

KADW410016272024



Presented on : 03-12-2024
Registered on : 03-12-2024
Decided on : 06-06-2026
Duration : 1 years, 6 months, 3 days

IN THE COURT OF SENIOR CIVIL JUDGE & JMFC AT

KUNDGOL

Present: Sri. Abdul Khadar, B.A.,LL.B.
Senior Civil Judge and JMFC
Kundgol.

This the 6th day of June - 2026

Ex.A. No.1/2024

Appellants

1) Shri. Peerpasha S/o. Mahaboobsab Peer Darga
@ Peerjade Age: 52Years, Occ: Agriculture
R/o: Betadur, Tq: Kundgol, Dist. Dharwad.

(By Sri. R.Hegade., Adv.)

-V/s

Respondents

1. Shri. Tajuddin Peer S/o. Modinsab
Peerjade @ Darga, Age: 88Years,
Occ. Prest of Darga and Agri
R/o: Betadur, Tq. Kundgol, Dist: Dharwad.

- 2.** Shri. IsmailsabS/o. WalipashaDarga @ Peerjade
Age: 75 Years, Occ: Agriculture
R/o: Betadur, Tq. Kundgol, Dist: Dharwad
- 3.** Shri. Yusufpeer S/o. Walipasha Darga @ Peerjade
Age: 65 Years, Occ: Agriculture
R/o: Betadur, Tq: Kundgol, Dist: Dharwad.
- 4.** Shri Abbasali S/o. WalipashaDarga @ Peerjade
Age: 63 Years, Occ: Agriculture
R/o: Betadur, Tq Kundgol, Dist: Dharwad
- 5.** Shri Ahamadpeer S/o. WalipashaDarga @ Peerjade
Age: 61 Years, Occ: Agriculture
R/o: Betadur, Tq: Kundgol, Dist: Dharwad
- 6.** Smt. Bibijan W/o, Dadapeer @
KaliminipeeraPeerjade Age: 64 Years, Occ: Household
R/o: HerekubiMakan, Badami, Dist. Bagalkote.
- 7.** Smt. Thahirbegum W/o. Javelnamdar
Age: 62 Years, Occ: Household
R/o: Unkal, Tq: Hubballi, Dist: Dharwad.
- 8.** Shri. Mahabubsab S/o. ModinsabDarga @ Peerjade
Age: 87 Years, Occ: Agriculture
R/o: Betadur, Tq: Kundgol, Dist: Dharwad.
- 9.** Smt. MamatajW/o. Babajan @ Babasaheb

Darga @ Peerjade Age: 60 Years, Occ: Household
R/o: Betadur, Tq: Kundgol, Dist: Dharwad.

10. Smt. Riyananegum W/o. KalandarsabMulla
Age: 32 Years, Occ: Household
R/o: Betadur, Tq: Kundgol, Dist. Dharwad

11. Shri. ModinsabS/o. Babajan @ Babasaheb
Darga@ Peerjade Age: 28 Years, Occ: Household
R/o: Betadur, Tq. Kundgol, Dist: Dharwad.

12. Smt. Shammubegum D/o Babajan @ Babasaheb
Darga @ Peerjade, Age: 26 Years, Occ: Household
R/o: Betadur, Tq: Kundgol, Dist. Dharwad.

13. Smt. Kaishmabegum D/o Babajan @
Babasaheb Darga @ Peerjade
Age: 24 Years, Occ: Household
R/o: Betadur, Tq. Kundgol, Dist: Dharwad.

14. Smt. RajiyabegumW/oAbdulhamid @ Syed
Abdulrahaman @ Peerjade
Age: 33 Years, Occ. Household
R/o: HerekubiMakan, Badami, Dist: Bagalkote

(R1- by Sri. PSP., Adv).

**(R2, 3(a)to(d), 4 to 8. 15, 18, 19 by Sri. UCP.,
Adv).**

(R.10 to 12 -exprte, R-13 - Deleted)

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Date and nature of decree: Appeal against the order on
I.A.No.V dated 1.10.2024 in
E.P.No.2/2024 by Civil Judge
& JMFC, Kundgol.

Date of institution of the appeal : 03.12.2024

Date of Judgment : 06.06.2026

Duration of the appeal : Year/s Month/s day/s
02 06 03

ORDER

The objector/ 3rd Party appellant has filed this appeal Under Order 41 Rule 1 and 2 R/w Sec. 151 of CPC seeking set aside the order passed in I.A. No.V dated 1.10.2024 in Ex.P. No.2/2024 on the file of Civil Judge and JMFC Kundgol.

2. The appellant hereinafter referred as 3rd party applicant and the respondents hereinafter referred as the DHR and JDR's for the sake of convenience.

3. Brief facts of the appellant is that, the suit is filed by the plaintiff in O.S. No.34/2002 seeking relief of partition and separate possession, claiming 7/32 share in the suit schedule 'A' and 'B' at Sl. No.1 and 2 properies, after merits the said suit was decreed in part

declaring that plaintiff is entitled 1/4th share in suit A property and Suit B Sl. No.1 and 2 properties. Aggrieved by the same, the defendant No.2 who is claiming that the suit schedule properties are in joint possession and enjoyment of the plaintiff and defendants along with one Shabir Pasha and Peer Pasha they are the sons of defendant No 1 and 2. It is the contention of the 2nd defendant that, the late Dadapeer had bequeathed his 1/2 share in the suit properties in favour of Shabir Pasha and Peer Pasha each by executing a Will. The plaintiff is not entitled 7/32th share in the suit properties, but he has claimed excess of share. The contention of the 2nd defendant has been dismissed by the trial court by giving findings that the defendant No.2 claimed that Dadapeer had bequeathed the interest in the suit property through Will in favour of Shabir Pashya and Pir Pashya The 2nd defendant has not elaborated whether the late Dadapeer had bequeathed his interest in the suit properties through a oral Will or through a written Will on the date of alleged bequeath on the capacity of the alleged testator. The defendant No.2 has not adduced any evidence in support of his claim and also taken the contention that, the legatees under the Will are necessary parties to the suit. One of the alleged legatee under the alleged Will Peer Pasha is the son of 2nd

defendant, as such the 2nd defendant could have adduced necessary evidence in support to his claim or else advised his son to come on record as one of the parties to the suit. The 2nd defendant has not adduced any evidence in support of his case. Hence issue castes upon the 2nd defendant has been answered in the negative. Aggrieved by the same the 2nd defendant has preferred appeal in RA No.15/2016 before this court. The said appeal filed by the 2nd defendant has been dismissed and the judgment and decree in O.S. No.34/2002 dated 2.3.2010 is confirmed. Thereafter the plaintiff in O.S. No.34/02 filed FDP proceedings for appointment of court commissioner to demark the property and allot his share and handed over in his possession. In the FDP proceedings filed by the petitioner has been allowed and after receipt of commissioner report, final decree has been drawn. Thereafter the plaintiff has filed execution Petition No.2/2024 claiming possession of the said allotted property in terms of final decree, at that time the present objector has been filed I.A. No.5 under order 21 Rule 97 and 101 R/w 151 of CPC objecting the execution petition seeking his 1/5th share in the execution petition properties based on Will and the decree passed in O.S. No.34/2002 is not binding on him alleging that he is in possession of the execution petition schedule properties.

The said application has been resisted by the petitioner by filing objection contended that the present application has been filed by the objector malicious intention to just to mislead the court and suppressing the truth facts. Hence on this ground, he prayed for dismiss the application with exemplary cot.

4. Aggrieved by that order, the objector has preferred this appeal on the following grounds:-

“ That the order passed by the trial court is capricious, perverse, unjust and unsustainable in nature. Therefor the same is liable to be set aside. The findings given by the trial court without following the mandatory ingredients U/o XXI Rule 101 of C.P.C and without treating I.A No.5 as suit will ends it's miscarrying of justice. Considering the points consideration in the very LA No.5 has rushed to pass the order though it requires it's framing of issues will clears about lacking of digestion power of trail court while arising the conclusion which is not only erroneous but also thegrave error committed by the trial court. Thereby the same is liable to be set aside. While assigning the reasons vide para no.7 of its order it utterly failed to appreciate about it's mandatory ingredients in respect of settled possession and enjoyment of the portion of the petition property in

respect of property of late Dadapeer Moinuddin Sardar @ Peerjade and its related documents like M.R.H No.29/2012-13 as well as the record of rights of the properties in question which are governed U/s 133 of Karnataka Land Revenue Act. but without considering these aspects very observation made by the trial court vide para no.7 to 9 of its order is patent wrong committed by the trial court. Thereby it requires its interference. When the very order XXI Rule 101 it's clearly speaks that no separate original suits is requires, as it can be agitated in the obstructor application itself the very observation made by the trial court vide para no. 10 of its order is foreign to the settled principles of law. The observation made by the trial court by referring C.R.P No. 100070/2020 in the present fact and circumstances of the case is bad in law as the catena's of the judgments will support the case of obstructed the very assigned reasons by the trial court itself is not only meaningless but also hopeless in nature. While coming to the conclusion by the trial court no acceptable and valid reasons is being assigned by the trial court, accordingly the impugned order came to be passed by trial court. The trial court has utterly failed to give the sound and acceptable reasons to come to the proper conclusion. If it would have been have been appreciated the matter in

accordance with law, no order in present fashion ought to be passed by the trial court. When the trial court utterly failed to treat IA No.5 as O.S even by framing the necessary issues and conducting the necessary trial, the opted method of trial court is unknown to the law. The order came to be passed on 1.10.2024 and the present appeal is being preferred within limitation. The Appellant has paid the requisite court fee for filing the appeal as well as for issuance of notice to the Respondents. Hence, the appellants have requested to allow the appeal as prayed for”.

5. Arguments heard from both sides, thereafter the matter is set-down for judgment.

6. On looking to the grounds of appeal, facts and circumstances of the case the following points that would arise for my consideration is:

1) Whether the orders of the trial court passed in respect of IA No.5 is arbitrary, capricious and vexatious and calls for interference by this court?

2) What order?

7. My findings on the above points as follows:

Point No. 1 : In the Negative

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

REASONS

Point No. 1 :

8. It is well settled principle of law that, even if on the pleadings and documents produced by the parties, it is possible to come to a different conclusion that one arrived by the trial court, is not a ground to interfere with the discretionary order of the trial court. On other words, this court can interfere with the order of trial court only if the order of the trial court is perverse, vexatious or capricious and not on the mere ground that, another view is possible on the basis of the pleadings and the documents of the parties. In this view this court would like to discuss whether the order of the Lower Court is liable to be interfered with or not.

9. On the say of the appellant is that the suit in O.S. No.34/2002 filed by Sri. Tajuddin before the Civil Judge and JMFC, Kundgol for partition and separate possession of his 7/32th share in and over the suit 'A' and 'B' properties. One Dadapeer Moinduddinsab Darga @ Peerjade also one of the sharer of the property in question who had 1/5th undivided share in and over the same properties. During the life time of Dadapeer Moinduddinsab Darga @ Peerjade on 29.1.2001 he had

bequeath his undivided share in favour of appellant and also one of the Shabir Pasha S/o Pasha Darga @ Peerjade before the Sub-registrar, Kundgol, the document registered No.26/2001-02. He died on 5.11.2001. After the death of the testator of the Will, the appellant as well as Shabir Pasha succeeded his undivided share and mutation held vide MR. No.29/2012-13 and they are in possession of the suit properties. The said legatee under the Will was not being made the parties to the suit in O.S. No.34/2002 and they have succeeded to the decree in question. Thereafter the 2nd defendant preferred RA No.54/2016 before this court, the said appeal also dismissed on 23.9.2017 by confirming the judgment of the trial court. Based on the same, the plaintiff has filed FDP. No.7/2015 before the trial court for final decree and the same came to be ended by drawing final decree, to this effect and in later the very plaintiff has moved Execution petition No.2/2024, the appellant as well as Shabir pasha has succeeded the share of Dadapeer Moinddinsab Darga @ Peerjade. Due to his demise and put in lawful possession and enjoyment of the properties in question jointly, behind the back and without knowledge they proceeded at the instance of respondent No.1 and the plaintiff misrepresenting before this court playing fraud

succeeded to proceed with the matter and the obstructor/appellant has filed I.A. No.5 under order 21 Rule 97 and 101 of R/w 151 of CPC, accordingly the decree holder of the said petition filed objection without considering the material to dispose the obstructor/applicant the trial court has resist to hear the argument and passed the impugned order under this appeal. Hence this appeal has been filed.

10. On perusal of the findings given by the trial court while discussing the appeal on I.A. No.5 filed by the obstructor it is held that FDP No.7/2015 initiated on 7.6.2019 the FDP petition was allowed. The report submitted by the court commissioner, Taluk Surveyor dated 23.10.2018 and the Advocate court commissioner dated 21.8.2017 were accepted. Accordingly the suit schedule 'A' property was to be divided and ordered for petitioner/D.Hr. shall be put in to separate possession over the same. Likewise the report dated 5.6.2017 submitted by the Advocate court commissioner was accepted and it was ordered that petitioner shall be put into separate possession over the 'B' schedule properties, as such the application filed by the objector is untenable. The counsel for the objector argued that, the deceased Dadapeer executed registered Will by virtue of Will being registered one, this is legal and binding on the D.Hr. The

person in whose favour it was executed was not party to the previous suit and FDP, as such he come up with the present application and it is settled law that a member of family cannot execute a Will beyond his share and as per Mohammedan's, the partition opens on the death of a family member and not on the birth of member of the family is entitled for share as of Hindu law. On perusal of certified copy of judgment passed in O.S. No.34/2002 it clearly mentioned that Dadapeer died leaving behind no wife and children. The suit was filed by the plaintiff, in this petition against his brothers Valipasha Mahaboob Pasha and Babasaheb for relief of partition and separate possession. The another brother Dadapeer was reported to be dead on 5.11.2001 and it was also clearly held that, the said Dadapeer had no wife and children at the time of his death. Moreover the 2nd defendant in O.S. No.34/2002 has taken contention of the Will, but he has not adduced any evidence in support of his claim. The legatees under the alleged Will are the necessary parties to the suit and was also observed that one of the legatee Peer Pasha being the son of 2nd defendant and the 2nd defendant not adduced any necessary evidence in support of his claim or else advised his son to come on record as one of the party to the suit. On carefully reading of portion of the said judgment, it is clear that,

objector in the present execution petition is none other than the son of 2nd defendant by name Mahaboob Pasha. It is also clearly shows that the objector was having every knowledge about the pending of the proceedings in OS. No.34/2002 for which he is claiming of not being party. Further in O.S. No.41/2018 the Trial court passed order in I.A. No.6 filed by the objector under order 39 Rule 1 and 2 R/w Sec. 151 of CPC praying for stay of further proceedings of execution petition was dismissed on 26.7.2023. As per the judgment and decree passed by the court in O.S. No.34/2002 the revenue authorities have carried out necessary steps for change of khata in the name of D.Hr. and RTC's available on record are also clear with regard to said fact. Now it is only for D.Hr. to get physical possession of the execution of schedule properties. As the objector is claiming his right and title under the alleged Will deed said to have been executed by Dadapeer. Under such circumstances, the trial court also relied the decision of Hon'ble High Court of Karnataka in Crl. P. No. 100070/2020 in the case of Smt. Sulochana and others V/s. Devappa and others, this execution petition arising out of judgment and decree passed in O.S. No. 34/2002 and FDP No.7/2015 for handing over the possession of schedule 'A' and 'B' properties to D.Hr.

11. On perusal of the schedule to the execution petition, it is clear that decree holder has sought for possession of immovable property, but it is contention of the objector that these immovable properties are belongs to the joint family properties, as such he is having share over them, but objector claiming right over the execution petition schedule properties is not under independent right. The contention of the objector as to the properties being the joint family properties and he is entitled for the share does not confirm any independent right to the objector in respect of present petition schedule properties. Hence there is nothing left to conduct inquiry as to decide the right of the objector over the execution petition schedule properties as they are the properties allotted towards the share of the D.Hr. On this ground the said I.A. dismissed.

12. On perusal of documents produced by the respondent No.1 i.e. J.Dr No.1 it appears that the obstructor was filed I.A. No.4 in O.S. No.34/2002 under order 1 rule 10 implead them as parties to the suit, the entire order sheet in O.S. No.34/2002 shows that the objector filed I.A. No.4 on 23.6.2003. The suit was decreed in part on 22.3.2010. The order passed in I.A. No.6 in O.S. No.41/2018 shows that, the Trial court has dismissed the application that there is no prima-facie

case made out by the plaintiff. At this juncture, as the application is untenable. There is nothing to discuss further with regard to present application when the records available on the file of this court itself are very much clear as to revenue authorities acting upon the order passed by this court in FDP No.7/2015. O.S. No.34/2002 filed by the Tajuddin has decreed in part by allotting 1/4th share in 'A' and 'B' schedule properties and 1/4th share in item No.1 and 2 of 'B' schedule properties. The order passing in R.A. No.54/2016 filed by the 2nd defendant shows that the said appeal was dismissed on the finding that I.A. No.1 filed under Sec. 5 of Limitation Act for condonation of delay in filing the application is rejected and the judgment and decree passed in O.S. No.34/2002 dated 22.3.2010 by Civil Judge and JMFC Kundgol is confirmed.

13. On perusal of judgment in O.S. No.34/2002 itself shows that there was an issue casted upon the defendant No.2 that, the defendant No.2 to prove that Dadapeer had executed the valid Will bequeathed his share in the suit schedule properties equally to Peer Pasha son of defendant No.2 and Shabir Pasha son of defendant No.1 but sufficient opportunity given to defendant No.2 has not stepped into witness box to prove the said issue. In this regard, the trial court in

para 35 of the judgment has clearly negative the issue that the 2nd defendant has not elaborate whether the late Dadapeer bequeath his interest in the suit properties through a oral Will or through written Will and the date of alleged bequeath and the capacity of alleged testator. He has not adduced any evidence in support of his claim and the legatees under the alleged Will is necessary parties to the suit. It is significant to note that, one of the alleged legatee Peer Pasha is the son of 2nd defendant, as such the 2nd defendant could have adduced necessary evidence in support of his claim or else advised his son to come on record as one of the parties to the suit. This findings in O.S.34/2002 itself clearly shows that this Court itself has given sufficient opportunity to prove the Will in question as sought by the objector in the present petition.

14. Taking into consideration of the above said materials made available by the parties on record, this court has no impediment in arriving conclusion that, the appellant has not made out prima-facie case to set aside the order passed by the trail court on I.A.No,5 under appeal. Further this court feels to observe that, the order under appeal is not arbitrary, capricious and vexatious, this court can interfere with the discretionary order of the trial court and set-aside the order under appeal.

Therefore, am not hesitating to answer point no. 1 in the negative.

Point No. 2 :-

15. In view of my findings given to the point No.1 as stated above, the appellants are not entitled for the relief as prayed for. In the result I proceed to pass the following:

ORDER

The appeal filed by the appellants/plaintiff's Under Order 43 Rule 1 of C.P.C is hereby dismissed with cost of Rs.5000/-

The order under appeal passed on IA-5 filed 1.10.2024 in Ex.P. No.2/2024 on the file of Civil Judge and JMFC, Kundgol is hereby confirmed.

(Dictated to the Stenographer, transcribed and computerized by him, corrected by me then pronounced in the open court on this the 6th day of June 2026.)

(Abdul Khadar)
Senior Civil Judge and J.M.F.C,
Kundgol.

