

**IN THE COURT OF THE PRL. CIVIL JUDGE & JMFC AT  
HONAVAR**

PRESENT: SRI MADHUKARA P. BHAGAWATH .K  
M.Com., LL.B.,  
Prl. Civil Judge & JMFC., Honavar

**Original Suit No. 91/2010**

Dated on this the 23<sup>rd</sup> day of June, 2018

**Plaintiff :**

Irayya Rama Naik,  
Aged about 72 years, Agriculturist,  
R/o.Hosad Village, Tq.Honavar.

(By Sri.G.V.B. Advocate)

**//Vs.//**

**Defendants:**

1. L.Rs of Rama Rama Naik

1(a) Late Anant Rama Naik,

Since deceased through his L.Rs:

1(aa) Shri Manjunatha Ananta Naik,

Aged about 23 years,

Agriculturist,

1(ab) Shri.Krishna Ananta Naik,

Aged about 20 years,

- 1(ac) Smt. Kamala Kom Ananta Naik,  
Aged about 35 years,  
All are R/o. Doddakeri,  
Olagadde Board Gallu, Po.: Malgadde,  
Tq.Soraba, Dist: Shimoga.
- 1(b) Smt.Mohini Kom Mablu Naik,  
Aged about 55 years,  
R/o.Hadinbal Village Hadgeri,  
Tq.Honavar.
- 1(c) Manjunath Rama Naik,  
Aged about 42 years, Hotel Gokul,  
Kaikini Road, Karwar.
- 1(d) Smt.Revati Timmappa Naik,  
Aged about 38 years,  
R/o.Mudkani, Tq.Honavar.
- 1(e) Dharma Rama Naik,  
Aged about 36 years, Mitra Samaj Hotel,  
Court Road, Karwar.
- 1(f) Ishwar Rama Naik,  
Aged about 32 years, Gokul Hotel,  
Kaikini Road, Karwar.

2. Hanumant Rama Naik,  
Since deceased by his LRs:

2(a) UFM Venkatraman Hanumant Naik,  
Since deceased by his LRs:

2(aa) Smt. Savitri Kom Venkatraman Naik,  
Major,

2(ab) Smt. Hemavati D/o. Venkatraman Naik,  
Aged about 21 years,

2(ac) Sri.Dattatreya S/o. Venkatraman Naik,  
Aged about 20 years,

2(ad) Kalavati D/o. Venkatraman Naik,  
Aged about 18 years,  
All are R/o.Behind Adhitya Hotel,  
Sirsi Town, Sirsi.

2(b) Smt. Sannamma Kom Hanumanth Naik,  
Aged about 60 years,  
R/o.Amatehalla, Tq.Sagar.

2(c) Smt. Parvati Kom Madev Naik,  
Aged about 25 years,  
R/o.Hosad, Honavar Tq.,  
Now at Honnesar, Soraba Tq.,  
Shimogga Dist.

3. Narayan Ram Naik,  
Since deceased by his LRs:

3(a) Ganapati Narayan Naik,  
Aged about 40 years,

3(b) Sadanand Narayan Naik,  
Aged about 35 years,

3(c) Seetaram Narayan Naik,  
Aged about 38 years,

All are R/o. Hosad, Tq.Honavar.

3(d) Biliyamma Kom Nagesh Naik,  
Aged about 50 years,  
R/o.Tadadi, Tq.Kumta.

4. Mahadev Rama Naik,  
Major,

5. UFM Vittal Mahabal Naik,  
Major,

6. Dharma Mahabal Naik,  
Major,

7. Maruti Mahabal Naik,  
Major,  
All are R/o.Hosad, Tq.Honavar.

8. UFM Keshav Laxman Naik,  
Major,

9. Neelakantha Laxman Naik,  
Major,

All are R/o. Mavinkurva,  
Tq.Honavar.

10. Smt.Kannu Kom Venkat Naik,  
Since deceased by her L.R:

10(a) Smt.Gouri Kom Subba Naik,  
Major, R/o.Nagare,  
Honavar Tq.

11. Smt.Devi Kom Kari Naik,  
Since deceased by her LR:

11(a) Mohan Ganapayya Naik,  
Aged about 30 years, R/o.Aneelgod,  
Tq.Honavar.

11(b) Laxmi Kom Hanumant Naik,  
Aged about 35 years,  
R/o.Mahime Village paiki Aanehonda,  
Tq.Honavar.

12. Smt.Bhagirati Kom Ramachandra Naik,  
R/o.Mururu, Kumta Tq.

13. Smt.Savitri Mahabal Naik,  
Major,

14. Smt. Saraswati Mahabal Naik,  
Major,  
All are R/o.Hosad, Honavar Tq.

15. Smt. Seete Kom Gopal Naik,  
Major, R/o.Nathageri,  
Honavar Tq.

16. Smt.Nagamma Kom Mahabal Naik,  
Aged about 55 years, R/o.Mavinkurva,  
Tq.Honavar.

Since deceased by LRs

Who are already on record as defendant No.5,6,7 and  
D.13 to 16.

{D-1(aa), D-1(ab), D-1(ac),D-1(c), D-1(e),  
D-1(f) by Sri.D.A.K, Advocate}

{D-3(ac), D-4 by Sri.G.G.B, Advocate}

D-1(ad), D-2(a) to D-2(d), D-3(b),  
D-3(d), D-5 to D-9, D-2(ad), D-10(a),  
D-11(a), D-11(b), D-12 to D-15 are  
exparte.

**: ORDERS ON PRELIMINARY ISSUES :**

By this suit, plaintiff sought for declaration of judgment and decree in O.S.No.184/1998 on the file of Prl.Civil Judge and JMFC., is obtained by fraud against him and the Court and also to set aside the

same and declare that the said judgment and decree is not binding on him.

2. Brief facts of the suit are as follows:-

According to plaintiff, late Rama Ganapayya Naik and his wife late Biliyamma had 9 children out of which 3 were females and other six were male children. He is the son of late Sanmagu 3<sup>rd</sup> daughter of Rama Ganapayya Naik. Defendant No.1(aa) and defendant No.1(ab) are the grand sons of Rama Ganapayya Naik, born to his pre-diseased son Ananth and Kamala {D-1(ac)}. Defendant No.1(b) to 1(f) are other children of late Rama i.e the 5<sup>th</sup> son of Rama Ganapayya Naik. Late Hanumanth, the 3<sup>rd</sup> son of Rama Ganapayya Naik had wife by name Sannamma and a son Venkatramana and a daughter Parvati. Venkatramana is no more and his wife and children are defendant No.2(aa) and defendant No.2(ab), defendant No.2(ac) and defendant No.2(ad) respectively. Narayana, the 4<sup>th</sup> son of Rama Ganapayya Naik is no more and defendant No.3(a) to 3(d) are his legal representatives. Mahadev (Defendant No.4) is only the sole survivor amongst the children of Rama Ganapayya Naik. Mahabala, the elder son of Rama Ganapayya Naik is no more and defendant No.5 to 7, 12, 13 and 14 are his legal representatives. Laxmana, the 2<sup>nd</sup> son of Rama

Ganapayya Naik is also no more and defendant No.8, 9 and 15 are his legal representatives. Kanu, the elder daughter of Rama Ganapayya Naik is no more and defendant No.10(a) is the daughter of Kanu. Devi the 2<sup>nd</sup> daughter of Rama Ganapayya Naik is no more and defendant No.11(a) and 11(b) are her legal representatives. The 5<sup>th</sup> son of late Rama Ganapayya Naik was given in adoption to Subbi W/o.Devappa Naik as she was the sister of Biliyamma. Thereafter, defendant No.5 was residing as adopted son of Devappa Naik and Subbi. As his father was not properly maintaining his family, late Rama Ganapayya Naik called his mother Sannmagu and was looking after her and the plaintiff. Due to foresight for the sake of his daughter late Rama Ganapayya Naik had orally given 1/6<sup>th</sup> share in his self acquired property along with his other 5 male children. After death of Rama Ganapayya Naik and his son Laxmana (2<sup>nd</sup> son), his other 4 male children along with Laxman's wife and children had given application for mutation and accordingly 1/6<sup>th</sup> share was jointly allotted to all the applicants. When this being the circumstance, Rama, the 5<sup>th</sup> son of Rama Ganapayya Naik had filed a suit for partition numbered O.S 184/1988 in the file of Prl.Civil Judge and JMFC., Honavar. It was unanimously held by all the defendants that in the said suit they would appoint one Advocate at Honavar Court's. As one Vittala (D-5)

the son of late Mahabala was educated, he was entrusted with the responsibility in respect of the said suit. As such, this plaintiff did not participate in the said suit, but said Vittala to make the wrongful gain and defraud the other defendants of that suit had suppressed the information of land granted by Land Tribunal and managed to get decree in favour of the plaintiff in that suit. Thereafter, Vittala informed that the suit is dismissed in favour of defendants. As the RTC extracts did not change, this plaintiff had reason to believe the words of Vittala. Accordingly, no appeal was preferred against the said judgment. Based on the judgment and decree passed in O.S 184/1988, the plaintiffs there, filed final decree proceedings in the same Court numbered FDP 16/2007 against this plaintiff and others. When the wife of Narayana by name Shivamma shown the notice served on them in FDP 16/2007, this plaintiff learnt that the said suit was decreed against him. Thereafter, in an appeal preferred against the said FDP in appeal No.6/2009, the said appeal was also dismissed by the appellate Court. As the knowledge of judgment and decree in O.S 184/1988 was gained on 17-01-2008 for the first time, this suit is filed by the plaintiff without any other remedy left out to him.

3. In this suit defendant No.1(c) and defendant No.3(c) have filed their written statement. The written statement filed by defendant No.3(c) is adopted by defendant No.3(a) and defendant No.4. Defendant No.3(c) Seetarama in his written statement has particularly denied the fact that Rama Rama Naik {father of defendant No.1( c)} was given in adoption to Subbi W/o.Devendara Naik. He further denied that the plaintiff's mother has got 1/6<sup>th</sup> share in the self acquired property of Rama Ganapayya Naik. He also denied that there was oral partition between the 5 sons and plaintiff's mother. He admits the suit No.184/1988 was decreed in favour of defendant No.1 and contended that defendant No.1 is the family member of Rama Ganapayya Naik. Further he also contended that Hanumantha Rama Naik had two wives one Sannamma and another Smt.Devi. Devi had 4 male children and 2 female children who are not brought on record in this suit. He prays for dismissal of this suit.

4. Defendant No.1(c) has also admitted that the suit No.184/1988 was decreed in favour of his father Rama Rama Naik. He contended that this suit brought by plaintiff after 12 years of judgment and decree in O.S.No.184/1988 is bared by law of limitation and also on the principles of Resjudicata. He contended that the

material assertions of the plaintiff in this suit was directly and substantially in issue in the said suit between the same parties. He also contended that in O.S No.184/1988 it is held that defendant No.1 is a co-parcener of the family of Rama Ganapayya Naik. The rest of allegations made by the plaintiff stating that his mother was given 1/6<sup>th</sup> share in the self acquired property of Rama Ganapayya Naik by oral partition is specifically denied. The filing of FDP No.16/2007 and R.A 6/2009 is admitted by this defendant. He further denied the assertion of the plaintiff that on 17-01-2008 he had knowledge of judgment and decree passed in O.S 184/1988 for the first time and contended that this suit is bared by law of limitation and liable to be dismissed.

5. On going through the pleadings of both parties, the following issues were framed by my predecessor in Office.

1. Whether the plaintiff proves that defendants in O.S 184/88 have obtained the judgment and decree in their favour by playing fraud on the part of the court and same is not binding on the plaintiff with respect to his 1/6<sup>th</sup> share?
2. Whether the defendants prove that suit is barred by limitation?

3. Whether the defendants further prove that suit is barred by principles of Res-judicata?
4. Whether plaintiff entitled to the relief as sought for?
5. What order or decree?

6. As the issue No. 2 and 3 relates to maintainability of this suit, it was taken up for hearing as preliminary issue. The Order 14 Rule 2 CPC requires that when the Court is of opinion that the case may be disposed off on issue of law only, then it may try that issue first, until the settlement of other issues. In this suit plaintiff has lead his evidence and also the documents from Ex.P.1 to Ex.P.14 was marked. As issue No. 2 and 3 in my opinion pertains to an issue which could be disposed off on question of law only, it was heard in order to determine the following issues.

**7. Issue No. 2:** Whether the defendants prove that suit is barred by limitation?

**Issue No. 3:** Whether the defendants further prove that suit is barred by principles of Res-judicata?

8. My answer to the above issues are in the affirmative for issue No.2 and issue No.3 does not survive for consideration for following:-

### **REASONS**

9. **Issue No.2:** In support of plaintiffs assertion, the counsel has vehemently argued that the suit filed by the plaintiff is within the law of limitation and in accordance with Article 59 of the limitation Act 1963. He specifically argued that the plaintiff gained knowledge of judgment and decree in O.S.No.184/1988 for the first time on 17-01-2008 when the wife of Narayana (4<sup>th</sup> son of Rama Ganapayya Naik) shown him the notice served on them in FDP 16/2007 and thereafter, he had obtained the copy of judgment and decree and had filed his objections in FDP and said objections were over ruled. Then, the order of lower Court was upheld by appellant Court in R.A 6/2009. Therefore, the plaintiff has filed this suit. He further argued that in O.S 184/1988 all the defendants of that suit including this plaintiff had entrusted responsibility of defending the suit to one Vittala (D-5), but the said Vittala having colluded with the plaintiff of that case (defendant No.1 of this case) had suppressed the information in respect of land granted by Land Tribunal in favour of plaintiffs mother and others, accordingly the said suit went in favour of the plaintiff.

But, the said Vittala assured that suit was ended in favour of defendants. As the RTC extracts did not change, the plaintiff had no reason to disbelieve the words of Vittala stating that the suit was dismissed in favour of this plaintiff. Much was argued that as per Article 59 of limitation Act to set aside the decree, the period of limitation would be 3 years from the date of knowledge and from 17-01-2008 till the filing of this suit i.e. 10-12-2010 3 years have not been lapsed and accordingly, this suit is maintainable.

10. Per contra, the learned counsel for contesting defendants argued that the person referred by the plaintiff in this case who is defendant No.5 (Vittala S/o.Mahabala Naik) is none other than the person who was also defendant No.4 in O.S 184/1988 and this plaintiff was defendant No.11. As such, the plaintiff of this case being defendant No.11 in O.S 184/1988 having adopted the W.S filed by the contesting defendants therein cannot claim that he had no knowledge of judgment and decree in O.S 184/1988. As such, the plaintiff shall be estopped to deny the said fact. He further argued that, the assertion of plaintiff that the said Vittala has committed fraud on him and favoured the plaintiff in that case is only with the intention to harass the contesting defendants of this case. He further argued that

when the plaintiff has not preferred any appeal against the judgment and decree in O.S 184/1988, the said decree is binding on him and has reached the finality and 2<sup>nd</sup> suit to defeat the interest of contesting defendants after laps of 12 years from the date of the said decree is not maintainable, as barred by law of limitation. He further argued that the present case in hand would be within the purview of the Article 113 of the limitation Act 1963 and the right to suit would have accrued immediately within prescribed period of filing the appeal against the judgment and decree passed in O.S 184/1988.

11. In this case, before starting the discussion on the point of limitation, it is just and necessary to state the admitted facts in this suit. The parties herein have admitted the passing of judgment and decree in O.S 184/1988. However, Ex.P.1 (judgment in O.S 184/1988) reveals that it was pronounced on 15-03-2000. Ex.P.2 (decree) reveals that it was signed on 21-03-2000. The filing of FDP 16/2007 and appeal against the said FDP in R.A 6/2009 are also admitted. Ex.P.8 and Ex.P.9 also reveals the said fact.

12. By these admissions, it is certain that the plaintiff herein was defendant No.11 in O.S 184/1988 and the respondent No.11 in FDP 16/2007 and the appellant in R.A 6/2009. On going through the

contents of Ex.P.1, Ex.P.8 and Ex.P.9 it is certain that plaintiff (defendant No.11 in O.S 184/1988) has adopted the W.S filed by defendant No.1 in that suit. He had also filed his objections in FDP 16/2007 and also had preferred an appeal in R.A 6/2009. The contents of Ex.P.9 para 11 reveals that plaintiff has admitted therein that he has not filed written statement but contested the suit along with defendant No.1 to 3 and defendant No.4 to 6 on faith. He also contended therein that defendant No.1 to 6 have not properly contested the suit. But, in this suit plaintiff has put forth the new version which was not taken in R.A 6/2009. In this suit the blame is on defendant No.5 (Vittala) that he colluded with the plaintiffs in that suit. This stand is first taken up in this suit after filing of Regular Appeal against the Final Decree Proceedings. As the appearance of this plaintiff in O.S 184/1988 is admitted, it can not be said that he had no knowledge of judgment and decree in O.S 184/1988. Though he might not have filed his written statement, he was represented by Counsel and memo for adoption of W.S of defendant No.1 by this plaintiff is admitted therein. However, it is admitted that no appeal against O.S 184/1988 is filed and as such, the said judgment and decree has reached its finality.

13. In this suit, during arguments, counsel for plaintiff argued that the present facts of the case comes within purview of Article 59 of limitation Act and the counsel for contesting defendants argued that it comes within Article 113. As it is the argument of both the learned counsel for the plaintiff and the defendants in respect to issue No.2 that Article 59 of limitation Act has application to the present facts of the case, it is to note that the said Article provides to cancel or to set aside an instrument or decree or for the rescission of a contract, the period of limitation prescribed is 3 years when the decree first become known to plaintiff. The counsel for the contesting defendants has contended that Article 113 of limitation Act applies when any suit for which no period of limitation is prescribed else where in the schedule then 3 years when the right to sue-accrues. Both Articles provides period of limitation as 3 years. In the first Article, it is 3 years from the date of knowledge and in the later one when the right to sue-accrues. However, the knowledge of the plaintiff and his right to sue within 3 years is recognized. As the suit filed by the plaintiff is on the ground of fraud and to set aside the judgment and decree passed in the year 2000 i.e on 15-03-2000. Even if we take into account the aspect of knowledge of the plaintiff or that the right of plaintiff to sue it would be 3 years. Herein, it is specific assertion of the plaintiff that

he noticed the Final Decree Proceedings in F.D.P No.16/2007 for the first time on 17-01-2008, he had not filed any appeal against the judgment and decree passed in O.S 184/1988 till this date. He has also taken contention that the suit is not properly defended by the defendants in O.S 184/1988. But till this date, he has not taken any steps against the said defendants. Even there is also no allegation against defendant No.5 alone in R.A 6/2009 but, for the first time the said allegations are taken in this suit. This seems a step after thought. However, it is to take note that the plaintiff herein was also one of the contesting defendant who had adopted W.S of defendant No.1 in O.S 184/1988 as such, it is to presume that all the parties to the said suit had notice of judgment and decree passed therein and contrary to that needs to be proved by cogent and reliable evidence. However, the assertion of the plaintiff in this suit that defendant No.5 (Vittala) had committed fraud upon him is nothing but a self serving statement which is inadmissible U/sec.21 of Indian Evidence Act. It is also noticeable that no effective steps are been taken against the said Vittala till this date. When it is undisputed that suit was decreed in the year 2000 i.e. on 15-03-2000, the right to sue would have accrued by the time fixed for filing appeal against the said judgment and decree and now it is improper to file a separate suit when plaintiff

himself was defendant No.11 in O.S 184/1988 and more particularly when the judgment and decree passed in the former suit has reached its finality. However, from the date of said judgment and decree till the date of filing this suit 10 years have passed unexplained.

14. Last but not least, in this case the counsel for plaintiff has argued that on the basis of preliminary issues framed, he has adduce the evidence of plaintiff as PW.1 and has marked all the documents from Ex.P.1 to Ex.P.14 and the evidence so lead remained unchallenged due to non cross examination of PW.1. This argument does not holds good for the reason that the evidence so lead by a party need not always be subjected to cross examination in order to rebut the same but it may be left to the option of the adversary to point out the material point and evidence which he desires to rebut the evidence so lead. As such, the evidence so lead does not mean that it is unchallenged, the contesting defendants had got an opportunity to point out their point of argument. However, the document so marked in this case has aided this Court to come to right conclusion and to hold that the present suit filed by the plaintiff is beyond 3 years from the date of his deemed knowledge and beyond the right he accrued after judgment and decree. Therefore, for the above said reasons and

findings, I am of the opinion that this suit is barred by law of limitation and accordingly, issue No.2 is answered in the affirmative.

15. **Issue No.3**:- It is specific contention of defendant No.1(c) that the material assertion of the plaintiff in this suit was directly and substantially in issue in O.S No.184/1988 between the same parties of this suit. This contention of the defendant is categorically denied by the plaintiff counsel. However, it is to note that two issues were taken up for hearing as preliminary issues i.e. issue No.2 and issue No.3 and both are based on the point of maintainability of this suit, and if any of the issues are answered in the affirmative, then this suit would be dismissed holding suit as not maintainable. In this suit as issue No.2 is answered in the affirmative holding that this suit is barred by law of limitation then this suit shall be dismissed, as such, it is not necessary to go into the discussion related to issue No.3. Therefore, in view of my answer to issue No.2, this issue does not survives for consideration. Based on my findings on issue No.2, I proceed to pass following:

**: O R D E R :**

This suit is dismissed with costs as  
barred by law of limitation.

Draw decree accordingly.

(Dictated to the Typist directly on the computer, computerized by her, corrected and then pronounced by me in the open court on this **23<sup>rd</sup> day of June, 2018**).

**(MADHUKARA.P BHAGAWATH.K),  
Prl. Civil Judge & JMFC Honavar**

**: A N N E X U R E :**

**List of witnesses examined for Plaintiff:**

P.W. 1 : Irayya Rama Naik

**List of exhibits marked for Plaintiff:**

Ex.P.1 : Certified copy of Judgment in O.S 184/1988  
Ex.P.2 : Certified copy of decree in O.S 184/1988  
Ex.P.3 : Certified copy of Legal heirs register  
Ex.P.4 : Certified copy of M.E. No. 8499  
Ex.P.5 : Certified copy of Land Tribunal order  
Ex.P.6 : Certified copy of Form No.10  
Ex.P.7 : Certified copy of the M.E No. 726  
Ex.P.8 : Certified copy of the order in FDP 16/07  
Ex.P.9 : Certified copy of the Judgment in R.A No.6/09  
Ex.P.10 : Certified copy of the decree in R.A No.6/09  
Ex.P.11 : Notice  
Ex.P.12 : Office copy of the notice  
Ex.P.13 : Postal acknowledgement letter  
Ex.P.14 : Transfer Certificate of Rama Devappa Naik

**List of witnesses examined for Defendants: NIL**

**List of exhibits marked for Defendants: NIL**

**Prl. Civil Judge & JMFC  
Honavar**

