

**ORDERS ON I.A No.9**

This is an application filed by the respondent No.1 under Sec.151 of CPC to direct the petitioner to include item No.8 and 10 properties as mentioned in the application for adjudication. I.A No.9 is supported by an affidavit sworn to by the respondent No.1.

2. The petitioner has filed objection opposing I.A No.9.

3. Having heard, the following **POINTS** that would arise for my determination is:

***1. Whether the I.A No.9 filed by the respondent No.1 under Sec.151 of CPC for directing the petitioner to include the properties in the preliminary decree is deserves to be allowed ?***

4. My answer to the above **POINT** is in the **NEGATIVE** for the following:-

**REASONS**

5. Admittedly, the petitioners herein have filed a suit for partition in O.S No.316/1996 before this court which came to be decreed in part on 25.09.2006 granting 1/3rd share to the petitioner herein item No.1 to 3 and 1/6th share in item No.4 to 8 properties. Aggrieved by the said judgment

and preliminary decree, the respondents have preferred appeal in R.A No.382/2006 before the Hon'ble Presiding Officer of FTC IV at Mysuru which came to be dismissed. However, the Hon'ble Appellate Court has modified the quantum of share allotted to the plaintiffs granting 1/3rd share to the plaintiffs in all suit schedule properties. Now the petitioner has filed this petition under Order 20 Rule 18 of CPC for separation of shares in terms of preliminary decree and to draw final decree.

6. The record reveals that this court has forwarded the preliminary decree to the Tahsildar, T.Narasipura Taluk for making separation of shares of parties in terms of preliminary decree in R.A No.382/2006 in respect of item No.1 to 7 landed properties. As far as the house property is concerned, Advocate P.Sathisha was appointed as court commissioner for separation of share of parties in terms of preliminary decree. The court commissioners have submitted their reports for having separated the shares of parties in terms of preliminary decree.

7. Now the respondent No.1 has come up with the present application to include 02 landed properties to the preliminary decree. According to him, the proposed item No.9 and 10 properties to be included in the preliminary decree are the ancestral joint family properties and they are liable for partition between parties to the petition. Now the question to

be seen is whether it is permissible for this court to include the proposed properties to the preliminary decree which are not subject matter of the suit. In this connection it is opposite to refer the judgment of Hon'ble High Court of Karnataka reported in 2014(3) KCCR 2214 in the case of Channaveerappagowda V/s Renukappagowda and others. Wherein the Hon'ble High Court having considered the said question has held as under:

“However, this principle cannot be extended to include a property which was not the subject matter of the suit, at the time of passing of the preliminary decree. Variation of shares already declared in the property which is the subject matter of the suit is totally different from varying the subject matter of the suit. The reason being that what is the share to which a party to a suit is entitled to in law is purely a question of law, whereas a share in a property is dependent on the nature of the property which is purely a question of fact, which is to be decided on the facts and circumstances of the case based on the evidence adduced. Therefore, once a preliminary decree is passed in respect of the subject matter of the suit, question of including or adding a property to the subject matter of the suit subsequently and claiming a share in respect of the property so included or added is not permissible in law. In respect of the said property a separate suit is maintainable, if sufficient cause is shown for its exclusion in the earlier suit for partition. However, on the

ground final decree is not yet passed, the said property cannot be included in the suit after passing of the preliminary decree or a second preliminary decree cannot be passed nor can it be the subject matter of final decree proceedings. Further, if a property which was not the subject matter of a suit, were to be included at the stage of Final Decree Proceedings, evidence has to be recorded to decide whether it is a Joint Family Property or not and if the parties to the suit have share therein or not. By chance if a property belonging to the Joint family could not be included in the suit, a second suit for partition of the property so left out is not maintainable. But if there are acceptable reasons for not including the property in the suit, a second suit for its partition would still be maintainable. The Court would also have no such power even U/s 153 of CPC to include a property suo moto. A suit ordinarily means a Civil proceeding instituted by presenting a plaint.”

In view of the decision supra, it is not permissible for the court to include one more item of property to the preliminary decree which was not the subject matter of the suit. In the case on hand, the proposed properties were not subject matter of the suit. Hence, it is not permissible to include the said properties to the preliminary decree for adjudication. Hence, the application of respondent No.1 is devoid of merit. Hence, it is liable to be rejected. Accordingly,

the above **POINT** is held in the **NEGATIVE**, in the result, the following:-

**ORDER**

I.A No.9 filed by the respondent  
No.1 under Sec.151 of CPC is hereby  
rejected.

Call on 23.10.2018

**Sr. Civil Judge & JMFC,  
T.Narasipura.**