

**IN THE COURT OF THE SENIOR CIVIL JUDGE,
MADDUR**

PRESENT:

Sri.R.P. Gowda,
M.Com., LLB.,
**SENIOR CIVIL JUDGE,
MADDUR.**

DATED THIS THE 12th DAY OF APRIL, 2019.

O.S.NO.54/2011

Plaintiffs :

- 1) Smt. Gowramma W/o. Late. Nanjachar, Aged about 78 years.
- 2) Ashwathamma, Aged about 42 years, W/o. Umesha S. R/o. 1st Main, 2nd Cross, Kamalanagar, Bangalore City.
- 3) Renukamma, Aged about 35 years, W/o. Court Ramesh, R/o. 1st Main, R.G. Nagar, Bangalore.
- 4) Sowmya, Aged about 21 years, D/o. N. Manu, Bramhachari.
- 5) Sri. Manjunatha, Aged about 19 years, S/o. N. Manu Bramhachari.
- 6) N. Manu Bramhachari, Aged about 50 years, S/o. Late. Nanjachari.
- 7) Smt. Krishnamma @ Gowramma, Aged about 57 years, W/o. Late. Basavaiah, R/o. D.No.2606,

Naguvanahalli Road, Kesere, Mysore City.

8) H.S. Shivaraju, Aged about 42 years, S/o. Late. Shivalingachar and Late. Padma, r/o. Hemmanahalli Village, Maddur Taluk.

9) Smt. Sathyamma, Aged about 45 years, W/o. Ningachar, R/o. Laggere, Bangalore City.

10) Shyamala, Aged about 25 years, D/o. Shivannachari, R/o. Kadahalli, Chamarajanagar Taluk.

Plaintiffs No.1 and 4 to 6 are residents of Valagerehalli Village, Kasaba Hobli, Maddur Taluk.

(By Sri. H.P.S. Adv.,)

-V/S-

Defendants :

1) Sri. N. Puttaswamy S/o. Late. Nanjachari, Since, Dead by LRs.

D.1(a) Smt. Gayathri, Aged about 60 years, W/o. Late. N. Puttaswamy.

D.1(b) V.P. Shivananju, Aged about 45 years, S/o. Late. N. Puttaswamy.

D.1(c) V.P. Somashekhara, Aged about 43 years, S/o. Late. N. Puttaswamy.

All are Residents of Valagerehalli Village, Kasaba Hobli, Maddur Taluk.

- 2) Sri. S. Rajachar, Aged about 50 years, S/o. Sannachari, R/o. Halahalli Extension, Mandya City.
- 3) Sri. K.S. Chandrashekhara, Aged about 50 years, S/o. Somachar, R/o. Doddapete, Kunigal Town and Taluk, Tumkur District.

**(Sri. H.V.B. Adv., for D.1,
Sri. H.B.N. Adv., for D.2 & 3)**

Date of filing of suit	08.11.2011.		
Nature of Suit	Suit for Partition & Separate Possession		
Recording of evidence	10.09.2012.		
Pronouncement of Judgment	12.04.2019.		
Total duration	<u>Year/s</u>	<u>Month/s</u>	<u>Day/s</u>
	07	05	04

J U D G M E N T

This is a suit filed by the plaintiffs seeking the relief of partition and separate possession in respect of the suit schedule properties and for the ascertainment of mesne profits against the defendants.

2. The case of the plaintiffs in brief is as follows:

The plaintiff have shown the genealogy of their relationship with the defendants in the plaint, which reveals that the propositus by name Nanjachari had a wife by name Putteeramma. Both of them had 3 sons by name Nanjachari, Ningachari and Puttaiah. The plaintiff No.1 is the wife of the 1st son Nanjachari, the plaintiff No.6 and defendant No.2 are the sons of Nanjachari. The Plaintiff No.7 and 9 are the daughters of the said Nanjachari. Plaintiff No.4 and 5 are the sons of the said Nanjachari. The plaintiff No.2, 3 and the mother of the defendant No.3 by name Shivamma (dead) are the daughters of the plaintiff No.9. The other sons of Neelakantachari are no more. Out of the daughters of Nanjachari, Padma w/o Shivalingachar, who is the mother of the plaintiff No.9, Sharada (died as spinster), Sumithra, another son by name Prakasha, Ananda (died as bachelor) are no more now.

It is submitted that the plaintiff No. 1 to 5 herein along with another by name Shivappa, had filed a suit in O.S.No. 100/1993 on the file of the Civil Judge (Sr.Dvn) at Mandya as against the defendant No.1 and the plaintiff No.6 herein for declaration and permanent Injunction in respect of the suit properties. Subsequently, the married daughters of late Nanjachari and L.R.s of his deceased daughters were also brought as parties in the said suit. The said suit came to be transferred to Maddur after the establishment of the court and the same came to be renumbered as O.S.No.29/2000. The said suit after due contest by the defendant No.1 and the said suit came to be dismissed by the

court on the ground that a 'will' was executed by Late Nanjachari in favour of the plaintiffs in the said suit was not established and also holding that Nanjachari had no exclusive right over the properties to execute the 'will'. In the said suit, the defendant No.1 herein had taken specific contention that an alleged partition in the joint family as well as the partition in the joint family and the allotment of his share were considered by the court and accordingly, issues No.3 and 6 were held in negative. However, the plaintiffs in the said suit have approached the Hon'ble High Court of Karnataka in RFA 384/2002 as against the said judgment and decree. The said appeal was contested by the defendant No.1, however, he has not filed any appeal or cross appeal against the said judgment and decree. The said RFA came to be dismissed by confirming the judgment and decree passed by this court on 5.08.2011. Thus, the contention of the plaintiffs that the execution of the will not accepted by the Hon'ble High Court and also the alleged contention of the defendant No.1 that there was a partition amongst the suit schedule properties and the said contentions of both the parties have been rejected by the Hon'ble High Court. The findings of this court that the suit properties are the joint family properties were upheld by the Hon'ble High Court and it has decided that the schedule properties are the joint family properties of late Nanjachari and the defendant No.1 and the defendant No.5 herein, who was the defendant No.2 in the said suit. In view of this, the said judgment is binding upon not only the parties in the said suit, but also the

joint family members. Hence, it is well established and settled that the present suit properties are all the joint family properties of late Nanjachari and his 2 sons earlier.

It is submitted that there was no partition at all in between the said persons either during the life time of Late Nanjachari or subsequent to his death in between his two sons. IT is submitted that among the daughters of Nanjachari, the plaintiffs No.2 and 3 are married subsequent to 1994 and other daughters were married earlier to 1994. It is submitted that in view of the Hindu Succession Amendment Act, all the daughters of said Nanjachari have become the coparceners in respect of the suit properties and thereby they have become the joint owners of the said properties. The plaintiff No.1 being the wife of Nanjachari, she is entitle for the notional share in the said properties. It is submitted that all the plaintiffs are in joint possession and enjoyment of the suit properties along with the defendants.

It is alleged that though, the defendant No.1 being never in possession and enjoyment of the suit schedule properties and is not having exclusive rights over the said properties has got entries of revenue records in his name in collusion with the revenue authorities. However,those revenue entries do not confer any right in respect of the suit properties. It is alleged that those entries never binds the shares of these plaintiffs in respect of the suit properties. It is also alleged that the defendant No.1 is making hectic and illegal attempts to oust the plaintiffs from the

joint possession of the suit properties. Further, he is also attempting to put up construction over the suit item No.4 property by altering or dismantling the existing property, for which he is not entitled to and he is having no right to do so. Hence, these plaintiffs have approached the defendant No.1 and demanded to effect partition of all the suit schedule properties by metes and bounds. But, the defendant No.1 has unnecessarily dragged on the matter since from last 02 weeks. It is also alleged that the plaintiffs have also convened several panchayaths in respect of the said matter, but the said efforts were went in vain. It is alleged that the plaintiffs No.6 to 10 in this suit were defendants in the earlier suit, since they differed from the contention of the other plaintiffs herein the said suit, but subsequent to the decision of the Hon'ble High court, they have conceded and the defendant No.1 is acting adversely to the interest of the plaintiffs. Hence, these plaintiffs joined together and filed this suit. Hence, without any alternative way, the plaintiffs have come up with the present suit.

3. After filing the present suit, this court had issued the summons to all the defendants. Out of them, the defendant No.1 had entered his appearance and filed the written statement, in which the averments in brief are as under:

This defendant No.1 has clearly admitted the previous proceedings held between the parties. However, it is not admitted that the plea of partition of the defendant No.1 has been turned

down. It is submitted that there was no decree against the defendant No.1 and in favour of the plaintiffs in the earlier suit. Hence, there was no occasion for the defendant No.1 to file any cross appeal or any appeal. The averments regarding the decision said to be rendered by the court regarding the partition and allotment of the properties are specifically denied. There was no issue framed and also answered by any competent court of law regarding the plea of partition. Absolutely, there was no discussion regarding the several pleas taken by the present defendant No.1 who was the contesting defendant in the earlier suit. Hence, the allegations regarding the findings given in the previous judgment are specifically denied. It is submitted that only for the purpose of considering the validity of the will set up by the plaintiffs in the earlier suit, the observations were made. This defendant No.1 has specifically denied the allegations that there was a joint family in existence and also about the existence of the coparcenary. The defendant No.1 has specifically denied the allegations that the suit properties are all the joint family properties. The allegations that the daughters of the said Nanjachari have become coparceners are specifically denied. Their alleged joint possession over the suit properties has been specifically denied. The other allegations made in the suit are all specifically denied. The cause of action for the suit has been denied.

It is submitted that the properties mentioned in the plaint schedule were the properties jointly acquired by Nanjachari and

defendant No.1. Due to the endorsement of the family during the life time of Nanjachari, the defendant No.1 and the plaintiff No.6 being the only sons of Nanjachari wanted to become independent. There fore they demanded the father to effect partition. Accordingly, in the month of June 1992, in the presence of panchayathdars partition took place. In the said partition, the eastern 12 gunta in suit item No.1 and the entire suit item No.3, eastern half portion of residential house being suit item No.4 and 5 were allotted to the share of the defendant No.1. The suit schedule item No.2, western half portion of residential house being suit item No.4 and 5 were allotted to the plaintiff No.6 in the said partition. Western 11 gunta of property in suit item No.1 was also allotted to the share of the plaintiff No.6. As agreed and decided in the panchayath defendant No.1 and th plaintiff No.6 wee directed to look after the welfare of the parents . It is submitted that the defendant No.1 was put in exclusive possession and enjoyment of the above referred properties allotted to his share in the partition.

It is further submitted that the plaintiff No.1 and late Nanjachari wee living in the OPPARU PORTION of the residential house which is now described as item No.5 in the plaint schedule.

Though, the defendants No.2 and 3 have appeared, they have not filed their written statements.

4. After completion of the pleadings, the following issues were framed by the learned predecessor of this Court:-

- 1) Whether the plaintiffs prove that the suit schedule properties are the joint family properties of plaintiffs and the defendants?
- 2) Whether the plaintiffs further prove that the plaintiffs and defendants are in joint possession and enjoyment of the suit schedule properties?
- 3) Whether the defendant No.1 proves that there was a partition in the joint family properties in the year 1992 as contended at para No.12 of his written statement?
- 4) Whether the plaintiffs are entitled for the relief of partition and separate possession of their 72½/100 share in all the suit schedule properties by metes and bounds?
- 5) Whether the plaintiffs are entitled for mesne profit U/o.20 Rule 12 of CPC?
- 6) What Order or Decree?

5. After framing the issues, the plaintiff No.6 has been examined as PW.1 and Ex.P.1 to P.12 were marked during the evidence on plaintiffs' side. On the other hand, the deceased defendant No.1 has been examined as DW.1 and a witness by name as Sri. Shivannagowda as DW.2. During the evidence of defendants side Ex.D.1 to D.8 were marked.

During the pendency of the suit, the defendant No.1 reported to be dead and his legal heirs were brought on record.

6. Heard the arguments on both sides.

7. The following are my findings on the above said issues:-

Issue No.1 :- In the affirmative.

Issue No.2 :- In the affirmative.

Issue No.3 :- In the negative.

Issue No.4 :- In the partly affirmative.

Issue No.5 :- In the negative.

Issue No.6 :- As per final order,

for the following:-

REASONS

8. **Issues No.1 to 3**:- As these issues involve similar set of facts, they have taken together for common discussion to avoid repetition of facts.

9. It is the case of the plaintiffs that there exists a joint family comprising of the plaintiffs and the defendants and the suit schedule properties are all joint family properties. In order to support their version, they have relied upon the judgment rendered in O.S.100/1993 on the file of learned Civil Judge

(Sr.Dn) at Mandya, which came to be transferred to this Court and renumbered as O.S.29/2000. It is the specific contention of these plaintiffs that in the said suit, their claim for declaration has been failed and this Court had held that the suit properties are all joint and ancestral properties. Hence, they have only relied upon the records maintained in O.S.No.29/2000 more particularly, the pleadings, depositions and judgment as well as decree to support their version.

10. On the other hand, the contesting defendant i.e., the defendant No.1 has taken a specific contention that the suit properties are not at all the joint and ancestral properties and on the other hand, they are the joint properties of the defendant No.1 and his father Nanjachari. It is submitted by him that there was a partition effected in the said properties during the life time of their father in between this defendant No.1 and the plaintiff No.6 in the month of June 1992 and the same was acted upon. By urging these grounds, he denied the claim of these plaintiffs.

11. It is to be noted that always a presumption lies in respect of existence of a Hindu joint family. But, this presumption does not extends to the properties heed by the joint family. However, if disruption, or ouster is pleaded by the defendants, the burden is upon the defendants to prove their contention. However, it is also true that the initial burden is upon the plaintiff to prove his contention.

12. In the case on hand, in order to discharge his burden, the plaintiff No.6 has been examined before this Court as PW.1 in chief and during the course of his evidence, he placed reliance upon the Ex.P.1 to P.12 and he reiterated all the plaint averments in his examination-in-chief.

13. On going through the cross-examination of the PW.1, it has been elicited that the previous suit filed by these plaintiffs was in respect of declaration of their title based upon the will executed by his father. It has been elicited that there was no such thing related to earlier partition was revealed in the said suit. In respect of the separate living of the parties, this PW.1 deposed that “ನನ್ನ ತಾಯಿಯವರು ಅರ್ಧ ಎಕರೆ ಜಮೀನಿನಲ್ಲಿ ಸ್ವಾಧೀನ ಇದ್ದು ಮತ್ತು ಮನೆಯ ವಾರ್ ಪಾಕ್ ಅಂದರೆ ತೀರು ಭಾಗದಲ್ಲಿ ವಾಸವಿದ್ದಾರೆ. ನಮ್ಮ ಕುಟುಂಬದ ವಾಸದ ಮನೆಯಲ್ಲಿ ನಾನು ಒಂದು ಭಾಗದಲ್ಲಿ ಹಾಗೂ ನನ್ನ ಅಣ್ಣ 1 ನೇ ಪ್ರತಿವಾದಿ ಪೂರ್ವ ಭಾಗದಲ್ಲಿ ವಾಸ ಇದ್ದಾರೆ. ನಾನು ಮಧ್ಯಭಾಗದಲ್ಲಿ ವಾಸ ಇದ್ದೇನೆ. ನನ್ನ ತಾಯಿ ಪಶ್ಚಿಮ ಭಾಗದಲ್ಲಿ ವಾಸ ಇದ್ದಾರೆ. ಸುಮಾರು 20 ವರ್ಷಗಳಿಂದಲೂ ಆ ರೀತಿ ನಾವುಗಳು ಸದರಿ ಮನೆಯಲ್ಲಿ ವಾಸ ಇದ್ದೇವೆ. ನಾನು ಮತ್ತು ನನ್ನ ಅಣ್ಣ 1 ನೇ ಪ್ರತಿವಾದಿ ಕಳೆದ 08 ವರ್ಷಗಳಿಂದ ನಮ್ಮ ನಮ್ಮ ಕುಟುಂಬದ ನಿರ್ವಹಣೆ ಮಾಡಿಕೊಂಡು ಪ್ರತ್ಯೇಕವಾಗಿ ವ್ಯವಹಾರ ನಡೆಸಿಕೊಂಡು ಪ್ರತ್ಯೇಕ ಅಡಿಗೆ ಮಾಡಿಕೊಂಡು ವಾಸ ಇದ್ದೇವೆ”. However, he denies the suggestion that they are having separate families and they are looking after the family affairs separately. According to him, his sisters used to visit their house during the festivals as they are residing in their matrimonial houses.

14. As regard to the nature of the suit properties, the PW.1 deposed that “ನಾನು ಮತ್ತು ನನ್ನ ಅಣ್ಣ ನನ್ನ ತಂದೆಯವರಿಗೆ ಚಿಕ್ಕ ವಯಸ್ಸಿನಿಂದಲೂ ಸಹಾಯ ಮಾಡುತ್ತಿದ್ದೆವು ಎಂದರೆ ನಿಜ. ನಮ್ಮ ಮೂರೂ ಜನರ ಒಟ್ಟು ಪರಿಶ್ರಮದಿಂದ ದಾವಾ ಆಸ್ತಿಗಳನ್ನು ನಮ್ಮ

ತಂದೆಯವರ ಹೆಸರಿನಲ್ಲಿ ಖರೀದಿ ಮಾಡಿದ್ದೇವೆ ಎಂದರೆ ನಿಜ”. Though, he admits that his father had intended to give properties to this plaintiff No.6 and the defendant No.1, he denies the suggestion that a partition was effected at the instance of his father.

15. In respect of the contention of the defendant No.1 that separate possession as per the partition is concerned, the learned counsel for the defendant No.1 has tried to elicit that the parties are in separate possession of their respective shares in the suit properties. Though, it has been elicited that the defendant No.1 and the plaintiff No.6 as well as the plaintiff No.1 are in possession of some extents in the suit properties and their enjoyment separately, this PW.1 has denied that the partition was effected and it was acted upon. Further, he deposed that “ವ್ಯವಸಾಯದ ಕಾಲದಲ್ಲಿ ನಮ್ಮ ಅಕ್ಕತಂಗಿಯರು ಅವರವರ ಭಾಗಕ್ಕೆ ಇರುವ ಜಮೀನುಗಳನ್ನು ಉಳುಮೆ ಮಾಡಿಸಲು ಬಂದು ಹೋಗುತ್ತಾರೆ”. But, it is to be noted that it is not the case of the defendant No.1 that his sisters and the plaintiff No.1 have got their specific shares over the suit schedule properties and they are in separate possession of the same.

16. Further, in respect of contention of the defendant No.1 regarding the separate living of these plaintiffs, the PW.1 has clearly admitted that the plaintiffs No.2, 3, 5 and 9 are staying at Bengaluru, plaintiffs No.7, 8 and 10 are staying at Mysuru, Hemmanahalli and Chamarajanagar respectively. He denies the suggestion that as per the partition, mutation has been effected in their favour.

17. On the other hand, the defendant No.1 himself examined as the DW.1 and has reiterated all the written statement averments in his examination-in-chief. He has marked the Ex.D.1 to D.8 during the course of his evidence.

18. During the cross-examination, it has been elicited that his father had no ancestral properties at this village except a land and a house. However, this DW.1 is not aware about the transactions that were held in respect of those properties. He clearly admits that his father was managing the entire joint family affairs at Valagerehalli Village. Though, he admits that his father has derived the properties out of his own income, he deposed that he has also contributed in deriving those properties. It has been elicited that his sisters were residing with their parents until their marriages were solemnized. He deposed that his father was residing at suit schedule item No.4 and 5 properties till his lifetime and now, the plaintiff No.1 is residing therein.

19. As regards to alleged partition, the DW.1 has deposed that as per panchayath parikath, a partition has been effected, but, no such deed came in to existence. He is not able to say about the exact date and time of the said partition. Though, he deposed about the presence of his sisters at the time of alleged partition, he clearly admits that no shares were allotted to them. According to him, his father had applied for mutation in terms of

the partition, but, he has got no such documents to substantiate the same and further, he has got no such information with him.

20. As per the version of DW.1, his father did not retain any share in the properties, however, the plaintiff No.6 and this DW.1 have left the suit item No.5 in favour of both their father and mother. However, no such mutation has been effected, no kandayam paid by his father separately. According to him, his parents did not retain any property, but, they were having the financial capacity with them to maintain themselves.

21. Though, this DW.1 deposed that he got eastern portion of the house, 01 acre wet land and 12 gunta of dry land towards his share, he clearly admits that no mutation has been effected in his favour. Further, he has also not applied for mutation till this day and he was having no inconvenience to get the same in his favour. It is also brought on record that neither this defendant No.1 nor his brother, the plaintiff No.6 have applied for the mutation as per the alleged partition.

22. DW.1, during the course of his cross-examination has deposed that there was no quarrel between himself and his brother and sisters and he does not know the cause for the alleged partition. Further, he clearly deposed that “ನಮ್ಮ ಕುಟುಂಬದಲ್ಲಿ ನಾನು, ನನ್ನ ತಂದೆ, ತಾಯಿ, ನನ್ನ ತಮ್ಮ ಮತ್ತು ನನ್ನ ತಂಗಿಯರಾದ ಅಶ್ವತ್ಥಮ್ಮ ಮತ್ತು ರೇಣುಕಾ ಎಲ್ಲರೂ ಒಟ್ಟಿಗೆ ವಾಸ ಇದ್ದೆವು”. He clearly deposed that at the time of effecting the

alleged partition, they have not asked the plaintiff No.2 and 3, who were not married in the year 1992.

23. Regarding the mutation of the properties, this D.W.1 clearly admits that the Ex.D.1 to 3 documents are not having recitals about the alleged partition. He clearly admits that these plaintiffs No.2 and 3 challenged the said mutation entries before the Assistant Commissioner and the Ex.D.1 is the said order passed by the Assistant Commissioner.

24. As regards to the previous suit, he clearly admits that he did not challenge the said judgment and Decree before the Appellate court. However, he admits about the appeal preferred by the plaintiffs before the appellate court as well as the Hon'ble High Court of Karnataka and also their result.

25. This Defendant No.1 has examined a witness by name B.Shivanna Gowda as the D.W.2. This witness deposed that there was a partition held during the life time of Nanjachari amongst his sons about 22 years back and in the said panchayath he had participated along with other persons. He deposed about the separate possession of the properties by the sons of Nanjachari.

26. On going through the cross examination of the D.W.2, it has been elicited that he does not know about the details regarding the family members of Nanjachari and also about the ancestral properties of said Nanajachari. He clearly admits that

the sons and daughters of Nanjachari were looking after the affairs of his joint family properties. Though he deposed that the said Nanjachari as well as this defendant No.1 have jointly purchased the properties, he does not know what are all the sources available to them to purchase those properties. He clearly deposed that at the time of alleged partition, these plaintiff No.2 and 3 were not married and they have not asked any thing during the alleged partition. According to him, the said partition was effected not by measuring the lands and handing over the possession, instead, they decided the shares of the defendant no.1 and the plaintiff No.6 in the house, wherein alleged panchayath for partition was held. Though, he admits that usually, when a partition is held, it will be reduced in to writing, but in the alleged partition, it was done orally.

27. In the light of the afore said oral evidence if we look into the documentary evidence placed on record, the plaintiffs have relied upon the Judgment rendered by the Hon'ble High Court of Karnataka in RFA 384/2002. On perusal of the said Ex.P.1, it is very clear that the Hon'ble High Court was pleased to hold in page No.11, that "Hence, as it is held by the trial court, D.W.1 has proved and that the suit schedule property is joint family property in which Nanjachari himself cannot take decision by executing the will excluding the right interest of D.W.1 over the suit schedule property". Further, in page No.13, it is clearly held that "Therefore, it is clear that the suit schedule property is a joint family property and not a self acquired property".

28. It is to be noted that the Ex.P.2 to P.5 are the RTC extracts pertaining to the suit schedule item No.1 to 3 and assessment extracts of the suit item No.4 and 5. The suit schedule item No.1 still stands in the name of Nanajachari, whereas, the suit schedule item No.2 and 3 are standing in the name of the plaintiff No.6 and the defendant No.1 respectively. However, it is revealed from the said RTC extracts that it was done not due to the alleged partition as contended by the defendant No.1. The Ex.P.5 does not reveal that it is standing in the name of the plaintiff No.4 and 5. Hence, at no stretch of imagination, it can be held that alleged partition was acted upon.

29. The Ex.P.6 to 12 are the records pertaining O.S.No.100/1995 (New O.S.No.29/2000). On perusal of these records, it is very clear that the claim of these plaintiffs seeking the relief of declaration based on the will alleged to be executed by the father of the defendant No.1 Nanjachari has been rejected by this court and the same has been affirmed by the Hon'ble High Court. It is to be noted that this court while observing the nature of the suit properties, opined that *the suit properties are the joint family properties of the family consisting of the defendant No.1 and 2 also and that it was not the self acquired property of late Nanjchari and it is also sufficient to bold that the plaintiffs are not in exclusive possession of entire schedule properties as contended by them.* Further, it is also held that defendant No.1 cannot be declared as the absolute owner of any portion of the schedule

properties. Mere change of khata is not the ground to get the title in his favour.

30. It is to be noted that the learned counsel for the plaintiffs has based his contention on the Ex.P.1 and the entire records of the previous suit to contend that the suit properties are all the joint family properties of the plaintiffs and the defendants. More particularly, he relied upon the evidence of the D.W.1 regarding the non-effecting the mutation of the properties as per the alleged partition. In order to support his version, he has relied upon the following decisions:-

In **1997 SAR SC 314, (Sitaramacharya (dead) Through LRs. Vs. Gururajacharya (dead) Through LRs)**, wherein the Hon'ble Apex Court has held that:-

“Under Section 18 of the Evidence Act the admission made by the party would be relevant evidence. Section 31 provides that “admissions are not conclusive proof of the matters admitted but they may operate as estoppel under the provisions hereinafter contained”. In view of the admissions referred to earlier they appear to be unequivocal”.

In **AIR 1977 SC 409, (Union of India Vs. Moksh Builders and Financiers Ltd., and Others etc.)**, wherein it is held that:-

“An admission by a party is substantive evidence of the fact admitted and admission duly proved are admissible evidence irrespective of whether the party making them appeared in the

witness box or not and whether that party when appearing as witness was confronted with those statements in case it made a statement contrary to those admissions”.

31. Further, in respect of the earlier suit, where in this court had decided the nature of the properties, which has been attained the finality before the Hon'ble High Court and held that the suit properties are the joint family properties, he has relied upon the decision rendered by the Hon'ble Apex Court reported in **1998 SAR (Civil) 918, (Hopa Pantations Ltd., V/s. Taluk Land Board, Peermade & Another)**, wherein it is held that:-

“When the proceedings have attained finality, parties are bound by the judgment and are estopped from questioning it. They cannot litigate again on the same cause of action nor can they litigate any issue which was necessary for decision in the earlier litigation. These two aspects are 'causes of action estoppel' and 'issue estoppel'. These two terms are of common law origin. Again once an issue has been finally determined, parties cannot subsequently in the same suit advance arguments or adduce further evidence directed to showing that issue was wrongly determined. There only remedy is to approach the higher forum if available. The determination of the issue between the parties gives rise to, as noted above, an issue estoppel. It operates in any subsequent proceedings in the same suit in which the issue had been determined. It also operates in subsequent suits between the same parties in which the same issue arises”.

As regards to the relevancy of the previous judgment, he has relied upon the judgment rendered by the Hon'ble Apex court reported in **2002 (2) SCC 85, (Madhukar D. Shende Vs. Tarabai Aba Shedage)**, wherein it is held that:-

“The plaintiff's right to sue based on this very will was claimed and asserted in the earlier suit and was upheld though denied by this very defendant. These facts and finding are recorded in the previous judgment and have relevance in the present suit. Thus apart from res-judicata the judgment given in the earlier suit is a relevant piece of evidence under Sections 11, 13 and 35 of the Evidence Act and has a material bearing on the controversy arising for decision in the present suit”.

32. The learned counsel for the plaintiffs has contended that as the defendant No.1 has failed to prove the alleged partition, the family remained as joint and all the parties are coparceners. Towards this, he has relied upon the decision rendered in **AIR 1966 S.C. 405, (Bharat Singh and Others Vs. Mst. Bhagirathi)**, wherein it is held that:-

“There is a strong presumption in favour of Hindu brothers constituting a joint family. It is for the person alleging severance of the joint Hindu family to prove it. The mere fact that after the death of the father mutation entry was made in favour of three brothers and indicated the share of each to be one-third, by itself could be no evidence of the severance of the joint family which,

after the death of the father consisted of the three brothers who were minors”.

Further, he has also relied upon the decision rendered and reported in **AIR 1971 SC 1962, (Indranarayan V/s. Roop Narayan and Another)**, wherein it is held that:-

“No members of a Hindu family can separate himself from one member of the family and remain joint with others. He is either a member of the joint family or he is not. He cannot be joint with some and separate from others. It is true that for the existence of a joint family, the family need possess no property. The chord that knits the members of the family together is not property but the relationship”.

33. As regards to the possession of the plaintiffs is concerned, the learned counsel for the plaintiffs has relied upon the judgment rendered and reported in **2007 SAR (Civil) 12, (Jagannath Amin Vs. Seetharama (dead) by LRs. and Others)**, wherein it is held that:-

“It is not in dispute that the plaintiffs are entitled to a share. The property to which the plaintiffs are entitled is undivided ‘joint family property’ though not in the strict sense of the term. The general principle of law is that in the case of co-owners, the possession of one is in law possession of all, unless ouster or exclusion is proved. To continue to be in joint possession in law, it is not necessary that the plaintiff should be in actual possession of

the whole or part of the property. Equally, it is not necessary that he should be getting a share or some income from the property. So long as his right to a share and the nature of the property as joint is not disputed the law presumes that he is in joint possession unless he is excluded from such possession”.

Further, another decision reported in **ILR 1985 Kar. 3062, (Fakirappa Bailappa Kambar V/s. Kristappa Bailappa Kambar)**, has been relied upon, wherein it is held that:-

“It is open to the members of the co-parcenary to arrange amicably separate possession and enjoyment of the family properties without effecting partition or disruption of the joint family, but, at the same time whether co-owners in exclusive possession of different portions of joint family property held the same in the partition or under an arrangement as to the possession, depends upon the intention of the parties which has to be gathered from the facts and circumstances of each case”.

34. As regards to the validity of the alleged partition is concerned, the plaintiffs have relied upon the judgment rendered in **In ILR 1988 Kar. 2067, (Umakata Rao.v. Lalitabai)** wherein, the Hon'ble High Court was pleased to held that

“Document which is not a Memorandum of partition recording the partition which had taken place anterior to the document, but which effects partition of the joint family properties or immovable properties worth more than Rs.100/- ought to be registered as

required by sec.17(1)(b); the document which has not been registered could not be considered as a valid document affecting the immovable properties mentioned therein and could not be received in evidence to prove the partition”.

I have gone through the said decisions with due respect.

35. On the other hand, the learned counsel for the defendant No.1 has relied upon the RTC extracts pertaining to the suit properties which are marked as the Ex.D.1 and 2, assessment extract as the Ex.D.3, a Kandayam paid receipt as the Ex.D.4 and the copies of the orders passed by the Assistant Commissioner are marked as the Ex.D.5. Ex.D.6 is the endorsement issued by the gramapanchayath to show that the house property is in dilapidated condition. Ex.D7 is the photograph and the Ex.D8 is the newspaper publication, regarding the dilapidated condition of the house, wherein this defendant No.1 is said to be residing.

36. The learned counsel for the defendant No.1 has vehemently argued that the suit properties are not the joint family properties of the plaintiffs and the defendants. It is his specific contention that the said properties are the joint properties and Nanjachari and this defendant No.1 only. According to him, the Hon'ble High court was also considered the said aspect and held that the will executed by the said Nanjachari is not having any validity in the eyes of law. It is contended that the plaintiffs have

got no share in the properties and they are not at all the coparceners in respect of the suit properties. Towards his contention, he has relied upon the following decisions:-

37. To contend that the partition was effected orally and no document was executed in respect of the said partition and even though, the document is not placed on record, the partition was acted upon, he has relied upon the decision rendered in **2016 SAR (Civil) 772, (Subraya M.N. V/s. Vittala M.N. & Others)**, wherein it is held that:-

“Under Section 17 of the Registration Act, the documents which purport or operate to create, declare, assign, limit or extinguish any right, title or interest of the value of one hundred rupees and upwards, are to be registered. Under Section 49 of the Registration Act no document required by Section 17 or by any provision of the Transfer of Property Act to be registered shall be received as evidence of any transaction affecting an immovable property. As provided by Section 49 of the Registration Act, any document, which is not registered as required under the law would be inadmissible in evidence and cannot therefore be produced and proved under Section 91 of the Evidence Act”.

38. As regards to the partition effected by his father Nanjachari in between himself and the plaintiff No.6, this defendant No.1 has contended that the said partition was an arrangement made during the lifetime of Nanjachari itself and it binds upon the plaintiffs. Towards this, he has relied upon the

decision rendered in **2016 SAR (Civil) 945, (Smt. Ajambi (D) By L.R. Vs. Roshanbi & Others)**, wherein it is held that:-

“It is true that there is no concept of joint family in Muslims but it was open to late Shri Shaikaji to give his property to his children in a particular manner during his lifetime, which he rightly did, so as to avoid any dispute which could have arisen after his death. The arrangement so made was duly accepted by the family members and it was also acted upon. Only thereafter a formal record of the said fact was made by Late. Shaikaji in Ex.D.7”.

39. He has also relied upon the following decisions to contend that these plaintiffs are not the coparceners and they have got no share in the suit properties.

In **2018 (3) KCCR 2425 (S.C), (Mangammal @ Thulasi and Another V/s. T.B. Raju and Others)**, wherein it is held that:-

“Both father and daughter shall be alive as on the date when the amending Act of 2005 came in to force, irrespective of the date of birth of the daughter – In the event if any one of them not alive on the date of amendment Act came in to force, then the daughter will not be entitled to as a co-parcener”.

In **2018 (2) HRR 620 (Kar.), (Venkavva and Others Vs. Sabanna and Others)**, wherein it is held that:-

“Except placing reliance on the amendment to Section 6 of Hindu Succession Act, 1956, no other argument is advanced by learned counsel appearing for the appellants. Reliance placed on

this amendment Act is wholly misconceived. There is no material irregularity or infirmity found in appreciation of evidence by the Court below. The suit property being held to be not ancestral, partition effected during the lifetime of Hanumppa on 15.02.1974 being proved, no case is made out for the appellants to interfere with the judgment and decree of the Court below”.

40. I have gone through the said decisions with due respect. I am of the humble opinion that the said decisions are not coming to the aid of the defendant No.1 to deny the claim of the plaintiffs.

41. It is to be noted that in the case on hand, there is no dispute as to the relationship between the parties and also in respect of the suit properties. Though, no evidence is placed on record to consider that the suit properties are ancestral properties, it is an undisputed fact that the suit properties are joint family properties. As observed supra, the previous judgment of this Court passed in O.S.29/2000 regarding the nature of the suit properties and the same has been upheld by the Hon'ble High Court clearly show that the suit properties are the joint family properties. The contention of the defendant No.1 that he has contributed in purchasing the suit properties by his father is not substantiated. Hence, his contention that the suit properties are the joint properties of himself and his father Nanjachari is not sustainable. On the other hand, the Hon'ble High Court in RFA No.384/2002 has clearly held that the suit properties are joint

family properties and the Hon'ble High Court was pleased to reject the claim of the plaintiffs in contending that they have become the absolute owners in possession of the suit schedule properties by the virtue of a Will alleged to be executed by Nanjachari. It is to be noted that the said judgment rendered by the Hon'ble High Court has reached its finality. In that regard, the admissions given by the present defendant No.1 in the earlier suit regarding the nature of the suit properties and that of the decisions rendered by this Court as well as Hon'ble High Court in respect of the nature of the suit properties clearly show that they are remained as the joint family properties till today. Under these circumstances, I hold that the plaintiffs have clearly proved that the suit schedule properties are all the joint family properties.

42. As regards to the possession is concerned, the defendant No.1 has contended that the plaintiffs are never in possession of the suit properties. In my opinion, the said contention is not sustainable. Since, the decision above referred, which is reported in 2007 SAR (Civil) 12, (supra), it is very clear that unless ouster or exclusion is proved, the possession of one is in law possession of all. Hence, I am of the opinion that the plaintiffs and defendants are in joint possession and enjoyment of the suit schedule properties.

43. In respect of the alleged partition, it has been observed by this Court, the defendant No.1 has failed to establish the same before this Court that the partition was effected and it was acted

upon. Merely on the basis of the revenue entries, the Court cannot come to a conclusion that the partition was effected in between the parties. Though, revenue entries have been effected that clearly show that they were not mutated by the virtue of the partition and the same has been admitted by the defendant No.1. The mere fact that after the death of Nanjachari mutation entry was made in favour of the defendant No.1 as well as the plaintiff No.6 could be no evidence of the severance in the joint family. Hence, the plea of the defendant No.1 is not sustainable.

44. By summarizing all the above said things, I hold that the plaintiffs have succeeded in proving the nature of the suit properties, their joint possession over the same and that of their rights over the suit properties. On the other hand, the defendant No.1 has failed to prove that a partition was effected and he is in exclusive possession of his respective share. Hence, I answer the **Issues No.1 and 2 in the affirmative** and **Issue No.3 in the negative.**

45. **Issue No.4** :- In the case on hand, the plaintiffs have sought the relief of partition and separate possession in respect of the suit properties. Admittedly, the relationship between the parties is established and the nature of the suit properties held to be the joint family properties of the family comprising of the plaintiffs and the defendants. Hence, this court has come to the conclusion that all the suit properties are the joint family

properties of the plaintiffs and the defendants and all of them have got their specific share in the suit properties.

46. It is to be noted that the father of the defendant No.1, plaintiff No.6 and the husband of the plaintiff No.1 by name Nanjachari died in the year 1992 itself. At that time, the daughters of the said Nanjachari were not the coparceners in view of the provision under Sec.6 of Hindu Succession(Amendment) Act, 2005 and in view of the Judgment rendered by the Hon'ble Apex Court reported in Phulavathi case. However, it is an undisputed fact that as on the date of the death of said Nanajachari, the succession opens and a notional partition will be taken place. Accordingly, the daughters and the wife of the said Nanjachari are entitle for the notional shares only and not equal shares to that of the shares of the defendant No.1 and the plaintiff No.6. These defendant No.1 and the plaintiff No.6 are entitle for the each 1/3 rd share along with their father Nanajachari. The share of Nanjachari has to be divided among all his class I legal heirs equally. Hence, the calculation of the shares are as under:

47. The shares of the plaintiff No.6 and the defendant No.3 are calculated as under:-

i) Nanjachari, the plaintiff No.6 and the defendant No.1 are each entitled for 1/3rd equal share in all the suit properties by metes and bounds.

ii) The share of the said Nanjachari has to be divided amongst all his class-I legal heirs.

(a) The Class-I legal heirs are the plaintiffs No.1 to 3, plaintiff No.6, plaintiff No.7 and plaintiff No.9, the mother of the plaintiff No.8 by name Smt. Padma and the mother of defendant No.3 and the plaintiff No.10 by name Shivamma, the mother of the defendant No.2 by name Smt. Sumithra and the present defendant No.1 and as such, they are all equally entitled for their shares in the share of Nanjachari (Notional Partition).

iii) In view of this, the plaintiff No.1 to 3, plaintiff No.6, plaintiff No.7 to 9 and the defendant No.2 are each entitled for 1/30th share in the suit properties. The defendant No.3 and plaintiff No.10 are jointly entitled to 1/30th share in the suit properties. Since, the plaintiffs No.4 and 5 are none other than the daughter and son of the plaintiff No.6, they are entitled for their joint shares along with the plaintiff No.6.

48. In view of the above said discussion, the parties to the suit are entitled for their shares in the suit properties by metes and bounds. Accordingly, I answer **this issue in the partly affirmative.**

49. **Issue No.5** :- In the case on hand, the plaintiffs have sought the mesne profits U/o.20 Rule 12 and 18 of CPC from the date of judgment and till the delivery of possession of the plaintiffs' share. Infact, the plaintiffs ought to have claimed the

rendition of accounts as per Order 20 Rule 18 of CPC. In that regard, the plaintiffs have not lead any evidence before this Court. Further, nowhere in the evidence, the plaintiffs have placed any materials to arrive at a proper conclusion that they have been ousted from the suit properties and the defendant No.1 has made the profits out of the suit schedule properties. In the lack of evidence, I am of the opinion that the plaintiffs have failed to substantiate their contention and in my opinion that they are not entitled for the rendition of accounts/mesne profits as claimed in the suit. Hence, I answer **this issue in the negative**.

50. **Issue No.6**:- As per the discussion made on Issues No.1 to 5, this Court has come to the conclusion that the suit of the plaintiffs is deserves to be decreed in part. By looking in to the circumstances of the present suit, I find no grounds to award costs. Hence, I proceed to pass the following:

ORDER

The suit of the plaintiffs is hereby decreed in part.

The plaintiffs No.1 to 3, plaintiffs No.7 to 9 and the defendant No.2 are each entitled for 1/30th share and the defendant No.3 and the plaintiff No.10 are jointly entitled to 1/30th share in the suit schedule properties by metes and bounds.

The defendant No.1 and the plaintiff No.6 are each entitled for 11/30th share in the suit schedule properties by metes and bounds.

The claim of the plaintiffs regarding the mesne profits is hereby rejected.

No order as to costs.

Draw preliminary decree accordingly.

(Dictated to the stenographer, transcribed by her, corrected, signed and then pronounced by me in the open court, on this 12th day of April, 2019).

(R.P. Gowda)
Senior Civil Judge,
Maddur.

ANNEXURE

Witnesses examined for the plaintiff:

P.W.1 : Sri. N. Manu Bramhachari.

Documents exhibited for the plaintiff:

Ex.P.1 : C/c of Judgment of RFA.384/2002.

Ex.P.2 to 4 : R.T.Cs.

Ex.P.5 : C/c of Tax Assessment Statement.

Ex.P.6 : C/c of Plaint of O.S.29/2000.

Ex.P.7 : C/c of Statement of the defendant
No.1 in O.S.29/2000.

Ex.P.8 : C/c of Statements of the defendants
No.3 to 7 in O.S.29/2000.

- Ex.P.9 : C/c of Issues of O.S.29/2000.
Ex.P.10 : C/c of Judgment and Decree of O.S.29/2000.
Ex.P.11 : C/c of Evidence of PW.1 in O.S.No.29/2000.
Ex.P.12 : C/c of Evidence of DW.1 in O.S.No.29/2000.

Witnesses examined for the defendants:

- DW.1 : Sri. N. Puttaswamy.
DW.2 : Sri. Shivannagowda.

Documents exhibited for the defendants:

- Ex.D.1 & 2: 02 R.T.Cs.
Ex.D.3 : C/c of Assessment Register Extract.
Ex.D.4 : Tax Paid Receipt.
Ex.D.5 : Copy of Orders passed in R.Mis.No.37/93-94.
Ex.D.6 : Endorsement given by Valagerehalli
Grama Panchayath.
Ex.D.7 : Photograph and One C.D. in respect
of the suit schedule House Property.
Ex.D.8 : Paper Publication of Andolana
Kannada News Paper.

Senior Civil Judge,
Maddur.