

**KABK700003532021**



**O.S./101/2021**

**IN THE COURT OF THE PRL.SENIOR CIVIL JUDGE &  
JMFC, AT-JAMKHANDI.**

**PRESENT:** SMT KAVITA S. UNDODI,  
B.A.,LL.B.,  
C/c Prl. Senior Civil Judge, Jamkhandi.

**DATED: This the 7<sup>th</sup> day of December-2022**

**O.S.No.101/2021**

**PLAINTIFF:**

1. Smt. Rahematbi W/o Rafiq Hundekar

**V/s.**

**DEFENDANTS:**

1. Sri. Noormohammad S/o Gudusab Nidoni  
& others.

**Parties to IA No.4**

**APPLICANT/DEFENDANT NO.1 and 2:**

1. Sri. Noormohammad S/o Gudusab Nidoni  
2. Sri. Umarsab S/o Gudusab Nidoni

**V/s.**

**OPPONENT/PLAINTIFF:**

1. Smt. Rahematbi W/o Rafiq Hundekar

**ORDERS ON I.A.No.4**

The defendant No.1 and 2 have filed this IA under Order 7 Rule 11 (a) & (d) R/w section 151 of CPC for rejection of the plaint.

**2.** The defendant No.2 sworn to an affidavit stating that the plaintiff has filed suit for partition and separate possession in respect of suit schedule properties. Their father Gudusab died in the year 1994 during his life time the partition effected and distributed the suit schedule properties among defendant No-1, 2 and defendant No-6, accordingly M.E- 4101 of Todalabagi is certified in the year 1984. The said M.E has not been challenged by the plaintiff till today. Therefore, the alleged claim of plaintiff is purely barred by limitation. Admittedly, they are governed by Mohammedan law and there is no concept in respect of getting the share during the life time of propositus. The succession open under Mohammedan law after the death of propositus, admittedly their father died in the year-1994 i.e., on 09.05.1994. Therefore succession open to the plaintiff getting the share after the death of Gudusab, but this suit is filed in the year 2021 after lapse of 30 years, therefore the suit of the plaintiff is barred by limitation. Hence plaint may be rejected on the ground of limitation and prayed to allow the application.

**3.** On the other hand the plaintiff has opposed the application by filing written objection denying the averments of the affidavit sworn to an affidavit and stated that, the provision of Order 7 Rule 11 (a) of CPC can be invoked where the plaint does not disclose the cause of action. The cause of action is nothing but a bundle of facts, which constitutes the cause of action to file the suit. The plaintiff is daughter of Gudusab and it is admitted fact that the property bearing Sy.No.381 measuring 21 acres 6 guntas owned by Haseemsab the grand father of the plaintiff, on the death of Gudusab the plaintiff succeeded to the suit property. The Gudusab died leaving behind defendant-6 wife, defendant No-1 and 2 sons and defendant-3 to 5 and plaintiff daughters. The name of legal representatives entered in revenue records. The daughters of Gudusab married and residing in their respective husband's house. Taking undue advantage of the same defendant No-1 and 2 have created M.E No.4101. The plaintiff had made out to definite case that Gudusab did not effected partition. After the death of Gudusab his legal representatives become tenants in common, having defined as specified share as per Mohammedan law. Therefore the said facts constitutes a bundle of cause of action, therefore application is not maintainable.

**4.** Further averred in the objections that, Order 7 Rule 11(d) of CPC which can be invoked where the suit appears from the statement made in the plaint is to be barred by any law. On plain reading of the plaint the relief for partition has not been barred by the limitation. The defendants have taken contention that the plaintiffs have not challenged the partition effected by the Gudusab in the year 1994, therefore this suit is barred by limitation. The question of limitation is mixed question of law and facts and secondly the defendants are required to show that prior to certification of M.E No.4101 the plaintiff has not been notified by the authority and inspite of receiving notice of M.E the plaintiff kept quite. The defendants have not placed any documentary evidence to show that the plaintiff is party to the partition. There is no section or article in the limitation Act, which describes that after the succession opens to the Mohammedan they are required to be file suit within the certain period and in the absence of the filing of such suit, their claim is barred by limitation. The suit is for partition and separate possession and there is no time fixed under the provision of Limitation Act and prayed to reject the application with costs.

**5.** Heard on I.A.

6. The following points arises for my consideration.

**1. Whether the defendant No.1 & 2 have made out grounds to reject the plaint ?**

**2. What order?**

7. My answer to the above points is as under:

POINT NO.1 - In the **Negative**

POINT NO.2 - Is as per the final order for the following:

### **REASONS**

**8. Point No.1:** The plaintiff has filed suit for partition and separation possession against the defendants. In the affidavit sworn to an I.A the defendant No-2 has stated that their father died on 09.05.1994 and succession opens to the plaintiff for getting share after the death of Gudusab. But the plaintiff has filed this suit in the year 2021 i.e., after lapse of 30 years and further the defendants have taken contention that during the life time of Gudusab he has effected partition of suit schedule properties among the defendant No-1 and 2 and defendant-6 and accordingly M.E No.4101 has been effected.

**9.** The estate of deceased Mohammedan devolves on his heirs at the moment of his death. The heirs succeeded to the estate as tenants in common in specific shares. Where the heirs continue to hold the estate as tenants in common without

dividing it and on of them subsequently brings suits for recovery of the share the period of limitation for the suit does not run against him from the date of death of deceased but from the date of express ouster or denial of the title. The cause of action for partition of properties is said to be perpetually reoccurring one. The share of heirs under the Mohammedan law are definite and known before actual partition. Therefore on partition of properties belonging to the deceased Muslim there is division of shares by metes bounds in accordance with the specific share of each heir being already determined by the law.

**10.** In present case, it is contention of the defendants that during the life time of their father he has effected partition among defendant No-1, 2 and 6. But as per Mohammedan law the succession opens after the death of propositus, hence it shows that during the lifetime of their father they got divided the properties i.e., before succession open to defendant No.1, 2 and 6. Therefore, contention taken by the defendants will be considered at the time of appreciation of evidence. Further there is no contention of the defendant No-1 and 2 that after the death of their father they got effected partition by metes and bounds with the knowledge of plaintiff. The plaintiff has filed this

suit for partition and separate possession stating that there is no partition in the suit schedule properties.

**11. The Order 7 Rule 11 (a) and (d) reads as under -**

**(a) Where it does not disclose a cause of action,**

**(d) Whether the suit appears from the statement in the plaint to be barred by any law.**

In present case the plaintiff has shown cause of action in the plaint. Further the question of limitation is mixed question of law and facts. Therefore, it needs trial. Hence, looking to any angle the IA is not maintainable deserves to be rejected. Accordingly, point No.1 answered in **Negative**.

**12. Point No.2:** In view of the above discussion, I proceed to pass the following:

**ORDER**

**I.A.No.4 filed by the defendant**

**No.1 and 2 under Order 7 Rule 11 (a)**

**and (d) R/w 151 of C.P.C. is hereby**

**rejected.**

(Directly dictated to Stenographer on Lap-tap, print out taken by him, corrected and then pronounced by me in Open-Court this the 7<sup>th</sup> day of December-2022).

**C/c Prl. Senior Civil Judge & JMFC,  
JAMKHANDI.**