

KAHS310028582017



IN THE COURT OF II ADDL. CIVIL JUDGE & J.M.F.C, AT
ARAKALGUD

-:P R E S E N T:-

**Sri. RAGHU.M, B.A.L.,L.L.B.,
II Additional Civil Judge & JMFC.,
Arakalgud**

FDP No.12/2017

Dated 31st day of July-2023

Petitioners :-

1. Kum Nikhitha D/o Yoganna,
Aged about 21 years,
2. Smt Mamatha W/o Yoganna,
Aged about 42 years,
Both are R/at:
Jittenahally Village,
Kalenahally Dakhale,
Ramanathapura Hobli,
Arakalagudu Taluk.

(By Sri R K M, Advocate)

-V/S-

Respondents :- 1.Sri.Nanjegowda
S/o. Boregowda(Pouthi)

2. Sri. Yoganna
S/o. Late. Nanjegowda,
Aged about 50 years,

1 & 2 are R/at:
Jittenahally Village,
Ramanathapura Hobli,
Arakalagudu Taluk,
3. Smt. Kamalamma
W/o. Late. Nanjegowda,
Aged about 58 years,
Dummi Village, Doddamagge Hobli,
Arakalagudu Taluk.
4. Smt. Pankajamma
W/o. Krishnegowda,
Aged about 56 years,
R/o. Manjunatha Nilaya,
Adlimane ,2nd Cross,
4th Main road, Sangameshwara
Extention, Hassan.
5. Smt. Shobha W/o. Krishnegowda,
Aged about 54 years,
R/o. Bandihally village,
Chunchana Katte Hobli,
K.R. Nagara Taluk.
6. Smt. Hemalatha
W/o. Govindgowda,
Aged about 52 years,
Maggadavara road,
Saligrama village,
K.R. Nagara Taluk.

(R-2- By Sri H R N, Advocate)

INTERIM APPLICATION No: I

Applicant/Petitioner :- Kum. Nikhitha
....Petitioner No.1

-V/s-

Opponent/Respondents :- Sri Nanjegowda & others
....Respondents

ORDERS ON I.A NO.I U/S 151 OF CPC

When the petition is set down for enquiry, the petitioner No.1 has filed the present application dated 30-03-2022 praying to rectify the preliminary decree passed in O.S No.83/2001.

2. In the affidavit annexed to the application stated that, the petitioners had filed original suit No.83/2001 against respondents for the relief of partition and separate possession and said suit came to be decreed and ordered to entitled for 1/4th share in the suit schedule properties. After passing preliminary decree in O S No.83/2001, the grand father of petitioner No.1 was died and the petitioners are entitled for $\frac{1}{2}$ share over the petition schedule properties. Hence prayed to rectify the preliminary decree passed in O S No.83/2001. Hence prayed to allow the application.

3. On the other hand, the respondent No.2 appeared through his counsel and filed objections to the application stated that, the application is not maintainable either in law or on facts and liable to be dismissed. The petitioners have filed the suit against respondents for the relief of partition and separate possession and said suit was decreed and 1st respondent was died after passing preliminary decree. The children of the second wife of second respondent have filed the original suit No.165/2021 against petitioners herein and second respondent for the relief of partition and separate possession before Hon'ble I additional civil judge, Arakalgud and there is no provision in the law to rectify the preliminary decree passed in O.S No.83/2001 and the petition is not maintainable as not brought the children of second wife of second respondent. Hence payed to dismiss the application filed by the petitioner No.1 in the interest of justice and equity.

4. Heard arguments of counsel for petitioners and counsel for respondents has not addressed arguments.

Hence, the court taken on note that, arguments of the respondents taken as not addressed.

5. The following points that arise for consideration:

1. Whether the applicant/petitioner No.1 had made out grounds to allow the application u/s 151 of Cpc?
2. What order?

6. Findings to the above points as follows:-

Point No.1 : In the Affirmative,

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

: R E A S O N S :

7. **POINT NO.1:-** I have already narrated the facts stated in the affidavit annexed to the application and objections filed by the respondent No.2.

8. By perusal of records which disclose that, the petitioner No.1 through her mother i.e petitioner No.2 had filed original suit No.83/2001 against respondents No.1 and 2 for the relief of partition and separate possession with respect to petition schedule properties before Hon'ble Civil Judge and JMFC, Arakalgud. Later the respondents No.3 to 6

were impleaded as formal parties in the said suit and the said suit came to be decreed that, the petitioners and respondents No.1 and 2 herein are entitled for $\frac{1}{4}^{\text{th}}$ shares in item No.1 to 8 of suit schedule properties and petitioner No.1 is having right of residence in item No.9 of suit schedule properties. The respondents No.3 to 6 were impleaded in the original suit as they are children of respondent No.1. But in the judgment in said suit, the respondents did not get any share. In the para 12 of judgment the Hon'ble court was held that, the minor 1st plaintiff being the co-parcener she is entitled for her legitimate share in item No.1 to 8. The defendants No.3 to 6 who were brought on record subsequent to the institution of suit are the daughters of the 1st defendant. They are not necessary parties as the 1st defendant is very much alive. No evidence is brought on record to show that, any of the daughters of 1st defendant are also having a share by virtue of section 6A of Hindu succession act. In the said suit the respondents did not get any share as they are not necessary parties to the suit and did not consider them as co-parceners. The Karnataka legislature has amended the Hindu Succession Act 1956

and inserted Sec.6A to 6C for insuring that the unmarried daughters get equal share in the coparcenary property. The Hindu Succession (Karnataka Amendment) Act 1990 came into force from 30.07.1994 and the same was in force till commencement of Hindu Succession (Amendment) Act 2005 from 09.09.2005. As per Sec.6A(a) of Hindu Succession (Karnataka Amendment) Act 1990, the daughters are coparcenars by birth and Sec.6A(D) of Hindu Succession (Karnataka Amendment) Act 1990 has laid down the conditions to be fulfilled by a daughter to claim the status of coparcenary. First condition is as on 30.07.1994 daughter remained unmarried and 2nd condition is as on 30.07.1994 no partition had been affected in the family. But, in the said original suit there is no pleadings that, the respondent No.3 to 6 are married before enactment of Hindu Succession (Karnataka Amendment) Act 1990 and as per the pleadings of the plaintiffs in O.S.83/2001 there is no partition had been effected in the family as on 30.07.1994. But, in the said original suit the respondent no. 3 to 6 did not get benefit of Hindu Succession (Karnataka Amendment) Act 1990. After commencement of Hindu Succession (Amendment) Act 2005

the daughters are co-parcenars by birth and they are having rights in the ancestral properties.

In the case of Vineeta sharma Vs Rakesh Sharma and others reported in (2020) 9 SCC 1 Hon'ble apex court has held that, "living daughter as on 09-09-2005 will get the benefit of Hindu Succession (Amendment) act, 2005. Hence, the married daughters are also become co-parcenars as per amendment act of 2005, if as on 09-09-2005 they were alive".

9. The petitioners had filed original suit in the year 2001 and later the respondents No.3 to 6 were implead as defendants as formal parties. According to the petitioners, during pendency of the original suit, the respondents No.3 to 6 herein were and now are alive. Since the said suit was decreed on 06-12-2003, the respondents did not get any share in the said suit and the Court has not given benefit of Hindu Succession (Karnataka Amendment) Act 1990 at the

time of Judgment. Since the respondents No.3 to 6 are alive as on 09-09-2005, they are entitled for share in the suit schedule properties as per Hindu Succession (Amendment) act 2005.

10. The respondent No.2 in the objection has taken contention that, there is no provision in the law to rectify the preliminary decree.

In the case of Gunduri Koteshwaramma V/s. Chakiri Yanadi reported in (2011) 9 SCC 788 page 794, para 4 has held that, if in the interreanum i.e., after passing of the preliminary decree and before the final decree is passed, the events and supervening circumstances occur necessitating change in shares, there is no impediment for the Court to amend the preliminary decree or passed another preliminary decree redetermining the rights and interest

of the parties having regard to the changed situation.

In the case Vineeta sharma V/s Rakesh Sharma & others reported in (2020) 9 SCC 1 Hon'ble apex court at page 90 para 137.4 has held that not withstanding that, a preliminary decree has been passed, the daughters are to be given share in coparcenary equal to that of a son in pending proceedings for final decree or in an appeal.

11. According to the above decisions rendered by Hon'ble apex court, the court before passing final decree can draw one more preliminary decree or amend the preliminary decree. In the present petition final decree is not drawn. According to petitioners and respondent No.2, the respondent No.1 was died after passing preliminary decree and deceased's share will have to be allocated to respondents No.2 to 6. Hence, the respondents No.3 to 6 would get the

share in the item No.1 to 9 of petition schedule properties along with petitioners and respondent No.2. Hence on the above discussion, point No.1 is answered in the **affirmative**.

12. **Point No.2:** for the foregoing above reasons, court proceeds to pass the following :

: O R D E R :

I A No.1 filed by the petitioner No.1 U/s 151 of C.P.C is hereby allowed.

The respondents No.2 to 6 are entitled for 1/5th share in item No.1 to 9 of suit schedule properties.

The petitioners are entitled for ½ share in which can be allocated to the respondent No.2.

office is hereby directed to draw fresh preliminary decree as per this order.

No order as to cost.

(Dictated to the stenographer, transcribed by her, revised by me and
-after corrections pronounced in the open court on this the 31st day of July
2023)

(Sri. Raghu.M)

II Addl. Civil Judge & J.M.F.C,
Arkalgud

(Vide separate order pronounced in
Open Court)

: O R D E R :

***I A No.1 filed by the
petitioner No.1 U/s 151 of
C.P.C is hereby allowed.***

***The respondents No.2
to 6 are entitled for 1/5th
share in item No.1 to 9 of
suit schedule properties.***

***The petitioners are
entitled for ½ share in
which can be allocated to
the respondent No.2.***

***office is hereby
directed to draw fresh
preliminary decree as per
this order.***

No order as to cost.

***Issue Notice to
respondent No. 3 to 6 if
PF paid by 02.09.2023.***

***II Addl. Civil Judge & J.M.F.C,
Arkalgud***