

IN THE COURT OF THE CIVIL JUDGE & JMFC, AT K.R.PETE

**PRESENT: K.M.BASAVARAJAPPA., B.Com., LL.
Civil Judge & JMFC, K.R.PETE.**

Dated this the 17th day of October 2017

O.S.275/2012

Plaintiffs:-

1. Rakesh.B.M S/o Mahadevappa,
Aged about 16 years.

2. Kumari Ranjitha.B.M.
D/o Mahadevappa,
Aged about 17 years.

Plaintiff's No.1 & 2 are minor.
The natural mother of minor
plaintiffs Smt.Mahadevamma
W/o Mahadevappa,
R/o Bommalapura Village,
Sheelanere Hobli,
K.R.Pete Taluk,
Mandya District.

(By Shri. GKS.,-Adv.)

V/s

Defendants:-

1. Mahadevappa S/o Late.Kalappa,
Aged about 45 years.

2. Devaraja.B.M S/o Mahadevappa,
Aged about 20 years.

3. Veerappa S/o Devappa,
Aged about 57 years.

All are R/o Bommalapura Village,
Sheelanere Hobli, K.R.Pete Taluk,
Mandya District.

(D.1 & 2 Exparte

D.3 By Shri. PBM.,- Adv.)

Date of institution of the suit	04.06.2012		
Nature of the suit	PARTITION		
Date of commencement of recording of evidence	13.10.2014		
Date on which the Judgment was pronounced	17-10-2017		
Total duration	Year	Month	Days
	05	04	09

J U D G E M E N T

The plaintiffs have filed this suit against the defendants for the partition and separate possession by allotting legitimate equal share in the suit schedule properties in favour of plaintiff, defendant No.1 and 2 and put them in separate possession of the same by metes and bounds and such other relief's.

SCHEDULE

- 1. Land bearing Sy.No.16/3 paiki P2 measuring 44.00 guntas situated at Bommalapura Village, Sheelanere Hobli, K.R.Pete Taluk, Mandya District, bounded by East: Land of Kalappa S/o Late Dyavappa (item No.2), West: Land of Dyavappa @ Appaji, North: Land of Madappa S/o Giddamma, South: Land of Shivalingappa S/o Erappa.**
- 2. Land bearing Sy.No.17/3 Prala P2 measuring 1.18 guntas situated at Bommalapura Village, Sheelanere Hobli, K.R.Pete Taluk, Mandya District, bounded by East: Halla, West: Land of Kalappa S/o Dyavappa (Item No.1), North: Land of Mariyappana Papanna, South: Land of Shivalingappa S/o Erappa.**

2. The brief facts of the plaintiffs' case is that: The plaintiffs and 2nd defendant are sons of the 1st defendant and the suit schedule properties are ancestral and joint family properties of the plaintiffs and defendants No.1 and 2. The Kalappa S/o Dyavappa is the grandfather of plaintiffs and defendant No.2 and also father of the 1st defendant. The suit schedule properties are ancestral and joint family properties of the plaintiffs and defendant No.1 and 2. They are the co-parcener of the joint family and also they are Hindu undivided joint family members. The plaintiffs and defendant No.1 and 2 are entitled for equal shares in the suit schedule properties. The revenue documents pertaining to the suit schedule property are standing in the name of the grandfather of the plaintiffs and 2nd defendant. The 1st defendant taking undue advantage of the minority of the plaintiffs has sold part of the schedule properties to the defendant No.3 without any necessity and without the consent of the plaintiffs or their mother. The defendant No.3 is not the bonafide purchaser. As such, the first defendant through, he had the clear knowledge that all the issues of Kalappa had right and title over the suit properties. He was executed any sale deed in favor of 3rd defendant, it is not binding on the minor plaintiffs and 2nd defendant. The plaintiffs further submitted that, the schedule properties are not been divided by meets and bounds. When the

plaintiffs' mother orally enquired about their legitimate share in the suit property with the defendant No.1, he has given evasive reply. Hence this suit for partition and separate possession.

3. After causing suit summons the defendant No.1 and 2 have not appeared before the court, hence they have been placed exparte. The defendant No.3 has appeared through his counsel and filed written statement and categorically denied the entire plaint averments. He further submitted that the defendant No.1 has sold the item No.1 of the suit schedule property in his favor on 24.12.2001 for the valuable consideration for the purpose of digging bore well in the other lands belongs to him. Since from the date of purchase the defendant No.3 is in peaceful possession over the said property. After purchasing the 3rd defendant has improved the said property by spending huge amount. The 3rd defendant is a bonafide purchaser of the said property. Hence, the plaintiffs have no right to challenge the sale deed executed by the 1st defendant in his favor. With these contentions defendant No.3 prays dismiss the suit with cost.

4. From the above facts, the following Issues have been framed:

ISSUES

- 1. Whether the plaintiffs prove that suit schedule properties are ancestral and joint**

family properties of plaintiffs and defendants?

2. **Whether the plaintiffs prove that they have got 1/4th share in the suit properties?**
3. **Whether the plaintiffs are entitled for the relief of partition and separate possession as sought in the plaint?**
4. **Whether the plaintiffs are entitled for the relief of mesne profit and accounts as sought in the plaint?**
5. **What order or decree?**

5. To prove the plaint averments, the mother of minor plaintiffs has examined herself as PW.1 and got marked 7 documents as Ex.P1 to Ex.P.7. On the other hand the defendants have not adduced any oral or documentary evidence to disprove the case of the plaintiffs.

6. My findings on the above said issues are as under:

- 1) **ISSUE NO.1: In the Affirmative**
- 2) **ISSUE NO.2: In the Affirmative**
- 3) **ISSUE NO.3: In the Affirmative**
- 4) **ISSUE NO.4: In the Affirmative**
- 3) **ISSUE NO.5: As per final order for the following:**

REASONS

7. **ISSUE NO.1 TO 3:** Since these three issues are interconnected with each other they are taken up together for common discussion to avoid repetition of facts:

It is the specific case of the plaintiffs is that the plaintiffs and 2nd defendant are sons of the 1st defendant and the suit schedule

properties are ancestral and joint family properties of them. The suit schedule properties are ancestral properties and joint family properties of the plaintiffs and defendant No.1 and 2. They are the co-parcener of the joint Hindu undivided joint family. Hence, they are entitled for equal shares in the suit schedule properties. The 1st defendant taking undue advantage of the minor plaintiffs and their mother has sold part of the schedule properties to the defendant No.3 though there was no any legal necessity and without the consent of the plaintiffs. The defendant No.3 is not the bonafide purchaser. Hence, the sale deed executed by the 1st defendant in favour of 3rd defendant, it is not binding all the minor plaintiffs and 2nd defendant. When the plaintiffs' mother orally requested their legitimate share in the suit property with the defendant No.1 and 2, they have given evasive reply and hence this suit for partition and separate possession.

8. In order to substantiate his case the plaintiff examined himself as PW.1 and has reiterated the entire plaint averment in his examination in chief. The PW.1 has got marked documents at Ex.P.1 to P.7 and I carefully perused the said documents. Ex.P.1 and 2 are the RTC extracts with respect of suit item No.1 and 2 property is in the name of 3rd defendant and the item No.2 property is standing in the name of plaintiff's grandfather

kalappa. The Ex.P.3 is the demand register extract standing the name of one Dyavappa S/o Papaiah. Ex.P4 is the mutation register extract, which disclosed that the property in Sy.No.16/3 and 17 are transferred to the name of plaintiff's father Kalappa from his father Dyavappa. Ex.P5 is the notice issued to the Sub-Inspector of K.R.Pete Rural Police. Ex.P6 and P7 are the postal receipt and acknowledgment. The above documents relied by the plaintiffs are clearly discloses that the suit schedule properties are ancestral and joint family properties of plaintiffs and defendant No.1 and 2 out of which the item No.1 of the schedule property is in the name of 3rd defendant by virtue of sale made in his favor. Though, the counsel for the defendant No.3 has cross-examined the PW.1 at length, he has not elicited any material admissions from the mouth of PW.1 during his cross-examination and in other words the defendant No.3 has also not stepped into the witness box in order to substantiate his version.

9. On the other hand though, the defendant No.3 has submitted that the defendant No.1 has sold the item No.1 of the suit schedule property to him on 24.12.2001 for the valuable consideration for his legal necessity of digging bore well in the other lands belongs to him. The defendant No.3 even though pleaded supra he has failed tender any oral or documentary

evidence to substantiate his contentions. As discussed supra, in spite of giving sufficient opportunities, the defendant No.3 not stepped into the witness box to substantiate his case. Therefore, a valid presumption would arise that the case set up by the defendants is not correct. At this point of time I would like to place my reliance on the decision of Hon'ble Supreme court of India, reported in **AIR 1999 S.C.1441 between Vidhyadhar V/s Mankikrao and another**, wherein it is held that: *"when a party to the suit does not appear into the witness box and states his own case on oath and does not offer himself to be cross examined by the other side, a presumption would arise that the case set up by him is not correct."* As such an adverse inference can be safely drawn against the defendants and court can safely accept the evidence of plaintiffs and their documents. Hence, I am of the opinion that the defendant No.3 has failed to prove that he is a bonafide purchaser of item No.1 of suit schedule properties and the said property has been sold by the 1st defendant in his favor for the legal necessity of their family.

10. Admittedly, the suit schedules item NO.1 and 2 properties are ancestral and joint family properties of plaintiff and defendant No.1 and 2. The plaintiffs have claimed their legitimate share in the suit schedule properties. Therefore, now a very important

question that would arise for consideration before this court is whether the plaintiff No.2 is being daughter of 1st defendant is entitled to the equal share in the suit schedule properties. Hence, it is necessary to know the law in respect of entitlement of shares of the plaintiffs especially the plaintiff No.2. It is fairly settled law that the Hindu succession (amendment) act 2005 is not applicable to the claim of a daughter when his father who was a coparcener of the joint family died prior to 9th Sept. 2005. Only the living daughter of living co-parcener as on 09.09.2005 is entitled for equal share in the joint family properties being a co-parcener. In this regard I would like to rely on the decision reported in **2015 (4) KCCR 3265 (SC) (Civil Appeal No.7217/2013)**, between **Prakash and others -vs- Pholavati and others**, wherein it is clearly held that:

Para.23: The rights under the amendment **are applicable to living daughters of living coparceners as on 9th September 2005 irrespective of when such daughters are born.** In para no.26 it is observed that: We are unable to find any reason to hold that birth of the daughter after the amendment was a necessary condition for its applicability. **All that is required is that daughter should be alive and his father should also be alive on the date of the amendment.**

In view of the supra judgment, The provisions of Amendment Act. 2005 would have no application and the daughters of deceased father are entitled for notional partition.

11. In the present case on hand, the plaintiff No.2 being daughter of 1st defendant has claimed equal share with her father and brothers. On the other hand the defendant No.3 has also not disputed that the suit schedule properties are joint family properties of plaintiffs and defendants No.1 and 2. But he contended that the item No.1 of the suit schedule properties, which was purchased by him from the 1st defendant, is a self-acquired property of the 1st defendant. However, the defendant No.3 has not produced any iota of evidence to substantiate his said version. Therefore, the above pleading and evidence of plaintiffs clearly disclosed that the 1st defendant is the father of the plaintiffs and defendant No.2. Therefore, the rights under the amendment Act are applicable to the 2nd plaintiff also, who is none other than the only daughter of the 1st defendant.

12. From the oral evidence of PW.1 coupled with documentary evidence, it is very much clear that plaintiffs and the defendant No.1 and 2 are the joint family members and the suit schedule property their ancestral and joint family properties. As discussed above there is no rebuttable evidence to discord the evidence of PW.1. The ratio laid down in the supra decision clarifies the legal position that the amendment are applicable to living daughters of living coparceners as on 9th September 2005. Admittedly, in the

case on hand the father of plaintiff is the defendant No.1. Therefore, in view of the supra judgment **Prakash and others - vs- Pholavati and others**, the plaintiff No.2 is being a living daughter of living coparcener as on 9th September 2005, she is also entitled for equal shares in the suit item No.1 and 2 properties. Accordingly, the plaintiffs are jointly entitled for **2/4th** (1/4th each) share in the suit schedule properties. In view of my above reasoning, I answer Issue No.1 to 3 in the in the **AFFIRMATIVE.**

13. ISSUE NO.4: Further, the plaintiffs have sought for mesne profit from Defendants for wrongful retention of suit properties. P.W.1 also reiterates this aspect in her examination-in-chief affidavit. Except this, nothing has been placed on record to substantiate this contention. It is incumbent on the Plaintiffs to prove the present income of the suit properties. In the present case plaintiff has not placed any evidence to show that the present income of the suit properties. Therefore, a separate enquiry is to be conducted regarding the determination of quantum of mesne profits. Accordingly, I answer **issue No.4 in the affirmative.**

14. ISSUE NO.5: In view of my findings on issue No.1 to 4, I proceed to pass the following:-

ORDER

Suit of the plaintiffs is hereby decreed.

The plaintiffs are jointly entitled for 2/4th (1/4th each) share in the suit schedule item No.1 and 2 properties.

Further the plaintiffs are entitled for accounts of profits of their shares from the date of suit till the date of delivery of possession and there shall be separate enquiry in this regard.

Having regard to the relationship between the parties, no order as to cost.

Draw preliminary decree accordingly.

(Dictated to the Stenographer transcribed and typed by him, corrected by me and pronounced in the open court on this the **17th day of October 2017**).

(K.M. BASAVARAJAPPA)
Civil Judge & JMFC
K.R.PETE.

A N N E X U R E**1. WITNESSES EXAMINED FOR THE PLAINTIFF:**

PW.1 : Mahadevamma

2. DOCUMENTS EXHIBITED FOR THE PLAINTIFF:

Ex.P1 to 4 : 2 RTCs
Ex.P3 : Record of rights
Ex.P4 : Certified copy of M.R.
Ex.P5 : Copy of legal notice
Ex.P6 : Postal receipt
Ex.P7 : Postal acknowledgment

3. WITNESSES EXAMINED FOR THE DEFENDANTS:

-NIL-

4. DOCUMENTS EXHIBITED FOR THE DEFENDANTS:

- NIL -

(K.M. BASAVARAJAPPA)
Civil Judge & JMFC
K.R.PETE.