

**IN THE COURT OF CIVIL JUDGE AND JMFC, KORATAGERE
AT KORATAGERE**

Dated this the **31st day of October 2019**

PRESENT :

Smt. Vidyalaxmi Bhat,

BA., LL.B.(Hons), LL.M.

Civil Judge & JMFC,
Koratagere.

O.S.No.01/2007

Plaintiffs :

1. Smt. Savithramma D/o Krishnamurthy
@ Papanna W/o Prasanna,
aged about 41 years,
Muslim street, Koratagere Town.
2. Smt. Kamalamma D/o Late Krishnamurthy @
Papanna W/o T.S.Gangadharaiah,
aged about 48 years,
Gokula Extension, Mudlapanne,
Koratagere Town.
3. Smt. Rukmanamma @ Rukkamma
D/o Late Krishnamurthy @ Papanna,
W/o Ramakrishnappa,
aged about 39 years,
Gokula Extension,
Madhugiri Road, Koratagere Town.
4. Smt. Mangalamma D/o Late Krishnamurthy
@ Papanna, aged about 37 years,
Gokula Extension, Mudlapanne,
Koratagere Town.

(By Sri H.Krishnamurthy, Advocate)

Versus

- Defendants :**
1. Venkataswamy S/o Late Krishnamurthy @ Papanna, aged about 45 years,
Behind Police Quarters,
Gokula Extension, Koratagere Town.
 2. Rajanna S/o Late Krishnamurthy @ Papanna, aged about 35 years,
A.C personal jeep driver,
A.C. Quarters, Tiptur Town,
Tumakuru District.
Since dead by his L.Rs,

D-2(a) Smt. Pushpa W/o Late Rajanna, aged about 42 years,

D-2(b) Pooja D/o Late Rajanna, aged about 18 years,

D-2(c) Vinay S/o Late Rajanna, aged about 15 years,

(a) to (c) L.Rs are R/o behind D.C. Quarters, Sira Gate, Tumakuru Town.

D-2(d) Rajalakshmi @ Lakshmi W/o Late Ashok, aged about 26 years,

D-2(e) Kishore S/o Late Rajanna, aged about 24 years,
4th and 5th opponents are
R/o Gundlahally, Dodderi Hobli, Madhugiri Taluk.
 3. Smt. Ramakka W/o Late Krishnamurthy @ Papanna, aged about 70 years,
Behind Police Quarters,
Gokula Extension, Koratagere Town.

(D-1 : By Sri A.M.K, Advocate)
(D-2(a) & (b)(c) : By Sri H.B.G.K, Advocate)
(D-2(e) : By Sri S.R, Advocate)
(D-2(d) & 3 : Absent on court notice)

Date of institution of the suit	:	02.01.2007		
Nature of the suit	:	Partition and separate possession		
Date of commencement of recording of evidence	:	07.08.2007		
Date on which the judgment was pronounced	:	31.10.2019		
Total duration	:	Year/s	Month's	Day's
		12	09	29

- : J U D G M E N T :-

This suit is filed by the plaintiffs against the defendants seeking the relief of partition and separate possession of plaintiffs' 1/7th share in the suit schedule properties and for costs.

2. The factual matrix of plaint is as under :

The plaintiff No. 1 to 4 are the daughters of one Krishnamurthy @ Papanna, and defendant No.1 and 2 are his sons. 3Rd defendant is wife of said Krishnamurthy @ Papanna. The suit schedule properties are ancestral joint family properties of plaintiffs and defendants. Suit item No.2 to 4 was allotted to said Krishnamurthy in the partition entered between himself and his

brothers. Suit item No.1 is self acquired property of said Krishnamurthy @ Papanna from the joint family nucleus. The suit item No.4 in Sy.No. 2 to 7, measuring 1 acre was sold by him and defendant No.1 and 2 by forming sites to different persons for the welfare of joint family. Therefore, in the plaint it is stated that suit item No.4 is not available for partition and it has to be deleted. After the death of Krishnamurthy @ Papanna, plaintiffs and defendants are in joint possession and enjoyment of the suit schedule properties and 1st defendant is the Manager of the same. Then it is stated that there is no partition between plaintiffs and defendants, khatha and pahani of suit schedule properties are in the name of Krishnamurthy @ Papanna. Then it is stated that defendants have no exclusive right over the suit schedule properties, but they are trying to enjoy the usufructs of the trees by denying the shares of plaintiffs. On all these grounds, they prayed to decree the suit.

3. The plaint came to be amended several times and there are several amended plaints can be found in the file. To contradict the case of plaintiffs, defendant No.1 has filed his written statement and denied all material averments in the plaint except

relationship. He contended that Krishnamurthy @ Papanna who is father of defendant No.1 and 2 has given two sites to 3rd plaintiff by means of Will as her share. Further 19 sites formed in suit survey numbers have been sold to different persons and they are in possession of the same. Some of the purchaser who are named in the written statement have even constructed houses in those sites. It is also stated that plaintiff No.3 has constructed a house in one of those sites and it is in her control. Since 1991 onwards, sites are sold. Therefore, suit is barred for non-joinder of necessary parties. They also contended that the suit is bad for non-inclusion of some other properties and the sites which have been given to plaintiffs are sold by plaintiffs themselves. In para-11 of written statement, 1st defendant contended that in suit item No.3, 3rd defendant has sold four sites and 2nd defendant sold five sites and in suit item No.2, one Siddappa S/o Chikkanarayanappa has purchased 5 guntas from Krishnamurthy @ Papanna and he has constructed a house and residing therein. Therefore, suit is bad for non-joinder of necessary parties and other properties. On all these grounds, he prayed to dismiss the suit.

4. 2nd defendant has filed his separate written statement and admitted all the plaint averments. He prayed for decree of the suit and also sought for allotting his share in the suit schedule properties.

5. Defendant No.3 has not filed separate written statement.

6. On the basis of the above said pleadings, my learned Predecessor-in-office has framed the following issues and additional issues :

ISSUES :

- i) Whether the plaintiffs prove that they are entitled for 1/7th share each in all the suit schedule properties ?
- ii) What order or decree ?

ADDITIONAL ISSUES :

- i) Whether the defendants No.1 and 3 prove the previous partition as alleged in para-8 of written statement ?
- ii. Whether the suit is bad for non-joinder of necessary parties ?
- iii. Whether the suit is bad for partial partition ?

7. In order to prove their case, the 1st plaintiff got examined herself as PW-1 and got marked documents at Ex.P-1 to Ex.P-5

and one witness examined as PW-2 on behalf of plaintiffs and plaintiffs closed their side. In order to defend their case, defendant No.1 got examined himself as DW-1 and did not mark any documents.

8. On appreciating above pleadings, documents and oral evidence, my learned Predecessor-in-office has decreed the suit of the plaintiffs and allotted 1/7th share each to plaintiffs in the suit schedule properties. Accordingly, preliminary decree was drawn. The said judgment was challenged by 1st defendant in R.A.No.15/2009. On appreciating the evidence and pleadings the said appeal was allowed and judgment passed in the above case was set-aside by order dated 17.11.2017 and the case was remanded to this court with direction to accord opportunity to defendant No.1 to tender himself for cross-examination and after providing opportunity to both sides to lead their evidence and dispose of the suit afresh in accordance with law.

9. The case file was received by this court on 06.12.2017 and parties were directed to appear before the court on 06.12.2017. On the said date, the Presiding Officer was on leave and therefore

the case was posted on 20.01.2018. On the said date, both sides were absent. Thereafter the case was listed before the court on 09.02.2018 and 28.02.2018. On both the dates both parties and counsel were absent. Therefore, on 28.02.2018 in the order sheet it is mentioned that sufficient opportunity is given to tender DW-1 for cross-examination, but the parties are not interested in proceedings with the claim. Therefore, cross of DW-1 was taken as closed and case was posted for arguments. Several opportunities were given to both the parties to argue the case, but there was no representation. But, on 20.03.2018 counsel for defendant No.1 and 3 who represented the suit had filed Memo seeking to retire from the case for want of instructions. The said memo was taken on record and court notice was issued to defendant No.1 to 3 though the memo was filed only for defendant No.1 and 3. Thereafter, 1st defendant is represented through counsel and plaintiffs are also represented by counsel. L.Rs of 2nd defendant have come on record and they have been represented by counsel. 3Rd defendant was duly served with court notice and she remained absent on the date of hearing. Then the case is proceeded with.

10. Heard both sides and perused the materials available on record.

11. On hearing, perusal of records, and evaluation of evidence my findings to the above issues are as under :

Issue No.i ; Partly in the affirmative,
Addl. Issue No.i ; In the Negative,
Addl. Issue No.ii ; In the Negative,
Addl. Issue No.iii ; In the Negative,
Issue No.ii ; As per final order
for the following :

-: R E A S O N S :-

12. Addl. Issue No.i to iii : Since in these three issues, burden is on the defendant No.1 and 3 to prove previous partition, non-jonder of necessary parties and partial partition alleged by them, I have taken these three issues first for consideration. The very contention that there was previous partition or prior partition in the family gives an indication that suit schedule properties were joint family properties. In the case on hand, in para-8 of written statement, defendant No.1 and 3 have taken contention that Krishnamurthy @ Papanna had given two sites to 3rd plaintiff by way of Will as her share. Further in suit survey numbers 19 sites

are formed and sold to different persons and those different persons have not been impleaded to the suit, as such suit is bad for non-joinder of necessary parties. Further it is contended that in the site which is given to 3rd plaintiff, she has also constructed house and it is in her control and those sites which are given to plaintiffs have not been added in the above suit and therefore, suit is bad for partial partition. It is further pleaded that defendant No.1 and 2 who are sons of Krishnamurthy @ Papanna are living separately after the death of their father. In fact there is no specific defence in the written statement either in para No.8 or in other paragraphs with respect to partition between plaintiffs and defendants with respect to suit schedule properties. No doubt, plea of separate residence is stated in the defence. It is necessary to mention that mere plea of separate residence is not enough to hold that there was prior partition. The 1st defendant who went on appeal and got the case remanded majorly on the ground that he was not given sufficient opportunity to tender himself for cross-examination and considering that fact the case was remanded to this court, even after remand, he has not chosen to enter witness box and tender himself for cross-examination. Therefore, all those

defences which are taken by him in his written statement has remained as defence alone and not proved by evidence. It is true that his chief examination affidavit is available on record, but without subjecting himself for cross-examination it cannot be considered as complete evidence. Therefore, on the basis of chief examination affidavit which has not went through the scrutiny of cross-examination, I am not inclined to hold that there was prior partition between the parties as alleged. Neither there is oral evidence nor is there any document in support of contention of the defendants. Therefore, in my considered view neither the defence of prior partition nor the defence of non-joinder of necessary parties and partial partition have been proved by defendant No.1 and 3. Therefore, I hold all the three additional issues in the **'Negative'**.

13. Issue No.i : In this issue, burden is on the plaintiffs to prove that they are entitled to 1/7th share in all the suit schedule properties. To hold that plaintiffs are entitled to such share, firstly nature of the properties has to be decided, secondly date of death of father of plaintiffs has to be seen and the law applicable to the case on hand has to be looked into. It is necessary to notice that

there are 4 items in plaint schedule. All of them are landed properties. In item No.2, which is landed property, also includes house properties. In the plaint itself, at para No.2 plaintiffs contended that suit item No.4 which is land in Sy.No.47/1A-P3 measuring 1 acre situated at Mudlapanne village, Kasaba Hobli, has been sold for the benefit of the joint family and therefore, the said property is not available for partition. It is also stated in the plaint itself that the said item No.4 has to be deleted from the plaint schedule. However, that item is not deleted, but found in the plaint schedule. Since according to plaintiffs themselves, suit item No. 4 is not available for partition, there is no need to look into the nature of this property and whether plaintiffs are entitled to share in item No.4. For the reasons mentioned above, suit with respect to item No.4 will have to be dismissed as not available for partition.

14. The remaining three items of the suit schedule properties are item No.1 to 3. According to plaintiffs, they are entitled to 1/7th share in it. To prove their case, 1st plaintiff herself was examined as PW-1. She re-iterated plaint averments in her chief

examination. She has produced genealogical tree at Ex.P-1. The said document is not in dispute.

15. At Ex.P-2 plaintiffs have produced RTC extracts for the year 2005 to 2007 with respect to suit item No.1, i.e. land in Sy.No. 27/1 measuring 2 acres 27 guntas. The said property as on the date of the suit stood in the name of Krishnamurthy @ Papanna. It shows the same has been purchased by him by way of sale. In the plaint it is stated that out of the joint family nucleus the said property is purchased. There is no contrary document and evidence to this averment. Therefore, it will have to be held that suit item No.1 is proved to be ancestral and joint family property of plaintiffs and defendants.

16. Suit item No.2 is land in Sy.No.34/1 measuring 1 acre 1 gunta out of 6 acres 23 guntas. Ex.P-3 is RTC of the said property for the year 2006-07. In the RTC extract the name of Krishnamurthy @ Papanna is found along with different other persons. According to plaintiffs 1 acre 1 gunta of land belongs to their father. But, in the RTC produced by them there is no specific extent of 1 acre 1 gunta standing in the name of Krishnamurthy @

Papanna. There are names of several persons in the said property. But, to come to specific conclusion that Krishnamurthy @ Papanna actually had 1 acre 1 gunta in the said property, there is no document available. Therefore, in the opinion of this court with respect to suit item No.2, there is no specific document, which show the share of Krishnamurthy @ Papanna is 1 acre 1 gunta as stated in the plaint. Though there is no dispute by the defendants with respect to nature of this property as joint family property since the plaintiffs are unable to establish before this court, that the specific extent mentioned in the plaint belongs to their father in the said land, this court cannot grant the relief of partition with respect to that property. If relief of partition is granted with respect to the said land, in which no specific extent is shown against the name of Krishnamurthy @ Papanna, certainly there will be confusion at the spot. Therefore, in my opinion partition cannot be granted in ambiguity and hence the relief with respect to the said property cannot be granted in the above case for want of documents.

17. Suit item No.3 is the land in Sy.No.37/1A measuring 10 guntas. To show that said property is ancestral property, plaintiffs

have produced RTC extract at Ex.P-4. In respect of said land for the year 2005-06 in which name of Krishnamurthy @ Papanna along with K.N.Sreenivasaiah S/o Narasaiah, K.V. Sreeramaiah S/o Lakshamma and one Lingamma W/o Chamanna is found to an extent of 1 acre 3 guntas. According to plaintiffs only about 10 guntas of land belongs to Krishnamurthy @ Papanna. But, to show how only 10 guntas is the share of Krishnamurthy @ Papanna, no document is produced. Moreover, plaintiffs are not sure about the extent of 10 guntas also. Because, in the plaint schedule they have mentioned about 10 guntas. It is necessary to notice the relief of partition cannot be given when there is no specific share allotted to the father of the plaintiffs. Further all those persons whose name is found in the R.T.C of Sy.No. 37/1A-P1 are not parties to this suit. What is the claim of those persons is not known to the court. Therefore, it is not proper to grant the relief of partition even with respect to item No.3. Hence, suit will have to be dismissed for suit item No.2 to 4.

18. Having come to the conclusion that it is only suit item No.1 in which this court can grant relief of partition, now the allotment of shares have to be made. As mentioned above, in

Hindu law, to apply the law of succession which is applicable to the parties, date of death of propositus is necessary pre-requirement. In the case on hand, neither in plaint nor in defence the date of death of Krishnamurthy @ Papanna is mentioned. The only available evidence on record with respect to the date of death of Krishnamurthy @ Papanna, is the cross-examination of PW-2. Even Appellate court while remanding the case has mentioned about the fact that date of death of propositus is not mentioned in pleadings. In the cross-examination of PW-2 she has deposed that Krishnamurthy @ Papanna died prior to 8 to 10 years of the date of her giving evidence. The said evidence was recorded on 01.01.2008. If that date is taken into consideration, approximately Krishnamurthy @ Papanna died somewhere in 1998 to 2000, i.e., prior to Hindu succession (Amendment) Act, 2005. There is no contrary evidence on record to dispute the date of death. Therefore, the evidence of PW-2 can be safely relied upon. She deposed as under :

'ವಾದಿಯ ತಂದೆಯವರನ್ನು ನೋಡಿದ್ದೆ. ಅವರು ತೀರಿಕೊಂಡು 8 ರಿಂದ 10 ವರ್ಷವಾಗಿದೆ. '

On the basis of this evidence it can be inferred that Krishnamurthy @ Papanna died prior to amendment Act of 2005 and plaintiffs were not coparceners on that date. They have become coparceners only from the date of amendment. Therefore, the law applicable to them is the one prevailing prior to amendment. Since I have come to the conclusion that only suit item No.1 is ancestral property, it is Sec.6 of Hindu Succession Act, which has to be made applicable to the case on hand. As such, on the principle of notional partition plaintiffs are entitled to $1/21^{\text{st}}$ share each in suit item No.1 and defendant No.1 and 2 who are sons of Krishnamurthy @ Papanna are entitled to $8/21^{\text{st}}$ share each. Defendant No.3 who is wife of Krishnamurthy @ Papanna is entitled to one share in the share of her husband. Therefore, the share of 3^{rd} defendant Ramakka W/o Krishnamurthy @ Papanna is $1/21^{\text{st}}$ in suit item No.1. As mentioned above suit with respect to item No.2 to 4 will have to be dismissed. Having regard to close relationship between the parties and partial success of plaintiffs in claiming the relief of partition it is proper only if the parties bear their costs of the suit. Hence, I hold this issue **'Partly in the affirmative.'**

19. Issue No.ii : For the reasonings and findings given to above issues, I proceed to pass the following :

ORDER

The suit of the plaintiffs for partition and separate possession is hereby partly decreed.

It is held that plaintiff No.1 to 4 are entitled to 1/21st share each in suit item No.1.

It is further held that the defendant No.1 is entitled to 8/21st share and L.Rs of defendant No.2 together are entitled to 8/21st share of Rajanna in suit item No.1.

It is further held that 3rd defendant is entitled to 1/21st share in suit item No.1.

Suit with respect to item No.2 to 4 is hereby dismissed.

No order as to costs.

Draw preliminary decree accordingly.

(Dictated to the Stenographer, directly computerized by him, then corrected, printout taken, signed by me and then pronounced in the open court on this the **31st day of October 2019**)

(Smt. Vidyalaxmi Bhat)
Civil Judge & JMFC,
Koratagere.

ANNEXURE**List of witnesses examined on behalf of the plaintiff :**

PW.1 - Savithramma

PW.2 - Kamalamma

List of documents marked on behalf of the plaintiff :

Ex.P.1 - Genealogical tree

Ex.P-2 - C.C of RTC extract of Sy.No.27/1

Ex.P.3 - C.C. of RTC extract of Sy.No. 34/1

Ex.P-4 - C.C. of RTC extract nof Sy.No. 37/1AP1

Ex.P-5 - C.C. of RTC extract of Sy.No.47/1AP2

List of witnesses examined on behalf of the defendants:

DW.1 - Venkataswamy

List of documents marked on behalf of the defendants:

- N I L -

(Smt. Vidyalaxmi Bhat)

Civil Judge & JMFC,
Koratagere.

31.10.2019

Plaintiffs : By HKM,

D-1 : By Sri A.M.K,

D-2(e) : By Sri S.R,

D-2(a) & (b) : By Sri H.B.G.K,

D-3 : Absent on court notice,

For Judgment,

(Vide separate judgment pronounced in
the open court. Operative portion reads as
under)

ORDER

The suit of the plaintiffs for
partition and separate possession
is hereby partly decreed.

It is held that plaintiff No.1
to 4 are entitled to 1/21st share
each in suit item No.1.

It is further held that the
defendant No.1 is entitled to
8/21st share and L.Rs of
defendant No.2 together are
entitled to 8/21st share of Rajanna
in suit item No.1.

It is further held that 3rd
defendant is entitled to 1/21st
share in suit item No.1.

Suit with respect to item
No.2 to 4 is hereby dismissed.

No order as to costs.

Draw preliminary decree
accordingly.

Civil Judge & JMFC,
Koratagere.

