidence of PW.1 having been recorded in part, the Trial Judge has committed material error and illegality in passing the impugned order.

3. Sri G.Ravishankar Shastry, learned advocate, on the other hand, made submissions in support of the order passed by the learned trial Judge to decide the issue Nos.8 and 9 as preliminary issues. He submitted that the impugned decision being in consonance with settled principles of law, no interference is called for.

4. Perused the petition and considered the rival contentions. The point for consideration is, *whether the impugned decision is perverse or illegal?*

5. Issue Nos.8 and 9 raised in the suit are to the following effect:

- “8) Whether the court fee paid by the plaintiff is sufficient?
- 9) Whether the court has jurisdiction to try this suit?”

6. In UMARABBA Vs. PATHUNNI AND OTHERS, 1984 (2) Kar.L.J. 97, it has been held that under Section 11(2) of the Karnataka Court Fees and Suits Valuation Act, 1958, which is a special Act, the Trial Court is required to first decide the issue whether the court fee paid is proper or not. It was held in the said case, that it is incumbent on the trial Court to decide the issue relating to the court fee before recording the evidence affecting the parties on the merits of their claim.

7. In THE KARNATAKA THEOSOPHICAL FEDERATION (R) Vs. BALAKRISHNA ASHRAMA, ILR 1999 KAR 2930, repelling a contention that the issue should not have been decided as a preliminary issue as it required evidence and therefore, should not have been decided until recording of

the evidence on all issues, it has been held that the issue relating to the court fee shall have to be heard and decided before recording the evidence on other issues.

8. In ABDUL SALAM Vs. THE DISTRICT AUTOMOBILE WORKERS ASSOCIATION, REP. BY ITS SECRETARY AND ANOTHER, ILR 2010 KAR 3018, it has been held, that once a plea is taken by the defendant in his written statement that the subject-matter has not been properly valued or that the court fee paid is not sufficient, it is incumbent on the Court to determine the court fee that is payable and that the Court cannot skip the issue of court fee and proceed to record the evidence on merits of the case. It has been made clear, that the issue regarding valuation of the suit and payment of court fee shall be tried as a preliminary issue, if necessary, after recording of evidence and the court has to decide the said preliminary issue, before the evidence is recorded on the merits of the case.

9. In VEERAGOUDA & OTHERS Vs. SHANTAKUMAR @ SHANTAPPA GOWDA, ILR 2009 KAR 887 (DB), it has been

held, that the Act is a special law and it having received the assent of the President, prevails over the general law and when a special mode has been prescribed by special law to do a particular job or to exercise the power in relation thereto, then the special law has to prevail over the general law and the mode so prescribed by special law would have to be followed in respect of the matters covered therein.

10. In view of the well settled position of law and there being a statutory mandate on the Court to decide the issue of court fee before recording evidence on merits of the respective claim of the parties, the trial court should follow the mandate of law.

11. In the present case, the trial court having committed the mistake in proceeding to record the evidence of PW.1, on all the issues and before commencement of cross-examination, a Memo dated 27.03.2010 was filed by defendant No.1, to try and decide the issue Nos. 8 and 9 as preliminary issues. The trial

Judge having realized the mistake committed, has passed the impugned order.

12. The Court has inherent power to correct its own proceeding, when it is satisfied that in passing a particular order, it was misled by one of the parties or it has committed a mistake. The Court is bound to remedy the mistake in accordance with the principle '*actus curiae neminem gravabit*' - an act of the Court shall prejudice no one. In the said view of the matter, the impugned decision being in accordance with the settled principles of law, I do not find justification to interfere with the impugned order.

In the result, petition being devoid of merit, is rejected. However, if the plaintiffs make an application seeking to recast the issues, the same shall be considered and order passed in accordance with law.

Sd/-
JUDGE

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