

KAKB420006372016



**IN THE COURT OF THE ADDL. CIVIL JUDGE AND J.M.F.C. AT
CHINCHOLI**

PRESENT

Sri. Dattakumar Jawalkar, B.B.A. LL.B. (Hons.) LL.M.
Addl. Civil Judge and J.M.F.C.,
Chincholi

Dated: 15th day of February 2024

FDP. No.03/2018

Petitioner

Umakanth S/o Malleshappa, Age: 23 years
Occ: Agriculture, R/o Huvinhalli, Tq:
Chincholi, Dist: Kalaburagi

(By Sri.S.B.S Advocate)

V/s

Respondents

1. Malleshappa S/o Late Fakeerappa,
Age: 47 years Occ: Agriculture,
2. Beerappa S/o Late Fakeerappa, Age: 45
years Occ: Agriculture,
3. Gouramma W/o Late Fakeerappa, Age:
68 years Occ: Agriculture,
4. Shankamma @ Shantabai W/o
Malleshappa, Age: 38 years Occ:



Household,

5. Shamsundar S/o Malleshappa Mallanor, Age: 15 years, minor (under the guardian of Malleshappa Respondent No.1),
6. Nagamma W/o Ramesh(D/o Fakirappa), Age: 38 years Occ: Household,

All R/o Huvinhalli, Tq: Chincholi, Dist: Kalaburagi

(Respondent Nos.1, 3 & 4 by Sri. B.Sudarshan Advocate, Respondent No.2 by Sri. S.A.Panga and Respondent No.5 is minor)

ORDER

1. The present Final Decree Petition is filed by the Petitioner praying to draw the Final Decree with respect to preliminary decree passed in O.S. No. 24/1996 and along with other properties as mentioned in the Annexure to the Petition. It is stated in the Petition that the right regarding ancestral properties is already decided in the judgment and decree in O.S. No.24/1996 and the remaining properties which are included are acquired by the family hence prayed to allow the Petition by drawing 1/6th share in all the properties.



2. The Respondent No.1 has filed his objection to the main Petition stating that the Petition is not according to the preliminary decree passed in O.S. No.24/1996. This Court in O.S. No.24/1996 has included 1 to 7 properties and the same was decreed but the Petitioner has included 1 to 14 properties in the present Petition. The legal representatives of other two wives of Fakirappa are not made as parties to the suit. The market value of the properties included in the Petition is more than twenty lakhs hence this Court does not have pecuniary jurisdiction to try the Petition. Hence, prayed to dismiss the Petition.

3. The Petitioner and Respondent No.1 have led their evidence on the main Petition. It is not in dispute that some of the properties which were not included in the main suit in O.S. No. 24/1996 and included in the present Petition on the ground that they are subsequently acquired. Hence, without going into the merits of the Petition this Court is first constrained to examine whether the present the Petitioner can add the properties in the Petition without the specific Order with that respect. Hence the following points arise for the consideration before this Court.



POINTS FOR CONSIDERATION

- 1) Whether the present Final Decree Petition with the additional properties which were not included in the original suit maintainable?
- 2) What Order?
4. This Court answers the above points for consideration as under:
 - Point No.1: Negative
 - Point No.2: As per the Order for the following:

REASON

5. **Point No.1:** It is the case of the Petitioner that she is entitled to 1/6th share in all the properties as mentioned in the suit properties. It is the further case of the Petitioner that the other properties which are included are gained from the benefit arrived from the ancestral properties as mentioned in the preliminary decree in O.S. No.24/1996. The Respondent No.1 has taken contention that the Petition as filed by the Petitioner is not maintainable as she has included additional properties which were not included in the O.S. No.24/1996. The Petition is not in accordance with the preliminary decree.



6. The explanation to Section 2(2) of the Code of Civil Procedure, 1908 provides as under:

Explanation: A decree is preliminary when further proceedings have to be taken before the suit can be completely disposed of. It is final when such adjudication completely disposes of the suit. It may be partly preliminary and partly final.

The Code explains that the final decree is the continuation of the preliminary decree when the adjudication is completed. In a partition suit, first a preliminary decree is passed declaring the rights of the parties in the schedule property. During the course of final decree proceedings, the Court has jurisdiction to alter shares if it is occasioned by the death of one of the sharers. Notwithstanding the declaration of rights in the preliminary decree, there may be more than one preliminary decree. If there is no dispute regarding some of the joint family properties, or the claim for partition is admitted by the defendants in respect of some of the suit schedule properties, then the Court can proceed under Order XII, Rule 6 of CPC and pass preliminary decree in respect of such items at once. Thereafter, after contest yet another preliminary decree in respect of the other items of property.

7. Further the Hon'ble Supreme Court in the case of *Ganduri Koteshwaramma v. Chakiri Yanadi*, reported in (2011) 9 SCC 788 has held as under:

"14. A preliminary decree determines the rights and interests of the parties. The suit for partition is not disposed of by passing of the preliminary decree. It is by a final decree that the immovable property of joint Hindu family is partitioned by metes and bounds. After



the passing of the preliminary decree, the suit continues until the final decree is passed. If in the interregnum 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 pass another preliminary decree redetermining the rights and interests of the parties having regard to the changed situation.

21. It is true that final decree is always required to be in conformity with the preliminary decree but that does not mean that a preliminary decree, before the final decree is passed, cannot be altered or amended or modified by the trial Court in the event of changed or supervening circumstances even if no appeal has been preferred from such preliminary decree."

In the aforementioned judgment, the Hon'ble Apex Court has viewed that the final decree needs to be in conformity with the preliminary decree and further that the trial Court can alter or amend the decree in the event of changed or supervening circumstances.

8. Further, the Hon'ble High Court of Karnataka in the case of *Channaveerappa Gowda v. Renukappa Gowda* reported in 2014 SCC OnLine Kar 12228 : (2014) 3 KCCR 2214 : (2014) 4 AIR Kant R 711 : (2014) 4 ICC 283 in which the Defendant No.2 therein challenged the Order passed by the trial Court



allowing I.A. under Order VI Rule 17 of the Code for including an immovable property in the Final Decree Proceedings though it was not the subject matter of the suit has held as under:

"12. However, this principle cannot be extended to include a property which was not the subject matter of the suit, at the time of passing of the preliminary decree. Variation of shares already declared in the property which is the subject matter of the suit is totally different from varying the subject matter of the suit. The reason being that what is the share to which a party to a suit is entitled to in law is purely a question of law, whereas a share in a property is dependent on the nature of the property, which is purely a question of fact, which is to be decided on the facts and circumstances of the case based on the evidence adduced. Therefore, once a preliminary decree is passed in respect of the subject matter of the suit, question of including or adding a property to the subject matter of the suit subsequently and claiming a share in respect of the property so included or added is not permissible in law. In respect of the said property a separate suit is maintainable, if sufficient cause is shown for its exclusion in the earlier suit for partition. However, on the ground final decree is not yet passed, the said property cannot be included in the suit after passing of the preliminary decree or a second preliminary decree cannot be passed, nor can it be the subject matter of final decree proceedings. Further, if a property which was not the subject matter of a suit, were to be included at the stage of Final Decree Proceedings, evidence has to be recorded to decide whether it is a Joint Family Property or not and



if the parties to the suit have share therein or not. By chance if a property belonging to the Joint family could not be included in the suit, a second suit for partition of the property so left out is not maintainable. But if there are acceptable reasons for not including the property in the suit, a second suit for its partition would still be maintainable. The Court would also have no such power even U/s 153 of CPC to include a property suo motu. A suit ordinarily means a Civil proceeding instituted by presenting a plaint. Coming to the case on hand, Order VI, Rule 17 CPC provides that the Court may at any stage of the proceedings allow either party to alter or amend his pleadings as may be necessary for determining the real question in controversy between the parties. The plaint, therefore, can be amended only at the instance of the plaintiff and the 1st defendant cannot seek to include a property in the plaint schedule. Sy. No. 51 measuring 3 acres 28 guntas is situated at Talale village, Huncha Hobli, Hosanagar Taluk was admittedly not included in the plaint. Nor did the 1st defendant make any attempt to bring the same to the notice of the Court during the pendency of the suit and therefore this property could not form a part of the preliminary decree. The impugned order therefore cannot be sustained."

The principle as mentioned by the Hon'ble High Court of Karnataka in the aforementioned judgment is that a property which was not the subject matter of a suit, were to be included at the stage of Final Decree Proceedings, evidence has to be recorded to decide whether it is a Joint Family Property or not and if the parties to the suit have share therein or not.



Therefore, once a preliminary decree is passed in respect of the subject matter of the suit, question of including or adding a property to the subject matter of the suit subsequently and claiming a share in respect of the property so included or added is not permissible in law. In respect of the said property a separate suit is maintainable if sufficient cause is shown for its exclusion in the earlier suit for partition. However, on the ground final decree is not yet passed, the said property cannot be included in the suit after passing of the preliminary decree or a second preliminary decree cannot be passed, nor can it be the subject matter of final decree proceedings.

9. In the present case the Petitioner has filed the Petition for final decree which is not in conformity with the preliminary decree as passed by this Court in O.S. No.24/1996 dated 26.07.2005 wherein this Court decreed the suit of the Petitioner with respect to seven properties and the present Petitioner has included additional seven properties on the ground that they were acquired subsequently. The Petitioner has not sought for the amendment of Plaint as well to include the said additional properties in the Suit. As observed by the Hon'ble High Court of Karnataka in aforesaid judgment once a preliminary decree is passed in respect of the subject matter of the suit, question



of including or adding a property to the subject matter of the suit subsequently and claiming a share in respect of the property so included or added is not permissible in law. Hence the only option left to the Petitioner is to file the second partition suit for the partition with respect to additional properties as per the principle laid down by the Hon'ble High Court of Karnataka in the aforesaid judgment.

10. Further, the Petitioner has not included the Defendant No.1 and Defendant No.5 as parties to the present Petition. If the Defendant No.1 and 5 are dead, the Petitioner needs to state it in his Petition and implead all the legal representatives of Defendant No.1 and 5 by showing it is the cause title of the Petition. The Petitioner has included Respondent No.5 and Respondent No.6 who were not parties to the suit in O.S. No.24/1996 without seeking any permission from the Court to implead them as the party to the Petition. Hence for the aforementioned reasons the present Petition is not maintainable. With this observation, this Court answers Point No.1 in negative.
11. **Point No.2:** As per the discussion in Point No.1, this Court proceeds to pass the following:



ORDER

The Petition as filed by the Petitioner is hereby dismissed as not maintainable. However, the Petitioner is at liberty to seek Final Decree as per the judgment and decree passed in O.S. No.24/1996 within 15 days from the date of this Order.

(Typed by me in my laptop and pronounced by me in the Open Court on this the 15th day of February 2024)

*(Dattakumar Jawalkar)
Addl. Civil Judge & J.M.F.C
Chincholi*

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