

ORDERS

This order arises out of an application filed on behalf of Respondent No.1 under Order XX Rule 18 R/W Section 151 of the Code of Civil Procedure seeking for an order of modification of preliminary decree in respect of Sy.No. 256/16, Sy.No. 265/1, Sy.No. 266/1, Sy.No. 263/2, Sy.No. 263/4, Sy.No. 247/5 and Sy.No. 244/10K of Belambar Village of Ankola Taluk.

2. It is stated in an accompanying affidavit sworn in by Respondent No.1 that the plaintiff had admitted in OS.No.5/14 that the legal heirs of Mangu Gouda, Nagu Gouda and Naynu Gouda have 1/3rd share right in the suit schedule properties and also had admitted that there was no partition by metes and bounds and this Court passed the preliminary decree declaring that the plaintiff is entitled for 4/9th share, defendants No. 3 to 9 are collectively entitled for 4/9th share and defendants No. 10 and 11 are entitled for 1/9th share in 1/3rd share of their branch but the shares of defendant no.1/respondent no.1 and defendant no.2/respondent no.2 have not been declared.

3. It is further stated that watap takta prepared and report submitted by the commissioner shows that the shares of plaintiff and defendants no. 3 to 11 are divided in all the suit properties excluding the 1/3rd share each of defendant no.1 and 2 which is in violation of the order of this Court. Further averred that the name of respondent no.1 is appearing in record of rights in respect of Sl.No.4, 6, 9, 11 and 15 of suit properties and the name of the purchaser Anil Mohan Kamat is shown as kabjedar to the extent

of 1/3rd right in respect of sl.no. 1 to 3, 5, 10, 12 to 14 of the suit properties.

4. It is further contended that this court had ordered for demarcation of the suit properties but it is difficult to show actual location of the house and possession of the parties. Hence, prays to allow the said application declaring the 1/3rd share of defendant no.1 in the aforesaid properties.

5. Per contra, objections came to be filed on behalf of the petitioner resisting the said application as not maintainable and contended that the respondent no.1 and 2 sold some of the properties to one Sarawati Anandrao Kamat and the 1/3rd share of the petitioner is also sold to the Saraswati Kamat which were brought to the notice of this Court in original suit and by considering the same, this court had declared 4/9th share in the suit properties and also contended that this court cannot go behind preliminary decree and the facts contended by the defendant no.1 has to be proved by filing separate suit. If the said application is allowed petitioner will be put into hardship, hence prays for dismissal of the same.

6. On perusal of the judgment and decree passed in OS.No. 5/2014, it can be seen that the main propositus was one by name Beera Gouda who had 4 sons by name Soma(died issueless), Mangu, Nagu and Naynu. Defendant no.1 is representing the branch of Mangu, defendant no.2 represented the branch of Naynu and plaintiff and defendants no.3 to 11 representing the

branch of Nagu Beera Gouda. Admittedly, there was no partition among them by metes and bounds and this Court after considering the materials on record declared $4/9^{\text{th}}$ share to plaintiff, $4/9^{\text{th}}$ share together for defendant no.3 to 9 and $1/9^{\text{th}}$ share together for defendant no. 10 and 11 in $1/3^{\text{rd}}$ share of their branch. It can be very well ascertained from the said judgment that all the said three branches had got $1/3^{\text{rd}}$ share. Hence, it is very clear that defendant no. 1 and 2 being the legal heirs of deceased sons are also entitled for $1/3^{\text{rd}}$ share in the suit schedule properties though the same has not been declared in operative partition of the said judgment.

7. This Court in pursuance of the said preliminary decree appointed ADLR as commissioner for demarcation of the suit properties wherein commissioner submitted its report along with watap takta and PT sheet wherein it can be seen from the said watap takta and PT sheet that only shares of plaintiff and defendants no.3 to 11 are shown excluding the $1/3^{\text{rd}}$ share of defendant no.1 and 2 which is not in accordance. Hence, being aggrieved by the same, the said application came to be filed on behalf of respondent no.1.

8. The Counsel for respondent no.1 also relied upon the decision reported in 2021 (5) KCCR 481 passed by Hon'ble High Court of Karnataka wherein it has been held that where there is no dispute with respect to the joint family members as well as joint family properties, then executing court in final decree

proceedings can determine the shares of each branch of the family.

9. In the present case also, there is absolutely no dispute with respect of the same and during arguments also, the counsel for the petitioner submitted that this court can declare the share and send back the records for demarcation of plaintiff's 4/9th share. Hence, relying upon the aforesaid decision and submissions made by respective counsels, there is no impediment on this Court to determine the share of the defendant no.1/respondent no.1 and 2/respondent no.2.

10. But the respondent no.1 has sought to determine for her 1/3rd share only in suit properties item no.4, 6 to 9, 11 and 15 by stating that her 1/3rd share in other remaining properties have been sold out. But, admittedly purchaser/s have not been made parties either in the original suit nor in the final decree proceedings. But this Court can take the notice of the same to protect the interest of the purchaser also. Admittedly, no doubt 1/3rd share of respondent no.1 and 2 in respect of the sold out properties will go to the purchaser but if this court determines the share of 1/3rd of defendant no.1 only in respect of the suit properties mentioned in the said application and after the demarcation of the same, then the purchaser will be deprived of his portion. It will be difficult for him to show his location. Hence to avoid any hurdles or multiplicity of the proceedings, it is necessary to show 1/3rd share each of respondent no.1 as well as respondent no.2 in other suit properties also or else the

purchaser will be put into the hardship which may lead to multiplicity of proceedings.

11. On the aforesaid observations, this Court proceeds to determine that defendant no.1/respondent no.1 and defendant no.2/respondent no.2 are also entitled for their 1/3rd share each in all the suit properties. Though the purchasers are not added as parties but the rights of the purchasers have to be protected as they are entitled for 1/3rd shares of their vendor . It is made clear that plaintiff is entitled for 4/9th share, defendants no.3 to 9 are collectively entitled for 4/9th share, defendant no.10 and 11 are collectively entitled for 1/9th share and defendant no.1 and 2 are entitled for 1/3rd share each in the suit properties. But admittedly, the commissioner has not shown the portions of the defendants no. 1 and 2 of their 1/3rd share each in its commission report which needs to be rejected for proper demarcation. On all these observations, this Court proceeds to pass the following order -

ORDER

The commission report submitted by the commissioner along with watap takta and PT sheet is hereby rejected since the same is not in accordance.

Office is hereby directed to send back the entire records and re issue commission warrant for fresh demarcation of the suit properties as

per this order and submit the report at the earliest by demarcating the suit properties properly by showing the possession and houses of the respective parties including the portions of defendant no.1 and 2 in all the suit schedule properties.

Accordingly, issue commission warrant if PF paid.

Call on – 02/08/2023.

Sd/-

Addl. Civil Judge, Ankola.