

ORDERS ON I.A NO.15 FILED U/O 14 RULE
5 R/W SEC.151 OF CPC

The counsel for defendant No.1 has filed above said application seeking an order to framing of additional issue which is as follows:-

Addl. Issue

- 1. Whether the present suit is hit by res judicata in view of disposal of O.S. No.129/2007 by Hon'ble I Addl. Civil Judge (Sr. Dn.) was dismissed ?*
- 2. The plaintiff has filed objections to the I.A.No.15.*
- 3. Heard arguments.*
- 4. Basically this suit is filed by the plaintiff against the defendants for the relief of partition and separate possession. When the suit has been set down for cross examination of D.W.3, the counsel for defendant No.1 came up with this application seeking the above said relief.*
- 5. In the annexed affidavit the defendant No.1 averred that, the properties bearing C.T.S.*

Nos. 2670 and 2671 are purchased by the propositus by name Rachappamula Muttal. After death of propositus, his son Shivappa S/o Rachappa Mulamuttala inherited the said properties. Similarly, the father of the defendant N.1 i.e., Shivappa during his lifetime purchased the property bearing CTS No.2672 measuring 34 Sq. yards from the joint family income. Thereafter, his father Shivappa Mulamuttal, in terms of the Apsat Vatni, left $\frac{1}{2}$ share in the property bearing CTS No.2670 and 2671 in the name of his elder brother Channamallappa S/o Shivappa Mulamuttal, and in the name of defendant No.1, and retained the remaining 34 sq. yds. in CTS No.2672 of the property in his possession.

The subject matter of the suit is the property of my younger son, Kiran Mulamuthal, who is the defendant No. 2 in the present suit. He had filed O.S. No.129/2007 in the Court of 1st Addl. Civil Judge, Hubli against me and the present plaintiff claiming 1/3rd share in the said property and seeking partition and permanent injunction. The said case was dismissed on 10.11.2008. In the present suit also, his elder son, Arun Mulamuthal, i.e. the plaintiff in the present suit, has claimed partition. The suit is not valid in law. The plaintiff is

not entitled to claim partition once again on the same issue under Section 11 of the Code of Civil Procedure, 1908, as the plaintiff was aware of the fact that the same issue was not elaborated in the plaint. In view of the facts stated by him in the petition, he pray for framing additional issue.

6. On the other hand counsel for plaintiff filed objections and contended that, application filed by defendant No.1 praying to frame additional issue "Whether the present suit is hit by res judicata in view of disposal of OS No.192/2007 by Honorable 1st Additional Civil Judge (Sr Dn) was dismissed" is not maintainable either under law or on facts. On perusal of suits it is perused that no suit bearing O.S. No.192/2007 is on record and hence referring such suit number for res-judicata is liable to be dismissed with heavy cost. The defendant No.01 had obtained loan amount from Karnataka Bank, Old Hubballi branch, Hubballi and had mortgaged suit property as security to said loan amount. Since he was defaulter to payment of loan amount bank had initiated recovery of loan dues against mortgaged property. Hence in order to effect the recovery of loan dues against bank defendant No.02 had filed suit bearing O.S. No.129/2007

pleading Karnataka Bank as defendant No.03 and claiming partition. Since recovery was pending by bank the suit was dismissed with cost. That said suit filed to effect bank recovery cannot be considered as partition suit decided on merits against the legal heirs of said property. The defendant No.01 has executed alleged sale deed dated:14.02.2011 in favor of defendant No.03 and defendant No.02 has consented his share by signing as witness to said sale deed. That plaintiff has not sold his share in said suit property nor consented to said alleged sale deed. That said sale is not binding on the share of plaintiff. The defendant No.01 and 02 along with plaintiff are in possession of suit property till date and hence allegation pertaining to O.S. No.129/2007 targeting the bank to effect the bank recovery cannot be considered as Res-judicata.

It is further contended that the plaintiff has filed above said suit for partition and possession of his 1/3rd share in suit property inherited by family from ancestors. That Examination in chief of plaintiff along with exhibiting P-1 to P-10 and cross examination of plaintiff by all defendants No.1 to 3 is completed. The defendant No.1 and 2 have filed their written statement and their evidence through

examination in chief affidavit and have exhibited D.1 to D.8 documents and cross examined by plaintiff and defendant No.1 and 2 each other. The written statement is filed by defendant No.3 on 09.08.2023 and defendant No.3 has filed his Examination in Chief and has exhibited D.9 to D.26 documents through his evidence. Now the stage is for further cross of defendant No.3 and this application is filed just to drag the proceedings of above said suit and harass the plaintiff with one or other false reasons and gain illegally pertaining to the share of plaintiff. The defendant No.1 has not clearly explained the facts and law of O.S. No.129/2007 and has submitted O.S. No.192/2007 which is not record and hence reasons for claiming Res-judicata is against the provision of law and be dismissed with heavy cost in the interest of justice and equity.

7. On careful perusal of the application and objections of the parties and material available on record it is noticed to the court that, The defendant No.1 has filed the present application seeking framing of an additional issue, contending that the present suit for partition is barred by the principles of res judicata on the ground that an earlier suit for

partition between the parties was dismissed. The plaintiff has opposed the application, contending that the defendant No.01 and 02 along with plaintiff are in possession of suit property till date and hence allegation pertaining to O.S. No. 129/2007 targeting the bank to effect the bank recovery cannot be considered as Res-judicata. Further taken specific contention that, the defendant No.1 has not clearly explained the facts and law of O.S. No.129/2007 and has submitted O.S. No.192/2007 which is not record and hence reasons for claiming Res-judicata is against the provision of law, no doubt, during the course of argument the typographical mistake has noticed to the defendant no-1 and the counsel submit it may be rectified as O.S. No.129/2007. And it was consented by the otherside. Hence in this regard the case No.192/2007 mentioned in application is to be considered as O.S. No.129/2007

8. On careful consideration of the pleadings and rival submissions, it is to be noted that the plea of res judicata under Section 11 of the Code of Civil Procedure is a mixed question of law and fact. The defendant has specifically pleaded in the written statement about the institution and

dismissal of the earlier partition suit. And has asserted that the subject matter and parties are the same. Whether the earlier suit was between the same parties?, whether the matter directly and substantially in issue in the present suit was also directly and substantially in issue in the former suit and whether the former suit was finally decided on merits by a competent court or all matters which require adjudication on the basis of evidence. At the stage of framing issues, the court is only required to see whether a material proposition of fact or law is offered by the one party and denied by the other. Since the defendant has raised a specific plea of resjudicata and the same is disputed by the plaintiff, a clear issue is required to be framed and so has to enable both parties to lead evidence. And to avoid any prejudice at the stage of final Arguments. Framing of an additional issue at this stage will not amount to deciding the matter in favour of either party and would only facilitate proper adjudication of the controversy involved. in such circumstances, No doubt the defendant No-1 has taken contention in their written statement regarding the above said defence, but the issue raised by the defendants is not framed in the present suit, any how burden of proving the said

issue is on the defendant No.1. Therefore, said application filed by the defendant No.1 is maintainable. Hence, this Court is of the opinion that the issue regarding Resjudicata is necessary. Therefore, with this observation, this court proceed to pass the following:

ORDER

The I.A. No.XV filed by the defendant No.1 under Order 14 Rule 5 R/w section 151 of CPC is hereby allowed.

Consequently additional issue is framed and treated as preliminary issue.

To hear on preliminary Issue or enquiry.

Call on 17.02. 2026.

sd/-

*I Addl. Senior Civil Judge and JMFC.,
Hubballi.*