

**IN THE COURT OF THE CIVIL JUDGE AND JMFC,. JEWARGI
AT JEWARGI.**

**Present:- Sri.D.Ramesh, B.AL., LL.B.,
Civil Judge and JMFC, Jewargi.**

Dated : This the 28th day of February, 2022

F.D.P.No.8/2013

Between:

Nagamma : **PETITIONER**
W/o Kareppa Benkotagi,
(D/o Late. Sidramappa Biradar)
Aged about: 47 years,
Occ: Agriculture,
R/o Halagattarga,
Jewargi Taluka,
Kalaburagi District.

(By Sri.J.V.H., Adv.,)

V/s

1. Chandawwa : **RESPONDENTS**
W/o Late Sidramappa Biradar,
Aged about: 70 years,
Occ: Agriculture,
R/o Halagattarga,
Jewargi Taluka,
Kalaburagi District.

2. Bhagamma
W/o Late Bhimaraya Biradar,
Aged about: 40 years,
Occ: Agriculture,
R/o Murganur,
Jewargi Taluka,
Kalaburagi District.

3. Basalingamma
W/o Sharanagouda Kalagi,
(D/o Late Bhimaraya S/o Sidramappa
Biradar)
Aged about: 20 years,
Occ: Agriculture,
R/o Murganur,
Jewargi Taluka,
Kalaburagi District.

4. Sharanagouda
S/o Chandramappa Kalagi,
Aged about: 27 years,
Occ: Agriculture,
R/o Murganur,
Jewargi Taluka,
Kalaburagi District.

**(Respondent No.1 Dead,
Respondents No.2 and 3 Exparte,
Respondent No.4 Sri.B.B., Adv.,)**

ORDERS ON MAIN PETITION

The petitioner has filed the petition U/Sec.54 of CPC for drawing of final decree in respect of petition schedule properties.

2. The brief facts of the petition are as under:

That, the petitioner had filed a Civil suit in O.S.No.138/2012 on the file of Civil Judge Junior Division, Jewargi for partition and separate possession in respect of suit properties. The said suit came to be decreed declaring that the plaintiff is entitled 4/9th share, defendant No.1 has 1/9th share and husband of defendant No.2 and father of defendant No.3 by name Bhimaraya has 4/9th

share and declared the registered sale deed bearing No.5700/2011-12 dated 07-03-2012 in respect of suit property bearing No.47/1 to the extent of share of plaintiff is null and void and not binding on the plaintiff. In pursuance of the preliminary decree the defendants are not ready to effect the partition and give separate possession. Hence this petition.

3. In pursuance of the notice the respondent No.4 appeared through his counsel, and respondent No.1 to 3 remained absent and placed exparte. During the pendency of the R.A.No.15/2018 the respondent No.1 herein dead. The respondent No.4 did not file his objection to the petition as well as I.A.No.1 for appointment of court commissioner to demarcating the suit property as per the decree. Accordingly the court commissioner was appointed for demarcating of shares. Thereafter on 19-03-2016 the court commissioner had filed his report by demarcating the shares of the parties. Thereafter this court ordered to draw final decree on 09-04-2018 by accepting the commissioner report.

4. Aggrieved by the final decree drawn by this court in this case dated 09-04-2018 the respondent No.1 to 4 herein prepared Regular Appeal before the Hon'ble Senior Civil Judge, Jewargi in R.A.No.15/2018 contending that this court had drawn the final decree without giving opportunity to the respondents to argue on the commissioner report. Hence the Hon'ble appellate court allowed the said Regular Appeal and remanded back the matter to this court for fresh disposal by following the principles of natural justice

by giving equal opportunity to both sides while considering the commissioner report.

5. After receipt of the copy of the judgment in Regular Appeal, this final decree proceedings is reopened and taken on board. Accordingly the both counsels were present and the counsel for the petitioner filed memo and prayed to amend the preliminary decree regarding changing of the shares of the parties as the Hon'ble Appellate court in its judgment in R.A.No.15/2018 discussed that the defendant No.1 was dead during the pendency of the appeal, hence the share of the plaintiff was increased and she entitled $\frac{1}{2}$ share. The counsel for the respondents submits no objection to the said memo. In view of memo, the preliminary decree was amended regarding changes of the shares vide order dated 17-11-2020. Thereafter learned counsel for petitioner filed I.A.No.9 U/o 26 rule 10(A) of CPC for appointment of court commissioner for demarcating the shares of parties as per the amended preliminary decreed. The learned counsel for the respondent No.4 submits no objection to the I.A.No.9, accordingly the surveyor through Tahasildar was appointed as court commissioner to demarcate the shares of the parties to the suit. Thereafter the court commissioner has filed his report on 03-06-2021. Thereafter the counsel for the petitioner submits no objection to the commissioner report. The counsel for the respondents filed objection to the commissioner report on certain grounds. Hence the court commissioner by name Mallikarjun S/o Somanna Taluk surveyor summend and examined as CW1 and got marked 3 documents at Ex.C.1 to 3.

6. Heard the both counsel on commissioner report and main petition, perused the records, the following points would arise for my consideration.

1. Whether the petitioner has made out grounds for drawing the final decree?
2. What order?

7. I have answered above points in the following;

Point No.1 : In the Affirmative.

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

REASONS

8. Point No.1: It is not in dispute that the present petitioner had filed the suit in O.S.No.138/2012 before this court for seeking partition and separate possession of her share in respect of suit schedule properties. Accordingly the said suit was came to be decreed on 19-11-2012, and thereby preliminary decree was passed, and declared that the plaintiff had got 4/9th share in the suit schedule properties. Accordingly the preliminary decree was drawn on 30-01-2013. The certified copy of the said decree has been establish the facts from the drawing of preliminary decree in the said suit.

9. Thereafter the present petition was filed for drawing of final decree, accordingly the final decree was drawn on 09-04-2018. Aggrieved by the final decree drawn by this court the respondents herein have prepared an appeal before the Hon'ble Senior Civil Judge, Jewargi in R.A.No.15/2018. The said appeal was came to be allowed and remanded back to this court for drawing of fresh final decree by following principles. Wherein also made an observation

that the present petitioner is entitled half share over the suit schedule property as her mother i.e., defendant No.1 dead during the pendency of the appeal, and also directed to this court to modify the preliminary decree accordingly. Hence the preliminary decree has been modified on 08-01-2021 by allotting half share to the petitioner herein.

10. Thereafter, the court commissioner was appointed for demarcating the suit schedule properties as per modified decree. Accordingly the court commissioner after following the due procedure has demarcated the shares of the parties in respect of suit properties by meets and bounds and submitted the report along with the sketch.

11. Counsel for petitioner submits no objection to the commissioner report. The counsel for the respondents filed objection to the commissioner report and it was contended that;

11(1) That the commissioner has not properly surveyed the landed properties under decree on the basis of fertility of the lands and Phot Kharab. The proposed allotted lands to petitioner are more fertile than the portion shown to respondents. Hence the proposed allotment is an unequal partition.

11(2) That the commissioner did not record the statement of respondents regarding the fertility of lands and portions shown in the actual land is unequal one for which respondents refused to sign on the plain paper.

11(3) That the commissioner asked the respondent to sign on the plain paper without writing anything on it. Hence, the commissioner report filed before this hon'ble court is collusive with petitioner and helpful for petitioner only.

11(4) That the petitioner is in hurry to take the possession of the land shown in the sketch because more fertile has been shown towards her share.

11(5) That the commissioner has not shown the way to reach the landed property bearing Sy.No.47. There is Phot Kharab in the land to the extent of approximately 23 Guntas which has not been divided and Halla is also situated towards western side attached to the portion shown to respondent due to which land shown to respondent is not good for cultivation.

11(6) That with respect of land Sy.No.9 also commissioner has not completely surveyed the land. There are two roads in the land. One reaches to Aralagundagi village and now Road work is also running. Further there are houses constructed over the said land which are said to be sold by the plaintiff by executing notarized deeds. Respondent submitted to mention the same in the commissioner report but commissioner did not do so.

11(7) That the portion shown to petitioner towards northern side in the land Sy.No.9 is more valuable one than the portion shown to respondent as it is near to village and private plots could be made over the said properties. Already there are houses in the said portions. Hence the said allotment is also unequal one.

11(8) That the land cultivable in the said Sy.No.9 is approximately 12 Acres 39 Guntas only and remaining portion is Phot Kharab one which is uncultivable. Commissioner has not

shown the same also. Suppressing the real truths, the commissioner sitting in the office prepared maps and sketches which is totally favorable to petitioner only and the same unequal one to respondent.

11(9) That the purchaser who is also having right of equitable partition not permitted to submit his statement while surveying the land Sy No.47/1 and 9 of village Halagatharaga.

12. Thereafter the commissioner is summoned, accordingly, he appeared and adduced his evidence before the court. In his chief-examination he deposed that on 09-02-2021 he received warrant from this court for demarcating the Sy.No.9 and 47 of Halagattarga village. Accordingly on 02-03-2021 he issued notice to all the parties, to attend at the spot on 10-03-2021. Accordingly on 10-03-2021 at about 11-00 A.M., he rushed to the spot with court order and survey records. By that time the petitioner, respondents and villagers were present. Thereafter he completed survey work and made 2 shares as per the order of this court, and prepared a sketch and submitted same with report to the court.

13. In the cross-examination of CW1 he states that kharab property has been shown in the 'Vata Patra' which is annexed to the sketch. Further he denied that the land bearing Sy.No.9 is adjacent to the village. Further he also denied that there is a main road adjacent to the block No.1 mentioned in the sketch. But further he says that there is a cart road adjacent to the said survey number. He admitted that the said cart road has not been shown in the sketch in block No.1. Further he denied that there are houses

adjacent to the land bearing Sy.No.9. Further he admits that in land bearing Sy.No.9 the soil was mixture of red, black and sand. He also admitted that there is a canal beside the land bearing Sy.No.47. Further he denied that there is a road beside the land bearing Sy.No.47.

14. On scrutiny of the evidence of CW1 no irregularities found in the survey proceedings. The gist of the objections of the respondent No.4 is that the property shown by the commissioner to the petitioner are more fertility and valuable than the portion shown to the respondents. Another main objection of the respondent No.4 is phot kharab has not been shown in the sketch. First of all one thing should be kept in mind that a court commissioner cannot allot the shares, he only prepare a sketch and demarcate the properties as per the preliminary decree. The court only has power to allot the shares. Therefore mere showing by the court commissioner in his sketch does not creates any rights. Hence the court will decide which portion to be allotted to whom after hearing both parties on commissioner report. Accordingly this court will decide which portion will be allotted to whom. Learned counsel for the petitioner fairly submitted that the petitioner is ready to accept any portion either block No.I or block No.II shown in the sketch. The objection of the respondent No.4 makes clear that according to them the block No.I shown in the sketch is more fertility and valuable than the block No.II. As discussed above the petitioner counsel submitted no objection to allot any portion to the petitioner. Hence block No.I will be allotted to the respondents.

15. Another objection of the respondent No.4 is phot kharab has not been mentioned in the sketch. As CW1 himself admitted that phot kharab has not been mentioned in the sketch. But the 'Vata Patra' which annexed to the said sketch are clearly shows that the phot kharab has been shown to both the parties. The said 'Vatapatra' discloses that in land bearing Sy.No.9 totally 1 acres 34 guntas phot karab is available. Accordingly 37 guntas phot kharab each allotted to block No.I and block No.II. In the same way in land bearing Sy.No.47/1 23 guntas phot kharab is available. Accordingly 11 guntas phot kharab shown to the block No.I, and 12 guntas phot kharab shown to the block No.II. Therefore the court commissioner did not make any mistake while surveying the property and demarcating the shares. Hence the commissioner report is proper one. In view of above reasons the commissioner report is accepted as it was drawn by following the procedures.

16. After perusal of the sketch submitted in respect of suit properties the block No.I in land bearing Sy.No.47 is allotted to the share of respondents and the block No.II is allotted to the share of petitioner. Further the block No.I in land bearing Sy.No.9 is allotted to the share of respondents and block No.II is allotted to the share of petitioner.

17. After considered the said report and sketch of the commissioner, this court is of the opinion that the said report is in accordance with law, and hence same is accepted. This court is of the opinion that the petitioner has made out grounds for allowing

petition, and thereby drawing the final decree. With these observations this court has held Point No.1 in the Affirmative.

18. Point No.2 :- In view of the above discussion, I proceed to the pass the following :-

ORDER

The final decree proceeding filed U/Sec. 54 of CPC is hereby allowed.

The block No.I mentioned in the sketch drawn by the survey authority is allotted to the respondents in respect of land bearing Sy.No.47/1 of Halagattarga Village.

The block No.II mentioned in the sketch drawn by the survey authority is allotted to the petitioner in respect of land bearing Sy.No.47/1 of Halagattarga Village.

The block No.I mentioned in the sketch drawn by the survey authority is allotted to the respondents in respect of land bearing Sy.No.9 of Halagattarga Village.

The block No.II mentioned in the sketch drawn by the survey authority is allotted to the petitioner in respect of land bearing Sy.No.9 of Halagattarga Village.

The report of court commissioner along with sketch submitted by the court commissioner in respect of petition schedule properties forms part and parcel of this final decree.

Draw final decree accordingly.

(Dictated to the Stenographer directly on Computer corrected and then pronounced by me in the open court on the 28th day of February-2022.)

(D.RAMESH)
Civil Judge & JMFC,
Jewargi.