

IN THE COURT OF SENIOR CIVIL JUDGE MADIKERI

Present: Sri. Vijay Kumar, B.Sc. L.L.B.
Sr., Civil Judge & CJM., Madikeri.

Dated: 09th day of September, 2019.

F.D.P. NO: 08/1999 AND 09/1999

PARTIES TO FDP NO.08/1999

Petitioner :- D.D.Keshava, S/o late.Devashetty,
59, 1/73, Mahadevpet, Madikeri-571201.
(Represented by Sri.N.G.V., Advocate)

-V/s-

Respondents:-

1. D.D.Ramesh, S/o late.Devashetty,
Major, Devashetty Compound,
Gowli Street, Madikeri-571201.
2. D.D.Ganesh, S/o late.Devashetty,
major, 1/73, Mahadevpet, Madikeri-571201.
3. Smt.Parvathi, W/o late.Devashetty,
Major, 1/73, Mahadevpet, Madikeri-571201.
4. K.N.Appaji, S/o Nanjunda, Major,
Dechur, Madikeri – 571201.
Since deceased by his Lrs
- 4(a) K.A.Nanjamma, W/o K.N.Appaji,
Age: 72 years, 17/43/1, Dechoor, Madikeri.
- 4(b) K.A.Uthappa, S/o K.N.Appaji,
Age: 52 years, Door No.1131, 11th cross,
II Stage, West of Chord Road,

Bangalore-560086.

- 4(c) K.A.Prabakar, S/o K.N.Appaji, Age: 50 years, Door No.411, 12th Cross, Saraswathipuram, Swimming Pool Road, Mysore-570009.
- 4(d) K.A.Manohara, S/o K.N.Appaji, Age: 48 years, Ibbinivalavadi Village, Boikeri Post, Madikeri Taluk.
- 4(e) Dr.K.A.Mohan @ Nanda, S/o K.N.Appaji, Age: 39 years, Insurance Medical Officer, E.S.I. Hospital, Yeshwanthpur, Bangalore.
- 4(f) Miss K.A.Kamala, D/ K.N.Appaji, Age: 44 years, No.13/43/1, Dechoor, Madikeri.
- 4(g) Mrs.M.S.Shakunthala Subramani, W/o M.N.Subramani, D/o late.K.N.Appaji, Age: 34 years, I.G.3 Cauvery Nilaya, II Stage, udayagiri, Mysore-19.
- 4(h) Mrs.Indira Rangaswamy, Age: 42 years, D/o late.K.N.Appaji, 10/A, Police quarters, Burlie Street, Long Ford Town, Bangalore-25.
5. Smt.Thangamma Appaji, W/o Appaji, Major, Dechur, Madikeri-571201.
6. Smt.N.S.Leelavathi, W/o late.M.Shivanna, Major, D/o Dr.S.K.Vishveshwar, Door No.19, II main, V.V.Mohalla, Mysore.
7. Smt.K.A.Saraswathi, W/o Dr.K.K.Appaji, Major, R/at Ranipet, Madikeri-571201.

8. Smt.Padmaja, W/o Keshavamurthy, Major,
9. Smt.Shailaja, D/o S.K.Vishveshwar, Major,
10. Smt.Vanaja, W/o D.D.Ganesh, Major,
11. Vijaya Prasanna, S/o Vishveshwara, Major,
12. S.K.Vishveshwara, Major,

No.8 to 12 r/at Door No.19, II Main,
V.V.Mohalla, Mysore.

13. Smt.D.D.Radhamani, 63 years,
D/o late.Devashetty, W/o T.V.Vishwanath,
No.45, Vivekananda Road,
Yadagiri, Mysore.

(R-2, 10 – Rep. By Sri. K.A.A, Advocate)
(R-4(a), 5 – Rep. By Sri. K.P.B, Advocate)
(R-13 – Rep. By Sri. S.S.B, Advocate)
(R-1, 3, 4(b) to (h), 6 to 9, 11, 12 placed Exparte)
(R-4(3) – Rep. By Sri. Smt.K.M.M, Advocate)

PARTIES TO FDP NO.09/1999

Petitioner :- D.D.Ramesh, S/o late.Devashetty,
Age: 46 years, Gowli street, Madikeri.
(Represented by Sri.N.H.F., Advocate)

-V/s-

Respondents:- 1. D.S.Deva Shetty, S/o Shakunaya,
Since decd. By L.R in H.C,
Smt.Leelavathy, D/o Anandan, Age: 45 years,
R/o Deva Shetty Lane, Gowli Street,
Madikeri, Kodagu Dt.

2. D.D.Keshava, S/o Deva Shetty Age: 50 years, Mahadevpet, Madikeri, Kodagu Dt.
3. D.D.Ganesh, S/o Deva Shetty, Age: 48 years, D.No.462, Upstair Portion, 11th Cross, Gokulam, III Stage, Mysore.
4. Smt.Parvathi, W/o Deva Shetty, Age: 70 yrs, Mahadevpet, Madikeri, Kodagu Dt.
5. K.N.Appaji, Age: 65 years, Kaggodu village, Madikeri Taluk, Kodagu Dt.
Since deceased by L.Rs.
- 5a. K.A.Thangamma, Age: 73 years, Widow,
- 5b. K.A.Uthappa, Age: 54 years, son,
- 5c. K.A.Prabhakar, Age: 52 years, son,
- 5d. K.A.Manohar, Age: 50 years, son,
- 5e. K.A.Mohan, Age: 42 years, son,
- 5f. K.A.Kamala, Age: 46 years, daughter, Respectively of late.K.N.Appaji, R/o No.17/43/1, Dechur, Madikeri.
- 5g. Mrs.M.S.Shakuntala Subramani, D/o K.N.Appaji and W/o M.N.Subramani, I.G. 3, Cauvery Nilaya, 1st Stage, Udayagiri, Mysore-19.
- 5h. Mrs.Indira Rangaswamy, D/o K.N.Appaji, W/o N.A.Rangaswamy, 10/A, Police Quarters, Burlu Street, Long Ford Town, Bangalore-25.

6. Smt.Thangamma Appaji, W/o K.N.Appaji, Age: 60 years, Kaggodu Village, Madikeri Taluk, Kodagu District.
7. Smt.N.S.Leelavathi, W/o late.Shivanna, Age: 75 years, Irwin Road, Mysore.
8. Smt.K.S.Saraswathi, W/o K.K.Appaji, Age: 70 years, Mahadevpeta, Madikeri, Kodagu Dt.
9. Smt.Padmaja, W/o Keshava Murthy, Age: 40 years, Fisheries Officer, Irwin Road, Mysore.
10. Kum.Shailaja, D/o Dr.S.K.Vishweshwara, Age: 35 years, Hariprasanna, V.V.Mohalla, Mysore.
11. Kum.Vanaja, D/o S.K.Vishweshwara, Age: 29 years, Hariprasanna, V.V.Mohalla, Mysore.
12. Vijaya Prasanna, S/o S.K.Vishweshwara, Age: 33 years, Hariprasanna, V.V.Mohalla, Mysore.
13. Suresh, S/o Dr.S.K.Vishweshwara, Age: 27 years, Hariprasanna, V.V.Mohalla, Mysore Dead – LR. 14 father is on record.
14. Dr.S.K.Vishweshwara, Age: 67 years, Hariprasanna, V.V.Mohalla, Mysore.
15. Ashok Plantations (P) Ltd., 2nd Floor, Ashoka Medical Buildings, Vadakara, Kozhikod Drt. Kerala State, by its Managing Director T.M.Rajan,

S/o late.Narayan.

16. Smt.D.D.Radhamani, Age: 63 years,
D/o late.Deva Shetty, W/o T.V.Vishwanath,
No.45, Vivekananda Road, Yadavgiri, Mysore

(R-1 - Rep. By Sri.M.A.N, Advocate)

(R-2 – Rep. By Sri. N.G.V, /P.M.Z, Advocate)

(R-3 – Rep. By Sri. K.A.K, Advocate)

(R-4(a), 5(a),(d),(g), 6 – Rep. By Sri.K.P.B, Advocate)

(R-5(b)(c) – by Sri. B.S.R, Advocate)

(R-15 – Rep. By Sri. N.S.N. Advocate)

(R-16 – Rep. By Sri. S.S.B, Advocate)

(R-4, 5 13 dead)

(R-5(g)(e),(h), 7 to 10, 12, 14 placed Exparte)

(R-4(c) – by Smt.K.M.M, Advocate)

~::~ J U D G M E N T ::~

These two Final Decree Proceedings filed based on the same judgment and decree. The Order sheet dated 09.03.2001 discloses that both petitions ordered to clubbing together, therefore they being disposed of by common judgment.

2. FDP No.8/1999 filed by the defendant No.2 and FDP No.9/1999 filed by the plaintiff to carve out their respective shares and allotment of separate possession as per preliminary decree passed in R.A.No.15/1989. The plaintiff D.D.Ramesh had filed partition suit in O.S.No.78/1978 and said suit dismissed by this court. Then, he

preferred Regular Appeal as per R.A.No.15/1989 challenging the dismissal of the suit, wherein the Hon'ble First Appellate Court decreed the suit and declared the plaintiff share that he entitled to 1/4th share. Against the said judgment and decree, the contesting defendants including the purchaser preferred Second Appeal as per RSA Nos. 777/93, 550/98 and 111/98, which dismissed by conferring the preliminary decree. The respondent No.15 filed revision petition No.549/2009 seeking allotment of 5/8th share in the suit properties. It was also dismissed on 24.04.2019 by Hon'ble High Court.

3. The petitioner in FDP No.8/1999 who was defendant No.2 in O.S. No.78/1978 paid court-fee in this petition and sought for allotment of his share. It is settled law that there is no prohibition to the defendants to seek partition by paying court-fee in final decree proceeding. But only prohibition is to without determining their right in preliminary decree they should not maintain final decree proceeding. In this case, the Hon'ble High Court of Karnataka in Revision Petition No.549/2009 in paragraph 9 of the judgment held that the plaintiff entitled for 1/4th share and the parties standing at par

with the plaintiffs are also entitled for 1/4th share. The other persons par with the plaintiffs are, defendants No.1 and 2 and remaining 1/4th share allotted to their father deceased D.S.Devashetty. Therefore, FDP filed by the defendant No.2 is maintainable.

4. The record discloses that on 10.11.2009 this court appointed Sri.M.E.M, Advocate as court commissioner to effect partition of schedule properties with the assistance of surveyor, Madikeri as per preliminary decree passed in RA No.15/1989. On 24.02.2010 the Advocate commissioner submitted his report as called by this court along with sketch, survey sketch, PT Sheet, mahazar, notices to the parties and commission warrant. The petitioners in both petitions and the respondents have not chosen to file objection to the commission report. It is settled law that the court commissioner not gave possession or allotted specific share to the parties is not a ground to disbelieve his report. Since, the court is the competent authority to allot specific share to the parties under Partition Act.

5. On the basis of petitioners and report of the court commissioner, the following points arise for my consideration, are:

1. Whether the court commissioner effected partition of schedule properties by metes and bounds as per preliminary decree?
2. What order?

6. After hearing both side and careful perusal of entire case records, my answer to the above points are as follows:-

POINT NO.1:- In the Affirmative,

POINT NO.2:- As per final order.

:: REASONS::

7. **POINT NO.1** :- The record discloses that on 24.02.2010 this court received the commissioner report and it shows that the Advocate commissioner with the assistance of surveyor fixed the date of effecting partition of schedule properties on 12.01.2010, 13.01.2010, 02.02.2010 and 03.02.2010. On the above dates, both petitioners, respondent No.15 and respondent No.2 were present and other respondents were absent even service of notice. The commissioners have carried out work for partition of landed properties situated at Ibbnivalavadi Village and also the properties situated at Madikeri town by equal division of four shares. Further the sketch prepared by the surveyor depicts that all the suit properties except Block No.1 & 2

of Madikeri Town properties divided in four parts mentioning Sl.Nos.1, 2, 3 and 4. But the court commissioner not partitioned the Block No.1 and 2 of Madikeri Town properties due to lane type residential house are situated touching with old residential houses with a common wall and which cannot be partitioned into four shares.

8. None of the parties have filed objection to the commissioner report. The respondent No.15 filed written arguments stating that he purchased items No.15 to 18, 20 to 23, 26, 28, 29, 36, 38, 39 and 40 of suit properties, who is innocent purchaser for value from the respondents No.5 and 6 under sale deeds dated 16.11.1988, 17.11.1988, 08.12.1983, 20.05.1989 and 08.12.1989. It is argued that these properties are in possession of the respondent No.15 and rest of the properties with the petitioners and other respondents. The properties purchased by respondent No.15 are less valuable than the properties in possession of other parties. If the value of the properties are considered as per the market value, purchased properties for Rs.8 Crores and the value of the properties in possession of other parties about Rs.25 Crores. Accordingly, pray for allot the properties

purchased by him as the share of defendant No.1 under equity. In support of his arguments, the respondent No.15 relied on the three citations along with market value of the schedule properties issued by the Sub Registrar, Madikeri.

9. The first decision reported in **2004(1) Kar.L.J. 277**, the Hon'ble High Court of Karnataka held that:- the properties are to be divided by metes and bounds in the final decree proceedings and while doing the same the object would be to preserve, protect and respect possession as far as possible. The second decision reported in **AIR 2019 ORISSA 71**, wherein the Hon'ble Orissa High Court in para-10 held that the defendants No.6 and 7, from time to time have sold the house property, more than their share ignoring the right of others for obvious purpose. Thus, the suit claim of defendants No.6 and 7 for allotment of house property is untenable. The defendants No.6 and 7 do not deserve the same for their own conduct, having not done the equity cannot seek the equity. If the above observation is consider, it goes against the respondent No.15 contention and said decision is not helpful to him. The third decision reported in **AIR 2012 SUPREME**

COURT 169 the Hon'ble Apex Court held that:- the court has always power to revise the preliminary decree or pass another preliminary decree if the situation in the changed circumstances so demand. But in this case, there is no changed circumstances to consider the grievance of the respondent No.15 to re-allocation of share or revise the preliminary decree. The market value of the schedule properties list issued by the Sub Registrar, Madikeri is no way helpful to the respondent No.15 to allot entire purchased properties in his favour. The respondent No.15 not invoked the provisions of Partition Act to seek specific properties to allot his share based on market value.

10. Moreover, the court commissioner has not determined the value of each sharers and not allotted any share to these respondents or petitioners. Section 54, Order. 26 Rule 13 and 14 and Order.20 Rule 18 of CPC clearly lay down the guiding principles while effecting partition. As per these provisions it is not only functions of the commissioner to divide the properties into definite portion as per preliminary decree, it is for the parties who not accepted allotment of share to suggest as to whether it is possible to them effect partition in

respect of their share or whether it could be done by some other method. But they have not done so at the time of effecting partition by the commissioner.

11. In so far as the claim of the purchaser/ Respondent No.15 of major portion of lands is concerned, he cannot contend that he is a bonafide purchaser. Considering the fact that his vendors defendants No.5 and 6 were not bonafide purchasers, who purchased the same during pendency of the suit. The share of defendant No.1 who sold the properties to defendants No.5 and 6 during pendency of the suit and the purchaser not denied the shares of plaintiff, defendants No.1 to 3 in the suit. Moreover, the defendants No.5 and 6 not filed written statement in O.S.No.78/1978. Under these circumstances, it cannot be held that the defendant No.5, defendant No.6 or defendants No.15 are bonafide purchasers of the suit properties and they are entitled to claim equity. The respondent No.15 is only entitled to whatever share entitled by defendant No.1. The preliminary decree had become conclusive with regard to the shares of the parties i.e., 1/4th share. If the present contention of respondent No.15 is accepted, the shares of

plaintiff, defendants No.2 and 3 will get disturbed. That cannot be done in view of the fact that the plaintiff, defendants No.2 and 3 are also entitled 1/4th share in all the suit properties. Hence there is no way this court to reduce the shares of them in the landed properties. Therefore, the respondent No.15 is only entitled to equities with regard to the shares of defendant No.1 in all the suit properties including properties at Madikeri town.

12. Now the question arose that whether the properties situated in Block No.1 and 2 of Madikeri town properties which were not partitioned by the court commissioner due to there was common wall and lane type residential house which can be allotted to the shares of the parties in this petition. None of the parties have not objected to the commissioner report and they have not disputed the report submitted by the commissioner. In the absence of objections raised by the other side it can be held that the properties of block No.1 and 2 of Madikeri town are not possible to divide between the parties. Either side of the parties not filed any application under Sec.2 of the Partition Act to conduct auction and also not furnished value of the

properties. In the absence of seeking allotment of these properties to any one of the parties by invoking Sec.2 of the Partition Act it is not justify to allot these properties to any of the parties in this proceedings. More over, these two petitions are more than 20 years old and if the parties to direct invoke application under partition Act to conduct auction then it will help the court to allot the shares of parties or bid amount in terms of preliminary decree.

13. The Hon'ble Apex Court in the case of *Shub Karan Bubna Vs. Sita Saran Bubna* reported in [(2009) 9 SCC 689] at para No.27 observed that “*in the present system, when preliminary decree for partition is passed, there is no guarantee that the plaintiff will see the fruits of the decree. The proverbial observation is that the difficulties of a litigant being when he obtains a decree. It is necessary to remember that success in a suit means nothing to a party unless he gets the relief.*”

14. In another decision reported in (1995) 3 SCC 413 in the case of *Shankar Balwant Lokhande V. Chandrakanth Shankar Lokhande* in para-7 held that, *it would be clear that where decree or order has*

been passed jointly against more persons than one. The application shall take effect against them all, even if it is made by one or more. It is seen that the preliminary decree is a declaration of the rights of the parties with a charge on the properties to be allotted and a Commissioner is required to be appointed for partition of certain specific properties. Therefore, as envisaged in sub-rule(2) of Rule 18 of Order 20, it was only a preliminary decree declaring the rights of the parties with power to the court to give further directions in the behalf. It is settled law that more than one final decree can be passed. With the passing of the final decree in respect of the share of the parties in respect of other properties have not been crystallized and no final decree dividing the properties by metes and bounds was passed nor any application was made to divide the properties in terms of the shares of the parties declared in the preliminary decree.

15. In another decision reported in the case of *Rachakonda Venkar Raw and others V R Satya Bai (dead) by LR* and another reported in **(2003) 7 SCC 452** in para-10 held that, *it is settled law that there can*

be more than one preliminary decrees in suit similarly, there can be more than one final decrees in a suit.

16. As per the above decisions it is the duty of the parties to the petition, if they want to allotment of shares in the block No.1 and 2 of Madikeri Town properties they shall file application under Sec.2 of the Partition Act or furnishing valuation of the properties to conduct auction. When they have not filed any application there is no way convenience to allot the properties without substantial materials on record. Therefore, with liberty to file fresh petition by any of the parties to invoke the said Partition Act by furnishing valuation of the properties to conduct auction it will help the court to decide the dispute amicably between the parties. The remaining properties considered based on commission report it would be assist to allot to the parties.

17. The commissioner report along with sketch prepared by them discloses that except Block No.1 and 2 of Madikeri town properties remaining all the schedule properties divided equally into four parts, but they have not allotted any portion of the properties to any of the

parties. Accordingly, this court allotted Serial No.1 of all the properties to deceased Deva Shetty. These properties entitled by respondent No.15 under equity as the purchaser. Sl.No.2 properties mentioned in the sketch allotted to the share of first son D.D.Keshava. Sl.No.3 properties mentioned in the sketch allotted to the share of D.D.Ganesh. Sl.No.4 properties mentioned in the sketch allotted to the share of D.D.Ramesh. Accordingly, Point No.1 is answered in the *Affirmative*.

18. **POINT NO.2** :- In view of above reasons I pass the following:-

: O R D E R :

The F.D.P.Nos.8/1999 and 9/1999 filed by the respective petitioners are decreed.

The Commissioner report and sketch are part and parcel of the final decree.

Sl.No.1 of the properties allotted to the share of respondent No.15, who purchased the properties in the share of defendant No.1. Sl.No.2 of properties allotted to the share of D.D.Keshava. Sl.No.3 properties allotted to the share of D.D.Ganesh. Sl.No.4 properties allotted to the share of D.D.Ramesh.

The parties are liberty to file separate final decree petition in respect of block No.1 and 2 of Madikeri town properties as observed in the Judgment.

Draw final decree in terms of preliminary decree passed in R.A.No.15/1989 and the report submitted by the Court Commissioner on furnishing requisite stamp paper by the parties.

However, it is made clear that, if the parties have not taken possession of their respective shares in suit properties they are entitled to file execution petition to recover possession.

Original Judgment shall keep in FDP No.8/1999 and copy thereof shall keep in FDP No.9/1999

(Dictated to the Stenographer directly on computer, typed by her, revised by me and after corrections pronounced in the open court on this the 09th day of September 2019)

Sd/-xxx
(VIJAYKUMAR)
Senior Civil Judge &C JM.,
Madikeri.

: ANNEXURE :

1. LIST OF WITNESSES EXAMINED FOR THE PETITIONER :-

-NIL-

2. LIST OF EXHIBITS MARKED FOR THE PETITIONER :-

-NIL-

3. LIST OF WITNESSES EXAMINED FOR THE RESPONDENT : -

-NIL-

4. LIST OF EXHIBITS MARKED FOR THE RESPONDENT :

-NIL-

Sd/-xxx
(VIJAYKUMAR)
Senior Civil Judge & CJM.,
Madikeri.