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O.S./75/2021

IN THE COURT OF THE SENIOR CIVIL JUDGE AT
PERIYAPATA

Present

Sri.A.SAMIULLA.

B.Sc, LL.B.,

**Senior Civil Judge,
Periyapatna.**

Dated: 23rd Day of February 2024

OS.No.75/2021

*** * ***

PLAINTIFF:

Sri.Channabasappa s/o Late B P Siddlingappa,
Age: 78 years, r/at # 413, BM Road,
Periyapatna Town.

(By Sri.BNH)

Versus

DEFENDANTS:

- 1.** Sri.Somashekar,
s/o Late B P Siddalingappa,
Age: 72 years, R/at No.223,
Shanthi Nivasa, B.M.Road,
Periyapatna.
- 2.** Sri.B.S.Shivananda s/o Late B P Siddalingappa,
Age:69 years, R/at No.1312/1, Double Road,
Indirangara 2nd stage, Bengaluru-560 038.
- 3.** Smt.Sukanya w/o Late B S Shivashankar,

4. Sri.Vijendra s/o Late B S Shivashankar,
Age: 50 years, D3 & 4 are r/at No 4982, 7th Main,
7th Cross, Vijayanagara II stage, Mysuru.

5. Smt.Gowramma w/o K L Rajashekharappa,
Age: 69 years, r/at Gonikoppa Road,
RM Office building, Periyapatna.

6. Smt.Subhadra w/o Late Jayadev
Age: 68 years, r/at No.1755, 4th Cross,
Aniketan Road, Madhu Nilaya,
Kuvempu Nagar, Mysuru.

7. Sri.Naveen
Konics Yuwa.com Computer Centre,
1st Floor, 'Yadiyuru Complex'
next to BSNL Office, BM Road,
Periyapatna Town 571 107, Mysuru.

8. Sri.Vinu
“Famous Bakery & General Store”
Ground Floor, Yadiyuru Complex,
next to BSNL Office, BM Road,
Periyapatna Town-571 107.

9. Dr.Krishna Prasad,
Kaveri Dental Clinic, 1st Floor,
'Yadiyuru Complex' next to BSNL
Office, BM Road, Periyapatna
Town 571 107, Mysuru District.

10. Sam Sheer Cell Needs
Mobile Sale and Services,
Ground Floor, 'Yadiyuru Complex'
next to BSNL Office, BM Road,
Periyapatna Town 571 107.

11. Sri.Harish
'Harish Medicals', Ground Floor,
'Yadiyuru Complex', next to BSNL

Office, BM Road, Periyapatna
Town 571 107, Mysuru District.

12. Sri.Manja Nayaka,
Chiru Shree Agri Equipments,
Hunasekuppe Road, BM Road,
Periyapatna Town-571 107.

13. Sri.Kumar,
Annapurna Xerox, Hunasekuppe Road,
BM Road, Periyapatna Town-571 107,
Mysuru District.

14. Sri.Faruk, The Proprietor,
Friends Corner, Hunasekuppe Road,
BM Road, Periyapatna Town-571 107.

15. The Secretary,
Vishwa Manava Sauharda Sahakari
Nigama, Hunasekuppe Road, BM Road,
Periyapatna Town-571 107.

***(D1,7, 8, 10,12 & 14 by Sri.CKM
D2, 3 to 6, 9, 11 & 15 ex parte).***

:ORDER ON PRELIMINARY ISSUE (Issue-4):

Suit is for partition and separate possession of
plaintiff's half share in the suit properties i.e., houses
and shops situated at BM road, Periyapatna Town.

2. Facts in brief; Siddalingappa and
Puttalingammanni died leaving behind deceased
Shivashankar (husband of D3 and father of D4),

Chennabasappa (P), Shivananda (D2), Somashekhara (D1), Gowaramabha (D5) and Subhadra (D6). There was no partition in respect of agricultural lands, as such the defendant-2 herein filed OS.No.47/17 on the file of Senior Civil Judge, Periyapatna which was decreed allotting 1/6th share each to the children of Siddalingappa. In said suits the present schedule properties were not included because it was orally divided among the brothers wherein plaintiff and defendant-1 agreed to receive the rents and other defendants have consented the same.

Under mutual consent the plaintiff & defendant-1 decided to take half share each in the suit properties and same is consented by other defendants. But defendant-1 is not giving any share in the rents and not allotted half share. Hence, suit is filed.

3. Defendant-1 filed written statement, wherein he

admits the relationship and also filing of OS.No.47/17. Denying other averments he contended that; suit is hit by the principles of Order 2 Rule 2 CPC, as the schedule properties were not included in OS.No.47/17 wherein the present plaintiff was defendant-3 and filed written statement seeking partition of properties involved in that suit. He contended that during pendency of said suit oral partition was entered between them in respect of present schedule properties, which were allotted to his (D1) share with consent of brothers and sisters including plaintiff, due to this reason the plaintiff herein has not sought any share in the suit properties herein in the earlier litigation (OS.No.47/17). Among these grounds he prayed to dismiss the suit.

4. Following issues arise for consideration;

ISSUES

1. *Whether plaintiff proves that the suit*

properties are joint family properties?

2. *Whether defendant-1 proves that the suit is not maintainable under Order 2 Rule 2 CPC?*

3. *Whether suit is bad for non-joinder of necessary parties?*

4. *Whether suit is bad for non-inclusion of all properties available for partition?*

5. *Whether plaintiff proves that he is entitled for partition and separate possession of half share in the suit properties?*

6. *What order or decree?*

Issue-2 is treated as preliminary issue & matter was heard regarding said issue.

5. Answer to the issue-2 is as under for the following;

REASONS

6. Issue-2: At the outset; suit is filed for partition and separate possession of plaintiff's half share in the suit properties i.e., houses and shops situated at Periyapatna Town.

7. Plaintiff asserted that; there was oral partition in respect of suit properties in which half share each was

allotted to him and defendant-1, due to this reason suit properties were not included in previous litigation OS.No.47/17. Whereas, defendant-1 contended that; under oral partition entire suit properties herein were allotted to him and same was consented by his brothers and sisters including the plaintiff.

8. Defendant-1 specifically contended that; suit is hit by the provision Order 2 Rule 2 CPC because the present suit properties were not included in OS.No.47/17 which was filed in respect of agricultural lands and same was decreed allotting 1/6th share each to the children of deceased Siddalingappa.

9. It is true that the present suit properties were not the subject matter of suit OS.No.47/17. It is well settled that in a suit for partition all properties available for partition should be included and partial partition is not maintainable.

10. It is worth to note that; the object of *Order 2 Rule 2 CPC* is to prevent multiplicity of suit. The cardinal principle is that a person shall not be vexed twice, on the same cause of action. The term cause of action which gives rise to action which gives occasion for and forms the foundation to the suit. If that cause enables a person to ask for a larger and wider relief than that to which he limits his claim, he cannot afterwards seek to recover the balance by an independent proceedings. It is a technical bar and has to be established satisfactorily. The bar cannot be presumed. There is no question of applying Order 2, Rule 2 when the cause of action for the suit is different from the cause of action in the earlier suit. The Rule does not preclude a second suit based on a distinct cause of action.

11. Earlier suit was filed by Shivananda (D2 herein) and the present plaintiff was defendant-3 therein.

12. The assertion of plaintiff and the contention of defendant-1 stated *supra* depict that; here, both are claiming that there was an oral partition in the family in respect of present suit properties. Plaintiff claims that in said oral partition half share each was allotted to him and defendant-1 with consent of others. ***Per contra,*** defendant-1 contended that; entire suit properties were allotted to him with consent of others. Plaintiff says that because of oral partition in respect of suit properties the said properties were not included in the previous litigation.

13. In the background of factual matrix at hand coupled with the bare reading of plaint averments and the specific defence raised by the defendant-1 this Court is of the opinion that; to decide whether there was oral partition in the family in respect of suit properties or not and whether the cause of action for

the earlier suit and the present suit are same; a full-fledged trial is warranted. In the given set of facts the issue regarding application of provision Order 2 Rule 2 CPC cannot be adjudicated at the thresh hold as a preliminary issue. Hence, keeping open the said contention parties are directed to conduct the trial. Accordingly, proceeds to pass the following;

ORDER

Adjudication of issue-2 is deferred and same will be considered along with the merits of suit.

(Dictated to the Stenographer and transcribed by him, corrected and initialed by me and then pronounced in the open Court on 23.02.24).

sd/-
(A.SAMIULLA)
Senior Civil Judge
Periyapatna.