

IN THE COURT OF ADDL. SENIOR CIVIL JUDGE AND
JMFC-I AT: RAICHUR

PRESENT: S.R. PARADESHI, B.Com. LL.B(Spl),
Addl. Sr. Civil Judge & JMFC-I, Raichur.

O.S No: 224/2015

DATED THIS 29TH DAY OF SEPTEMBER, 2018

Plaintiffs: 1. Archanna W/o Shivram,
Age; 32 years, Occ; Conductor,
r/o Kalamala village, Now residing at
Askihal, tq. & dist., Raichur.

2. Nagartana W/o Anjeneya,
Age; 30 years, Occ; Household,
R/o Govt. Quarter, KPC, Shaktinagar.
(By Sri. S.A.K., Advocate)

//Versus //

Defendants: 1. Shivabasamma @ Sarswati
W/o Gangappa Bagli, Age; 45 years,
Occ; Household, R/o Kalmal village.

2. Jothi D/o Gangappa Bagali,
Age; 20 years, Occ; Student,

3. Naveen Kumar S/o Ganagappa Bagali,
Age; 15 years, Occ; Student,

4. Sudeep Kumar S/o Gangappa Bagali,
Age; 13 years, Occ; Student,
All are resident at Kalmal village.
The defendant No.3 and 4 are minors
hence through natural guardian their
mother Shivabasamma @ Sarswati
i.e., defendant No.1.

(D-1 to 4 By Sri.G.A.G., Advocate)

Date of Institution of the suit.	02.12.2015
Nature of the suit.	Suit for partition, separate possession and declaration
Date of the commencement of recording of the evidence.	06.07.2018
Date on which the Judgment was pronounced.	29.08.2018
Total Duration	Year/s Month/s Day/s 02 08 27

(S.R. PARADESHI,)
Addl.Sr. Civil Judge, Raichur.

JUDGMENT

The plaintiff No.1 and 2 filed this suit against the defendants No.1 to 4 for partition and separate possession, to declare that they are entitled half share in the suit properties land Sy.No.199/2 measuring 1 acre 33 guntas, land Sy.No.199/1 measuring 1 acre 21 guntas, land Sy.No.291/1 measuring 7 acres 33 guntas, land Sy.No.49/3 measuring 4 acre 4 guntas and land Sy.No.49/2 measuring 9 acres 19 guntas situated at Kalmala village and House bearing panchyat No. 6-75 and 6-76 situated at above village.

2. Brief facts of the plaintiff's case is as under;

That, one Budeppa s/o Narasappa Bagali @ Narasanna died in the month of December 2014. The said Budeppa has a daughter by name Mahalaxmi @ Parvathamma, who died about 20 years back, leaving behind her daughter by name Archana and Nagaratana i.e., plaintiffs in this case. The said Budeppa has also a son by name Ganagappa Bagali has died in the month of November 2014 having behind his wife defendant No.1 and a daughter and two sons who are the defendant No.1 to 4 in this case. The said Budeppa was owning ancestral above landed and a house properties.

It is further contended that, the mother of the plaintiffs was given in marriage to one Venkoba resident of Kappal village. It is further contended that after death of their mother the said Budeppa being a maternal grand father brought up them and provided education to them. It further pleaded that the plaintiffs and defendants are being legal heirs succeeded the suit properties of said Budeppa. The said Budeppa, plaintiffs and defendants were/are enjoying the suit properties as their joint family properties. The said Budeppa, Gangappa and their mother are died during the

jointness of the family, there is no partition of properties till today.

It is further pleaded that, after the death of Budeppa some difference of opinion, the plaintiffs are unable to continue with the joint family. So, they have started demanding the defendant No.1 to effect the partition and allot their share in the suit properties. Even the panchayat was conveyed in the village, in the first week of February 2015, but the defendant No.1 refused to effect the partition. It is further contended that, the defendant No.1 is trying to alienate the suit properties with an intention to grab the properties. It is further contended that, the defendants are getting net annual income of Rs.10 lakhs every year. Hence, they have filed this suit.

3. After service of summons the defendants No.1 to 4 appeared through their counsels and filed the written statement.

The brief facts of the written statements are as under; The defendants admitted about the death of Budeppa s/o Narsappa Bagali. It is also admitted that said Budeppa has a son by name Gangappa, who died a year back. It is also

admitted that the mother of plaintiffs by name Mahalaxmi @ Paaravatamma was given in marriage to one Vendoba r/o Kapgal village and she died about more than 20 years back. But it is stated that the defendants are the class-I heirs and successors to his estate. It is further contended that, the said Budeppa was owning the suit schedule-A and B properties and they were his absolute properties. It is further pleaded that, after death of Mahahlxmi these plaintiffs are not brought-up by the said Budeppa as contended by the plaintiffs. It is further pleaded that in-fact at the time of marriage of Mahalaxmi, she was given gold and cash in lieu of her share in the suit scheduled properties. The said Mahalaxmi died prior to coming into force of Hindu succession Amended Act, 2005 as such, the right has not accrued to the plaintiffs at any time to claim the share in the suit scheduled properties, hence suit of the plaintiff is not maintainable. It is further contended that, there is no cause of action arouse to the plaintiffs to file this suit. Hence, on other grounds prayed for to dismiss the suit.

4. On the basis of the above pleadings of the parties, the following issues are framed;

- 1) Whether the defendants prove that, the mother of plaintiffs was given told and cash in lieu of her share in the suit schedule properties during her marriage?
 - 2) Whether the plaintiffs are entitled half share in suit schedule properties?
 - 3) Whether the plaintiffs entitled of Rs.5,00,000/- per annum as means profit from defendants?
 - 4) Whether the suit is properly valued and court fee paid is sufficient?
 - 5) Whether the plaintiffs are entitled for the relief sought for?
 - 6) What order or decree?
5. The plaintiff No.1 is examined as PW.1 and got marked Ex.P.1 to 7 and closed her side.

The defendant No.1 is examined as DW.1 and got marked any documents and in support of her case led evidence of DW.2 and closed their side

6 Heard arguments.

7. My answer to above issues are as under;

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|------------|---|------------------------------------|
| Issue No.1 | : | Does not survive for consideration |
| Issue No.2 | : | In the Negative. |
| Issue No.3 | : | In the Negative. |
| Issue No.4 | : | In the Affirmative. |
| Issue No.5 | : | In the Negative. |
| Issue No.6 | : | As per final order |

for the following;

REASONS

8. Issue No.1 to 3 & 5:- It is not in dispute that, Budeppa s/o Narappa had a wife Aiyyamma and both had a daughter by name Mahalaxmi and also had son by name Gangappa. It is also not in dispute that the present plaintiffs are the daughters of said Mahalaxmi. It is also not in dispute that, defendant No.1 is the wife deceased Gangappa and defendant No.2 to 4 children of defendant No.1 and deceased Gangappa. It is also not in dispute that mother of the plaintiffs has given in marriage to one Venkoba r/o Kapgal village and she died about more than 20 years back. It is also not in dispute that the said Budeppa died in the month of December 2014. It is also not in dispute that son of Budeppa by name Gangappa died in the month of November 2014.

9. By going through above facts that the married daughter of the Budeppa died more than 20 years back. The son of Gangappa died one month before of the death of his father Budeppa. As per the evidence of the plaintiff, the said Budeppa was owning ancestral landed properties as mentioned in the plaint. The learned advocate for the

defendant submitted the plaint has not disclosed about entire facts in detail. He further argued that the plaintiffs in their plaint nor in their evidence stated that who is propositior of the family and from whom the said Budeppa inherited properties. Only it is mentioned that, the said Budeppa was owning ancestral properties. He also argued that, as per order 6 rule 1 cpc., the parties must set-forth sufficient factual details so as to understand other party what is the case of the plaintiff. By perusing the plaint, they have not pleaded that from whom the said Budeppa had succeed the properties. Apart from this, the DW.1 in her cross-examination, it is suggested that the suit properties are the properties are belongs to her father-in-law. So, in my opinion, the plaintiffs themselves not sure whether the suit properties are the ancestral property or the self acquired property of the said Budeppa.

10. The defendants in their written statement has pleaded that the said Budeppa was owning the suit schedule-A and B properties and they were his absolute properties. It is further pleaded that, in fact at the time of marriage of Mahalaxmi she was given gold and cash in lieu of her share

in the suit scheduled properties. The said Mahalaxmi died prior to coming into force of Hindu succession Amended Act 2005 as such, the right has not accrued to the plaintiffs at any time to claim the share in the suit scheduled properties, hence suit of the plaintiff is not maintainable. In my opinion, it is the social obligation of everyone's father who has to discharge this obligation.

11. The learned advocate for the defendant argued that said Mahalaxmi died prior to coming into force of Hindu succession Amended Act 2005 as such, the right has not accrued to the plaintiffs at any time to claim the share in the suit scheduled properties, hence suit of the plaintiff is not maintainable. On the other hand, advocate for the plaintiff argued that said act is not applicable to the present facts of the case. On one count the plaintiffs have stated that the suit scheduled properties are the ancestral property of the said Budeppa and plaintiff in her evidence, she specifically deposed that, the suit properties are the ancestral property. As I have discussed above that in the cross-examination of D.W.1 suggested that, it is absolute property of the her father-in-law. So, the learned advocate

has argued that the pleadings are insufficient and it is not possible to know what exact case of the plaintiff. For this advocate for the defendant relied upon the ruling reported in AIR 2012 SC 2010 (A.Shanmugam Vs. A.K.R.V.M.N.P. Sangam) wherein it is held that, “(C) Civil P.C. (5 of 1908), O.6, R.1 –The pleadings must set-forth sufficient factual details to the extent that it reduces the ability to put forward a false or exaggerated claim or defence. The pleadings must inspire confidence and credibility. If false averments, evasive denials or false denials are introduced, then the Court must carefully look into it while deciding a case and insist that those who approach the Court must approach it with clean hands.

12. The learned advocate for the defendant further argued that the initial burden of the proof is on the plaintiffs and after discharging his burden the onus proof lies on the defendant to prove his case. For this, he relied upon the ruling reported in AIR 2006 SC 1971 (Anil Rishi Vs. Gurubaksh Singh) wherein it is held that, the initial burden of proof would be on the plaintiff in view of section 101. The elementary rule is section 101 inflexible. In the terms of

section 102 the initial onus is always on the plaintiff and if he discharges that onus and makes out a case which entitles him to a relief, the onus shifts to the defendant to prove those circumstances, if any which would dis-entitle the plaintiff to the same. Under section 111 when one party stands to other in a position of active confidence the burden of proving good faith would be on the party who in a position of active confidence. But before such a finding is arrived at, the averments as regard alleged fiduciary relationship must be established before a presumption of undue influence against a person in position of active confidence is drawn. The factum of active confidence should also been established.

13. On the other hand the learned advocate for the plaintiffs submitted that section 103 of Evidence Act is applicable because the defendant in their written statement has taken contention that it is self acquired property of the said Budeppa. But in my opinion it is the plaintiff came to court that the suit properties are the ancestral properties of the said Budeppa. As I have already discussed above that the plaintiffs themselves not certain whether the suit

scheduled properties are the ancestral property of the said Budeppa or his self acquired property.

14. After coming into force of Hindu Succession Act, 2005 Sec.6 was amended. As per this amended Act, where a Hindu dies after the commencement of the Hindu Succession (Amendment) Act, 2005 (39 of 2005), his interest in the property of a Joint Hindu family governed by the Mitakshara law, shall devolve by testamentary or intestate succession, as the case may be, under this Act and not by survivorship, and the co-parcenary property shall be deemed to have been divided as if a partition had taken place and,- As per Sec.3 (a) the daughter is allotted the same share as is allotted to a son. In th present facts of the case, the daughter by name Mahalaxmi who was married and died about 22 years aback.

15. I have relied upon the ruling reported in Civil Appeal No.1933 of 2009 of Hon'ble Supreme Court dated 19.04.2018Mangammal@ Thulasi and Anr., Vs., T.B. Raju & Ors.,wherein it is held as under;

“10) Moreover, under Section 29-A of the Act, legislature has used the word “the daughter of a co-parcener”. Here, the

implication of such wordings mean both the co-parcener as well as daughter should be alive to reap the benefits of this provision at the time of commencement of the Amendment of 1989. The similar issue came up for the consideration before this Court in *Prakash & Ors. vs. 8 Phulavati & Ors.*, (2016) 2 SCC 36, this Court while dealing with the identical matter held at Para 23 as under:-

23. Accordingly, we hold that the rights under the amendment are applicable to living daughters of living co-parceners as on 9 th September, 2005 irrespective of when such daughters are born.....”(emphasis supplied by us) It is pertinent to note here that recently, this Court in *Danamma @ Suman Surpur & Anr. Vs. Amar & Ors*, 2018 (1) Scale 657 dealt, inter-alia, with the dispute of daughter’s right in the ancestral property. In the above case, father of the daughter died in 2001, yet court permitted the daughter to claim the right in ancestral property in view of the amendment in 2005. On a perusal of the judgment and after having regard to the peculiar facts of the *Danamma* (supra), it is evident that the Division Bench of this Court primarily did not deal with the issue of death of the father rather it was mainly related to the question of law whether daughter who born prior to 2005 amendment would be entitled to claim a share

in ancestral property or not? In such circumstances, in our view, Prakash & Ors. (supra), would still hold precedent on the issue of death of co-parcener for the purpose of right of daughter in ancestral property. Shortly put, only living daughters of living coparceners would be entitled to claim a share in the ancestral property.

16. In view of this ruling the plaintiffs are not entitled for any relief as suit itself is not maintainable. Hence, I have answered the issues No.2, 3 & 5 in the Negative and issue No.1 does not survive for consideration.

17. Issue No-4:- Learned advocate for the defendants have contended that, the plaintiffs have not valued the suit property properly and the court fee paid by them is insufficient. On the other hand, the plaintiff has assessed the value of the suit property as Rs.10 lakhs and their half share is Rs.5 lakhs and on that value, they have paid the court fee. In order to show that, its valuation is more than Rs.10 lakhs no documents are produced nor led any evidence. Accordingly, I answer the issue No.4 in the Affirmative.

18. Issue No-6:- For the foregoing reasons, I proceed to pass the following;

ORDER

The suit of the plaintiff is hereby dismissed. No order as to costs.

Draw decree accordingly.

(Dictated to the stenographer, typed by him on computer, corrected, initialed and then pronounced by me in the open court on this 29th day of September, 2018)

(S.R. PARADESHI,)

Addl.Sr. Civil Judge, Raichur.

ANNEXURE

WITNESSES EXAMINED FOR THE PLAINTIFF:

PW.1 :Smt. Archana W/o Shivaram

WITNESSES EXAMINED FOR THE DEFENDANTS:

DW.1 :Smt. Shivabasamma W/o Gangappa Bagali

DW.2 :Smt. Chandravathi W/o late Bheemanna

DOCUMENTS MARKED FOR THE PLAINTIFF:

Ex.P.1 to 5 :Khasara Pahanis

Ex.P6 &7 :Pramana patra

DOCUMENTS MARKED FOR THE DEFENDANTS:

- NIL -

Addl. Senior Civil Judge & CJM,
Raichur.