

KABK710001122011



O.S./25/2011

{CASE_CAUSE_TITLE}

**IN THE COURT OF THE PRINCIPAL CIVIL JUDGE &
JMFC, JAMKHANDI, AT: JAMKHANDI**

PRESENT :

SRI ABDUL RAHIMAN. A. MULLA

B.A.L, L.L.B (Hons.)

Prl. Civil Judge & JMFC,

Jamkhandi

Dated this the 3rd day of November - 2022

O.S. No.25/2011

1. Laxman S/o Yallapa Wagennawar,
Age: 27 years, Occ: Agriculture,
Coolie, resident of Jamkhandi,
Tq: Jamkhandi, Dist: Bagalkot.
2. Smt. Kallawwa W/o Yallapa Wagennawar,
Age:48years, Occ: Household work,
R/o Jamkhandi, Tq: Jamkhandi,
Dist: Bagalkot.

...Plaintiffs.

(By Sri.C.S.B., Advocate)

- Vs -

1. Shri. Yallapa S/o Balappa Wagennawar,
Age:60 Years, Occ: Agriculture,
R/o Outi Galli, Jamkhandi,
Tq: Jamkhandi, Dist: Bagalkot.

2. Smt. Laxmibai Calling herself as the wife of Yallappa Wagennavar, Age: 54 years, Occ: House hold work, R/o Junjarwad, Tq: Athani, Dist: Belgavi, Now R/o Awati Galli, Jamkhandi.
3. Shri. Prakash calling herself as the son of Yallappa Wagennavar, age: 42 Years, Occ:Trade, R/o Junjarwad, Tq: Athani, Dist: Belgavi, Now R/o Awati Galli, Jamkhandi.
4. Shri. Ramesh calling herself as the son of Yallappa Wagennavar, age: 42 Years, Occ: Coolie, R/o Junjarwad, Tq: Athani, Dist: Belgavi, Now R/o Awati Galli, Jamkhandi.
5. Shri. Siddu calling herself as the son of Yallappa Wagennavar, age: 26 Years, Occ:Coolie, R/o Junjarwad, Tq: Athani, Dist: Belgavi, Now R/o Awati Galli, Jamkhandi.
6. Shri. Hanmant calling herself as the son of Yallappa Wagennavar, age: 26 Years, Occ:Coolie, R/o Junjarwad, Tq: Athani, Dist: Belgavi, Now R/o Awati Galli, Jamkhandi.
7. Shri. Raju calling herself as the son of Yallappa Wagennavar, age: 29 Years, Occ:Coolie, R/o Junjarwad, Tq: Athani, Dist: Belgavi, Now R/o Awati Galli, Jamkhandi.

8. Smt. Malashree calling herself as the daughter of Yallappa Wagennavar, (now married to and named as Smt. Malashree W/o Basappa Tungali, alias Samanagil Age: 25 Years, Occ:Household work, R/o Bandigani, Now residing at Awati Galli, Jamkhandi.

... Defendants.

(D-1 By Sri.M.C.B., Advocate)

(D- 2 to D-8 - By Sri. P.P.N., Advocate)

I.A. No.VII

1. Shri. Laxman S/o Yallapa Wagennawar, and another.

.... Applicants/Original plaintiffs.

- Vs -

1. Shri. Yallapa S/o Balappa Wagennawar, and others.

.... Opponents/Original Defendants.

ORDERS ON I.A. No. VII FILED BY PLAINTIFFS **UNDER ORDER 26 RULE 10 (A) R/W SECTION 151** **OF C.P.C**

The present suit is filed by plaintiffs against defendants for the relief of partition and separate possession and now when the suit is posted for arguments, present application is filed by plaintiffs praying this court to appoint Chief Medical Officer,

CDFD, Nacharm, Hyderabad as court commissioner to conduct the DNA test of plaintiffs and defendant No.1 in order to ascertain the paternity of the child.

2. In the affidavit annexed to the application, plaintiff No.1 averred that they have filed this suit for partition and separate possession and plaintiff No.1 is the son of defendant No.1 and plaintiff No.2 and he is born out of legal marriage of plaintiff No.2 and defendant No.1. In order to dupe the share of plaintiffs, defendant No.1 has denied the relationship with plaintiffs in the written statement. Defendant No.2 is falsely claiming to be the wife of defendant No.1 and defendant No.3 to 7 as sons and defendant No.8 as daughter of defendant No.1. The defendant No.2 to 8 have no right, title and interest in the suit schedule property. Hence plaintiffs to prove the relationship with defendant No.1 require scientific investigation and DNA test alone will put an end to the controversy of relationship and amongst these grounds, prayed to allow the application.

3. Defendant No.2 to 8 filed objections to the application contending that this suit was disposed of on 19-03-2013, same was remitted back to trial and the application of plaintiffs for appointment of court commissioner is unnecessary. When plaintiffs themselves have failed to prove their status in the suit, hence there is no necessity to allow the application. Only to protract the proceedings, present application is filed by plaintiffs and amongst these grounds, prayed to reject the application with heavy costs.

4. Heard, perused the records placed before the court.

5. The points that arise for my consideration are as under :

1. Whether plaintiffs have made out sufficient grounds to allow the application?
2. What order ?

6. My findings to the above points are as under:

Point No.1..... In the Negative,

Point No.2..... As per the final order for the following :

REASONS

7. **POINT No.1:** Admittedly now when the case is set down for arguments, present application is filed by plaintiffs praying to appoint Chief Medical Officer to derive the paternity of the child on the ground that defendant No.1 has denied the relationship with plaintiffs and hence in order to prove the relationship with defendant No.1, it is necessary to conduct DNA test. On the contrary, defendant No.2 to 8 filed objections contending that only to protract the proceedings, present application is filed by plaintiffs. Defendant No.1 has chosen not to file any objections to the application.

8. It is pertinent to note here that defendant No.1 in his written statement has denied the relationship with plaintiffs, hence burden is upon defendant No.1 to prove and establish to same before the court. The Hon'ble Supreme Court of India in decision reported in **(2010) 8 SCC 633** between **Bhabani Prasad Sena V/s Convenor Secretary, Orisa**

State Commission for Women and another held that “DNA test being an extremely delicate and sensitive aspect, a direction for said test, can be given if a strong prima facie case and an eminent need is made out for such a course. The Court has to consider diverse aspects including presumption under Section 112 of Evidence Act, pros and cons of such order and test of eminent need whether it is not possible for the court to reach the truth without use of such test. The result of a genuine DNA test may not be enough to escape from the conclusiveness of Section 112”.

9. The ratio laid down in above said decision is aptly applicable to the case in hand, because if at all scientific advances and tools are used, it could result in invasion of right of privacy of an individual and only as a matter of right, the present application cannot be allowed only to fill up the lacuna of the case. There are no reasons forthcoming from the side of plaintiffs as to whether they have discharged the initial burden laid down under Section 112 of Evidence Act and at this

stage of the case, plaintiffs have failed to make out a prima-facie case to file the present application.

10. Further Hon'ble Supreme Court of India in decision reported in **(2022) 1 SCC 20** between **Ashok Kumar V/s Raj Gupta and others** held that, “The normal rule of evidence is that the burden is on the party that asserts the positive. But in instances where that is challenged, the burden is shifted to the party, that pleads the negative. Keeping in mind the issue of burden of proof, it could be safe to conclude that in a case like the present, the courts decision should be rendered only after balancing the interest of the parties i.e., the quest for truth, social and cultural implications involved therein”.

11. The ratio laid down above said decision is aptly applicable to the case in hand, because in this case, defendant No.1 is pleading the negative i.e, about the relationship with plaintiffs, hence burden is upon him to plead and prove the same and no rejoinder is filed by plaintiffs. Hence the necessity of appointing

court commissioner for conducting DNA test of the parties appears to be wastage of time of the court. Moreover there are no reasons forthcoming from the side of plaintiffs as to what prevented them to file the present application at earliest stage of this case i.e., before judgment being passed on 19-03-2013. Now it appears that only to fill up the lacuna in their case, plaintiffs have come up with the present application after case is remanded and at fag end of the case. No sufficient grounds have been made out by plaintiffs to allow the application. Hence for the above said reasons, I answer point No.1 in the '**Negative**'.

12. **POINT No.2:** For the reasonings and findings given to point No.1, I proceed to pass the following :

ORDER

I.A. No.VII filed by plaintiffs
under Order 26 Rule 10 (A) R/w
Section 151 of C.P.C is hereby
rejected.

Parties to bear their own costs.

(Typed to my dictation by the Stenographer directly on Computer, then corrected, printout taken, signed by me and then pronounced in the open court on this **3rd day of November- 2021**)

(Abdul Rahiman A. Mulla)

Prl. Civil Judge & JMFC,

Jamkhandi.