

KAKB420000882021



Presented on : 22-01-2021

Registered on : 25-01-2021

Decided on : 03-01-2024

Duration : 2 years, 11 months, 12 days

**IN THE COURT OF PRINCIPAL CIVIL JUDGE AND
JMFC, AT CHINCHOLI**

PRESENT:- Sri. Ravi Kumara V ,.BA.LL.B.
Prl. Civil Judge,
Chincholi.

DATED THIS THE 3rd DAY OF JANUARY-2024

ORIGINAL SUIT NO. 10/2021

PLAINTIFF:

Lal Bi W/o Khajamainuddin, Age: 45
years, Occ: Agriculturist & Household,
R/o Nidagunda, Tq: Chincholi, Dist:
Kalaburagi.

(Rep.By Sri. R.L.H. Advocate)

V E R S U S

DEFENDANTS:

1. Douloth Bi W/o Mahebali, Age: 55 years,
Occ: Agriculturist & Household, R/o
Yedga village, Tq: Sedam, Dist:
Kalaburagi.
2. Rassol Bi W/o Mustafa, Age: 40 years,
Occ: Agriculturist & Household, R/o
Sangya, Tq: Tandur. Now at R/o
Chantrasala, Tq: Chincholi, Dist:
Kalaburagi.

(D-1 is Rep. By Sri. C.N.K Adv,.)

(D-2 is Rep. By Sri. N.C.H. Adv,.)

Date of Institution of the suit	25-01-2021
Nature of the suit	Partition and Separate Possession.
Date of commencement of recording of evidence.	02-01-2023.

(SRI RAVI KUMARA V.)
Prl. Civil Judge,
Chincholi.

J U D G M E N T

This is a suit for Partition, Separate Possession and for direction against revenue authorities.

2. The description of the suit schedule properties as described in the plaint reads as follows;

SCHEDULE

A) A land bearing Sy.No. 66/2 totally measuring 03 acres 15 guntas, situated at village Chatrasala village, Tq: Chincholi District: Kalaburagi and bounded:

East :	By the land of Mainuddin S/o Hussainsab
West :	By the land of Doulath Bi W/o Hussainsab.
North :	By the land of Nagappa S/o Hanumantha.
South :	By the land of Beerappa Pujari.

B) Another land Sy.No. 26/1 measuring to the extent of 01 acre 27 guntas situated at village Chatrasala village, Tq: Chincholi and bounded :

East : By the land of Mehaboobsab S/o Gudusab.
West : By the land of Ramraopatil S/o Mallanna Rao.
North : By public road.
South : By the land of Doulat Bi W/o Gudusab.

3. The case of the plaintiff in a nutshell reads thus;

That, the plaintiff and the defendants are the children of the Late Imamsab. That, the said Imamsab was the owner and in possession of the suit properties during his life time. That, Imamsab was died intestate by living behind the plaintiff and defendants and eversince, they are jointly in possession of the suit properties and are equally enjoying the usufructs of the said properties.

It is alleged by the plaintiff that, the defendant No. 1 has given her grand daughter to the son of defendant no. 2 and both the defendants have colluded with each other and trying to sell the suit properties to Vikat Sagar Cement factory by mutating their names in the revenue records. It is further alleged by the plaintiff that, on 20-12-2020 she demanded the defendants to give her rightful 1/3rd share in the suit properties, but in vain. Hence, the plaintiff claims to have filed this suit.

4. In pursuance to the suit summons, the defendant No.1 and 2 have appeared through their counsel. The defendant No. 2 filed her Written Statement and the same has been adopted by the defendant No. 1 by the filing the memo.

5. In her Written Statement, the defendant No.2 admitted the relationship between parties. She also admitted the case of the plaintiff that the suit properties were originally belonged to their father Imamsab. But, she denied the rest of plaintiff's case in toto.

5.1. It is specifically contended by the defendant No.2 that, her father had already given the shares of plaintiff and defendant no. 1 in the suit properties in the nature of gold ornaments and cash during the time of their marriage. She further contending that since she is the elder daughter of Imamsab and since the said Imamsab had no male issues he asked the defendant No. 2 and her husband to be along with him in his house. Thus, the defendant No. 2 further contending that, ever since her marriage herself and her husband Mustaq are residing with her father in his house by not only looking after the suit properties but also taking care of her father and mother. The defendant No. 2 further contending that, since she had taken care of Imamsab during his last days, he had bequeathed the

suit properties and a house property in her favor by executing a Will before a notary. Hence, the defendant No. 2 contending that, herself and her husband is in possession of the suit property by virtue of the said Will.

5.2 It is also contended by the defendant No. 2 that, the plaintiff demanded share in the suit properties by sending a notice to her father during his lifetime and hence, she further contending that, the suit is not maintainable as per the principles of Mohammedan law. She also contending that, the plaintiff has not included a house property belongs to Imamsab and hence, the suit for partial partition is not maintainable. Accordingly, the defendant No. 2 prays to dismiss the suit with cost of Rs. 50,000/-.

6. In light of the pleadings of both the parties, this court on framed the following;

ISSUES

- 1. Whether the defendants prove that the suit is not maintainable for non inclusion of a house property belongs to the ancestors of the parties to this suit?**
- 2. Whether the defendants further prove that their father Late Imamsab had executed a will in favor of defendant No. 2 by bequeathing the entire suit schedule properties into her name?**

3. Whether the plaintiff is entitled to the reliefs as sought for?

4. What order or decree?

7. In order to prove her case, the plaintiff has got herself examined as PW-1 and further examined two witnesses as PW-2 and 3. She also produced Ex. P-1 to 3 documents.

On the other hand, the defendant No. 2 got examined himself as DW-1 and further examined two witnesses as DW-2 and 3 and produced Ex.D-1 to Ex.D-4 documents.

8. Heard **Sri. Ravindra H. Hoovinabavi**, the learned counsel appearing for the plaintiff and **Sri. Nagabhushana C. Hulagundi** the learned counsel appeared for the defendant No.2.

9. I have Carefully perused the entire materials placed before this court.

10. My finding on above issues are as follows:

Issue No.1	:	In the Negative.
Issue No.2	:	In the Negative.
Issue No.3	:	Partly in the Affirmative.
Issue No.4	:	As per final order, for the following.

REASONS

11. ISSUE NO. 1: The defendants contesting this suit on one among the ground that the plaintiff filed this suit without including a house property belongs to Imamsab and hence, they contending that, the suit of the plaintiff for partial partition is not maintainable.

12. The contents of the written statement does not disclose the description of the house property which allegedly left out by the plaintiff in the present client. Nevertheless, the plaintiff during her cross examination has admitted that a house property belongs to her father is existing at Chatrasala village and she has not included the said property in this suit. From the said evidence it can be gathered that apart from the suit properties Imamsab left out an another house property and the same is not the subject matter of this suit.

13. But, the contention of the defendants that, the present suit for partial partition is not maintainable, can not be accepted on its face itself for a simple reason that the doctrine partial partition is not applicable to the Muslims unlike Hindus. It is a well settled law that, the doctrine of partial partition is applicable to only a Hindu copercener, where the coperceners

joint in estate, and not to the Muslims who are tenants in commons. Under the Mohammedan law the heirs of deceased succeeds to a definite fraction of every of part his estate. Muslim sharers are not obliged to sue for partition of all the properties which they are interested. There is nothing to preclude one of them from seeking a partition for only certain properties by letting out others.

14. The above view of mine is very well supported by the decision of Hon'ble Supreme court in the case of **Syed Shah Ghulam Ghouse Mohiuddin and others vs Syed Shah Ahmed Moriuddin Kamisul Quadri (Dead) By LR's and others¹**

"The cause of action for partition of properties is said to be a "perpetually recurring one". In Mohammedan Law the doctrine of partial partition is not applicable because the heirs are tenants-in-common and the heirs of the deceased Muslim succeed to the definite fraction of every part of his estate. The share of heirs under Mohamedan Law are definite and known before actual partition. Therefore on partition of properties belonging to a deceased Muslim there is division by metes and bounds in accordance with the specific share of each heir being already determined by the law."

1. (1971) 1 SCC 597

15. In view of above settled principal of law, the doctrine of partial partition is alien to the Mohammedan law and thus, the contention of defendants can not be accepted. Accordingly, the plea of partial partition set up by the defendants is rejected and accordingly, the present issue No. 1 is answered **in the Negative.**

16. Issue No. 2: At the cost of repetition it is worth to state that, according to the plaintiff her father Imamsab had died intestate by living behind her and the defendants and also the suit properties and hence, she claims that, herself and defendants are entitled to equal shares in the suit properties.

Per contra, the defendants have not only denied the said plea but have also setup the defence that Imamsab had bequeathed the suit properties and a house property in favor of defendant No. 2 by executing a Will as a token of gratitude as the defendant no. 2 and her husband taken care of him during his last days. Thus, the defendants claim that, except the defendant No. 2 none have any right in the suit properties.

17. During the course of his arguments the learned counsel for plaintiff has submitted that Imamsab died intestate and the defendant No.2 created a document of Will and making

false claim that said Imamsab bequeathed entire suit properties in her favour. He also argued that under the principals of Mahommeden law a Muslim can bequeath only 1/3rd of his property under a Will and hence, he further argued that, the Will executed by Imamsab is illegal as he had allegedly bequeathed entire property belongs to him under a Will. Therefore, he prays to reject the defence set by the defendant NO.2.

18. Per contra, the learned counsel for defendant No.2 argued that Imamsab executed the Will having sound mind and as a token of gratitude he bequeathed entire suit properties along with a house property infavour of defendant No.2 as she looked after Imamsab during his last days along with her husband. He further argued that the defendant No.2 has proved the due execution of Will by Imamsab by way of leading cogent evidence and hence, he further submits that, the plaintiff shall be non sued. Accordingly, he prays to dismiss the suit with cost.

19. Since, the defendant No.2 not disputing that the suit properties were originally belonged to Imamsab and since she set up a defence of disposition of suit properties by the said Imamsab in her favour by way of executing a Will, it is her whole and sole burden to prove the said plea. If she succeed in

discharging said burden then only this court can decide the entitlement of plaintiff to a share in the suit properties.

20. In this regard, the defendant No. 2 examined herself as DW-1 and reiterated the entire written statement contention in her affidavit filed in lieu of her examination in chief.

20.1. During the cross examination of DW-1 the counsel for plaintiff tried to elicit that Imamsab died intestate by living behind the suit properties. But, the same has been denied by the DW-1 and she further stick on her defence. The DW-1 also denied the suggestion put to her that the plaintiff has also taken care of Imamsab during his last days, for which a room was allotted to her in his house. Except the above, nothing much was elicited from the mouth of DW-1 to disprove her defence. Rather, the DW-1 has consolidated her defence in respect of the alleged Will by deposing that her father had come to Chincholi for executing the document of Will and he had himself purchased a stamp paper for engrossing the Will. The efforts of counsel for plaintiff to falsify the said evidence yield no result. Thus, the evidence of DW-1 remained intact.

21. Apart from her oral testimony, the DW-1 has also produced a notarized document dated: 15-11-2019 titled as a

'Will Deed'. On perusal of the said document it appears that late Imamsab being owner of the present suit properties and also a house property bearing GP No. 1/26 situated at Chatrasala Village had bequeathed the said properties in favor of his daughter/Defendant No. 2 by reciting that he is executing the said document out of love and affection and to avoid future complications in respect of his properties.

22. It is to be taken into consideration, the Ex.D-1 document contains the thumb impression of both Imamsab and the defendant No. 2. The said document is executed before a notary public, who has been examined by the defendant No. 2 as DW-3. The said DW-3 has stated that, Imamsab had notarized the Ex. D-1 document with him and at the time of he notarized the said document, the defendant No. 2, the witnesses namely Chandrashekhar, Laxman Reddy and Bheemshappa were also present. He further deposed that, before notarizing the Ex. D-1 document he had verified the Aadhar Card of Imamsab and has read over the contents of the said document to him and said Imamsab, defendant No. 2 and all the witnesses have signed the said document before him.

22.1. The DW-3 has produced the original notary register book and receipt book at Ex. D-3 and 4. According to

DW-3, he had entered the factum of notarizing the Ex. D-1 document at Sl. No. 603 of Ex. D-3 register and issued a receipt by keeping its counter file as Ex. D-4(A). The said evidence of DW-3 is in consequence with the contents of Ex. D-3 and 4 documents, where it is found that on 15-11-2019 Imamsab has attested the Ex. D-1 document.

23. It is also to be seen the defendant NO.2 examined the alleged attesting witnesses to Ex.D-1 document namely, DW-2 Laxmareddy. The DW-2 stated that, Imamsab executed the Ex.D-1 Will in his presence and bequeathed the suit property in favour of the defendant No.2 as result of his love and affection towards her as she looked after him during his last days. He also identified his signature in the Ex.D-1 document along with the thumb impression of the testator Imamsab, the defendant No.2 and the other witnesses.

24. No doubt, the evidence led by defendant No.2 through DW-1 to 3 and Ex.D-1 to 4 are not dismantled by the plaintiff and are also in consonance with her plea. However, on perusal of the contents of Ex.D-1 Will it is evident that testator Imamsab had bequeathed all his properties under the said Will and exceeding 1/3rd. Thus, in view of the arguments canvassed

by the learned counsel for the plaintiff a legal question emerges that whether the Ex.D-1 Will is valid and executed in accordance with the principles of Mahommeden law or not.

25. Undisputedly, the parties to this suit are Mahommedens and hence, extracting paragraph numbers 115 to 118 from chapter No.9 of Mulla's Principals of Mahommeden law, 21st edition, found significance. The same reads as follows;

115. Persons capable of making wills

Subject to the limitations hereinafter set forth, every Mahomedan of sound mind and not a minor may dispose of his property by will.

Hedaya, 673; Baillie, 627

116. Form of will immaterial A will (Vasiyyat) may be made either verbally or in writing.

117. Bequests of heirs A bequest to an heir is not valid unless the other heirs also consent so as to bind his own share.

A bequest to an heir, either in whole or in part, is invalid, unless consented to by other heir or heirs and whosoever consents, the bequest is valid to that extent only and binds his or her share. Neither inaction nor silence can be the basis of implied consent.

Explanation.- In determining whether a person is or is not an heir, regard is to be had, not to the time of the execution of the will, but to the time of the testator's death.

118. Limit of testamentary power A

Mahomedan cannot by will dispose of more than a third of the surplus of his estate after payment of funeral expenses and debts. Bequests in excess of the legal third cannot taken effect, unless the heirs consent thereto after the death of the testator.

Hedaya, 671 Baillie, 625.

26. From the above text of Mulla's Mahommeden law it can be gathered that a Mahommeden of sound mind and having attained the age of majority can bequeath his properties under a Will either orally or in writing. Executing a document of Will or reducing a Will in to writing is not necessary under the Mahommeden law. To be on the legal question raised by the counsel for plaintiff, how far a Mahommeden can dispose of his properties by Will is limited in two ways. Firstly, as regards the persons to whom the property may be bequeathed, and, secondly, as regards the extent which the property may be bequeathed.

26.1. A bare reading of para No.117 and 118 would clearly convey that the only case in which a testamentary disposition is binding upon the heirs is where the bequest does not exceed 1/3rd and is made to a person who is not an heir. More importantly, the bequest more than of 1/3rd share will be valid only when the consent of other heir is taken. As per the above principals, if an heir do not consent for the Will of testator bequeathing excess 1/3rd share in his property to an another heir will be invalid.

27. In the case on hand, it is absolutely nobodies case that the defendant No.1 or the plaintiff herein have given their consent to the Ex.D-1 Will and to the extent of property bequeathed thereunder in favour of the defendant No.2. Neither the pleadings of the defendant No.2 nor the contents of Ex.D-1 document itself disclose such consent given by the plaintiff and defendant No.1. Under the circumstances, it is prima facie appears that the Ex.D-1 Will is not executed in accordance principals of Mahommeden law. Therefore the said document is invalid in the eye of law and the same does not convey any right or title in favour of the defendant No.2 either over the suit properties or over the suit property mentioned therein.

28. Thus, it can be concluded that though the defendant No.2 proved the execution of Ex.D-1 Will by Imamsab, the said Will is not a valid document in the eye of law for the reasons as stated supra and therefore, the bequeath made under the said Will is also invalid. Accordingly, the issue No.2 is answered **in the Negative.**

29. Issue No.3: There is absolutely no dispute that late Imamsab died by leaving behind the plaintiff, defendant No.1 and 2 as his only heirs. It is nobodies case that the said

Imamsab had any other Sharer or Residuaries or Distinct Kindered to allot share in the suit properties. Under the circumstances, the plaintiff as well as the defendants herein are equally entitle to 1/3rd each share in both the suit properties as the Residuaries of Imamsab.

30. Hence, it can be concluded that, the plaintiff being a Residuary of Imamsab is entitle to 1/3rd share in the suit properties.

31. So far as the relief sought by the plaintiff in respect of the correction of revenue records is concerned, the jurisdiction of this court is barred U/s 135 of Karnataka Land Revenue Act and therefore, the plaintiff is not entitle to the said relief.

32. Being of the above view, I answer the issue NO.3
Partly in the Affirmative.

33. Issue No.4: Resultantly, I proceed to pass the following;

ORDER

The suit of the plaintiff is decreed in part.

It is declared that the plaintiff, defendant No.1 and 2 are entitle to 1/3rd

share in suit item No.'A' and 'B' properties by metes and bonds.

The defendant NO.1 and 2 are liable to pay court fee to carve out their shares in the suit properties.

Having regards to close relationship between parties, they shall bear their own cost.

In view of the guidelines issued by the Hon'ble Apex court in the case of ***Kattukandi Edathil Krishnan V/s Kattukandi Edathil Valson (AIR 2002 SC 2841)***, the office is directed to register a *suo-moto* Final Decree Proceedings and the copy of this Judgment shall put forth in the said proceedings.

Both parties are directed to appear in the Final Decree Proceedings on 03-02-2024.

Draw a preliminary decree accordingly.

(Directly dictated to Stenographer on Computer, print out taken by him, corrected and then pronounced by me in Open-Court this the 3rd day of January-2024).

(SRI RAVI KUMARA V.)
Prl. Civil Judge,
Chincholi.

ANNEXURES**1. WITNESS EXAMINED ON PLAINTIFFS SIDE:**

PW-1 : Lal Bi.
PW-2 : Tippanna.
PW-3 : Chandrappa.

2. DOCUMENTS MARKED ON PLAINTIFFS SIDE:

Ex.P-1 & 2 : RTC extracts.
Ex.P-3 : Death certificate.

3. WITNESS EXAMINED ON DEFENDANTS SIDE

DW-1 : Rasool Bi.
DW-2 : Laxmareddy.
DW-3 : Chandrashetty.

4. DOCUMENTS MARKED ON DEFENDANTS SIDE

Ex.D-1 : Will Deed dated:15-11-2019.
Ex.D-2 : Reply notice.
Ex.D-5 : Notarial Register.
Ex.D-4 : Notary book.

(SRI RAVI KUMARA.V)
PRL. CIVIL JUDGE AND
JMFC,CHINCHOLI.

(Pronounced in the open court vide separate judgment)

ORDER

The suit of the plaintiff is decreed in part.

It is declared that the plaintiff, defendant No.1 and 2 are entitle to 1/3rd share in suit item No.'A' and 'B' properties by metes and bonds.

The defendant NO.1 and 2 are liable to pay court fee to carve out their shares in the suit properties.

Having regards to close relationship between parties, they shall bear their own cost.

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Draw a preliminary decree accordingly.

Prl. Civil Judge,
Chincholi.