

KAUK710020172018



IN THE COURT OF PRL. CIVIL JUDGE & JMFC., KUMTA

PRESENT: Narendra B.R, B.Sc.LLB.
Prl.Civil Judge, Kumta

ORIGINAL SUIT NO.105/2018

Dated this 14th day of March, 2022

PLAINTIFF : 1. **Gopal Parameshwar Naik,**
Aged about 38 years, agriculturist,
R/at Kudavalli, Kallabbe,
Taluka Kumta.

(By Sri. B.S.U., Advocate)

// Vs. //

DEFENDANTS: 1. **Meera W/o Uday Naik,**
Aged about 48 years,
Agriculturist/Service,
R/at DRCS Office, GK Ram building,
Habbuvada, Tq: Karwar (UK)

2. **Kamalakar Parameshwar Naik,**
aged about 45 years, agriculturist,
R/at Kudavalli, Kallabbe,
Taluka Kumta.

3. **Rajesh Parameshwar Naik,**
aged about 42 years, agriculturist,
R/at Kudavalli, Kallabbe,
Taluka Kumta.

4. **Raghavendra Parameshwar Naik**,
 aged about 32 years,
 agriculturist/Private work,
 R/at Brigid Gardniyar, Agast Club,
 RBI Layout, JP Nagar, 8th Stage,
 Bengaluru-560 078.

(By Sri.R.A.H., Adv. For D.1 to 3)
(By Sri.SU., Adv.For D.4)

Date of Institution of the suit:	18-09-2018						
Nature of the suit:	Partition and separate possession						
Date of commencement of recording of evidence:	07-09-2019						
Date on which the judgment was pronounced:	14-03-2022						
Total Duration:	<table> <tbody> <tr> <td><u>Year/s</u></td> <td><u>Month/s</u></td> <td><u>Day/s</u></td> </tr> <tr> <td>03</td> <td>05</td> <td>24</td> </tr> </tbody> </table>	<u>Year/s</u>	<u>Month/s</u>	<u>Day/s</u>	03	05	24
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03	05	24					

Prl.Civil Judge.,Kumta.

J U D G M E N T

The plaintiff filed the preset suit against defendants seeking relief of partition and separate possession with respect of suit schedule properties.

2. **The brief facts of the case of the plaintiff case:-**

The plaintiff and defendants No.1 to 4 are the members of the joint family and the father of plaintiff by name Parameshwar Devappa Naik had two wives by name Madevi Parameshwar Naik and Revati Parameshwar Naik. The plaintiff and defendants No.1 to 3 are the children of Parameshwar Devappa Naik through first wife Mahadevi Parameshwar Naik, 4th defendant is the son born through 2nd wife Revati Parameshwar Naik. The suit properties are granted in favour of the family of plaintiff and defendants by the Land Tribunal and after all plaintiff and defendants acquired occupancy rights over the suit properties. After the grant in his favour, the plaintiff and defendants got changed Khata in his name and has been in possession and enjoyment of the suit schedule properties. The "B" schedule property is also joint family property of plaintiff and defendants. The plaintiff and defendants No.1 to 4 acquired right over the suit schedule properties through inheritance, after demise of their father. The annual income from the suit properties is approximately Rs.2 lakhs and defendant no 2 is enjoying the fruits derived from the suit properties. As such, plaintiff is constrained to file present suit seeking for partition and separate possession of his share in suit properties, since the defendants denied to effect partition of the properties.

3. Defendants appeared through counsels after service of summons and defendant No.1 to 3 filed their Written Statement separately and defendant No.4 filed his Written Statement separately. Defendants No.1 to 3 admitted relationship as stated in the plaint and also submitted no objections for division of share

as sought by plaintiff. The main contention raised by the defendant No.1 to 3 is that, the suit property bearing Survey No.181/1, measuring 00-08-00 situated at Kallabbe village is also joint family property and sought for inclusion. The suit is bad for non-inclusion of suit property. It is also contended that the record of rights discloses the mentioning of name of persons who have got right over the suit property and the suit of the plaintiff is not maintainable without bringing them on record. Further, it is also contended that defendant No.1 is ready to relinquished his share in favour of the defendant No.3 and sought for suitable order in that regard.

4. The defendants No.4 also filed Written Statement, wherein he has also sought for allotting his share in the suit properties. Based on the above said grounds, the defendants No.1 to 4 sought to pass suitable orders.

5. Based on the pleadings of both the parties, the below mentioned issues are framed by this Court:-

ISSUES

1. Whether the plaintiff proves that suit schedule properties are the joint family properties of himself and defendants?
2. Whether the plaintiff proves that defendant No.2 receives joint family income of Rs.2,00,000/- p.a, from the suit schedule properties?

3. Whether the defendants No.1 to 3 proves that suit is bad for non-inclusion of Sy.No.181/1 of Kallabbe village?
4. Whether the defendant No.1 proves that he is entitled to relinquish his share in favour of defendant No.3?
5. Whether the plaintiff and defendants are entitled for the relief of partition as sought for?
6. Whether the plaintiff is entitled for mesne profit? If so what extent?
7. What Order or Decree?

6. In order to substantiate his contention, plaintiff got examined as PW-1 and got marked Ex.P1 to P10. The defendants 4, 3, and 1 got examined as DW-1 to 3 respectively and no documents are marked on their behalf. The matter is posted for arguments.

7. Heard arguments of both side. Perused the materials on record.

8. On consideration of materials placed before Court, this Court answers issues as follows:

Issue No.1: In the **Affirmative**

Issue No.2: In the **Negative**

Issue No.3: In the **Negative**

Issue No.4: In the **Negative**

Issue No.5: In the **Affirmative**

Issue No.6: In the **Negative**

Issue No.7: As per final order,
for the following:

REASONS

9. **ISSUE NO.1:-** It is the contention of the plaintiff that the properties mentioned in suit schedule are joint family properties belonging to him and defendants. The said aspects do not appear to have been disputed by the defendants. The defendants also admitted the said contentions taken by the plaintiff. Further, the plaintiff furnished RTC extract belonging to suit schedule properties which are marked as Ex.P1 to P4. On perusal of RTC extracts, it discloses that the properties stand in the name of Parameshwar Devappa Naik who is the father of the plaintiff and defendants. In Ex.P-1, RTC extract pertaining to suit item No.1 property, column No.10 reveals that the nature of the property is ancestral property. Further column No.9 of Ex P- 2 to 4 reveals that the properties are granted in favour of Parameshwar Devappa Naik, who is father of the plaintiff and defendants. The aspect of grant is also mentioned in M.R extracts, which is marked as Ex.P6. On perusal of Ex.P6, it clearly disclose regarding grant made in favour of Devappa Jatti Naik who is father of Parameshwar Devappa Naik and grandfather of plaintiff and defendants. The properties mentioned in suit schedule item No.1 to 3 is also mentioned in Ex.P6. Further, the plaintiff also furnished M.R. extract, which is marked as Ex.P7, wherein the properties belonging to Devappa Jatti Naik devolved upon his heirs after his demise, is entered in the said documents. Ex.P8 is

M.R extract wherein the properties allotted to the share of legal heirs of Devappa Jatti Naik has been mentioned and the suit properties are being allotted to the share of Parameshwar Devappa Naik, who is father of plaintiff and defendants. The said documents clearly reveal that the suit properties are joint family properties of plaintiff and defendants. Ex.P8 clearly reveals that the suit properties have been allotted to the share of father of plaintiff and defendants by name Parameshwar Devappa Naik. The said entry in Ex.P8 is substantiated and corroborated by the recital of the Ex.P1 to P4. The documents furnished by the plaintiff clearly reveal that the properties are granted in favour of the Parameshwar Devappa Naik and they are joint family properties belonging to plaintiff and defendants. The said aspect do not appears to have been disputed either by the defendants No.1 to 3 or defendant No.4. The defendants have clearly admitted about the nature of the suit properties and also regarding right of plaintiff in the suit properties. There is due corroboration between oral and documentary evidence adduced by the plaintiff. In order to substantiate his contention, the plaintiff furnished Ex.P1 to P10 documents which also clearly disclose that the properties are joint family properties of plaintiff and defendants. The relationship between the parties is also not in dispute. The existence of joint family status between the plaintiff and defendants is admitted by defendants also and the documents furnished by plaintiff corroborate the said contention. As such, the plaintiff is succeeded in establishing existence of joint family status between him and defendants and that the suit properties

are joint family properties. Hence this Court answer **issue No.1 affirmative.**

10. **ISSUE NO.2 AND 6** : Since issue no 2 and 6 are interconnected with each other, they are taken up together for discussion in order to avoid repetition of facts.

11. It is the contention of the plaintiff that defendant No.2 receives income of Rs.2 lakhs per annum from the suit schedule properties and the same is utilized by him alone. The contention of plaintiff regarding income derived from the suit property is not substantiated by any material documents. Except oral contentions regarding the receipt of 2 lakhs income, the plaintiff not adduced any sufficient and satisfactory materials to show that Rs.2 lakhs is derived from the suit properties. During the course of cross examination of DW-1, suggestion is put forth to the witness stating that there is income of Rs.2 lakhs p.a. from the suit properties which aspect is denied by the witness. The materials that are placed by the plaintiff are not sufficient and satisfactory to substantiate his contention regarding the income derived from the suit properties. From the materials on record, the annual income derived from the suit properties is not forthcoming and it cannot be ascertained regarding the annual income that is derived from the suit property. The plaintiff failed to substantiate his contention about receipt of annual income of Rs 2 lakhs by defendant No.2. The plaintiff not produced cogent material either to show that income of Rs.2 lakhs from the suit properties or

receipt of the same by the defendant No.2. Primarily, the plaintiff has to establish that Rs 2 lakhs is derived from the suit properties and then, it can be ascertained whether the said income is received solely by defendant no 2 or not. But, the plaintiff not furnished any sufficient and satisfactory materials in order to show receipt of income of Rs 2 lakhs from the suit properties.

12. Apart from that it is the settled principle of law that in a joint family, possession of one is construed to be possession of all. The materials on record reveal that the properties are the joint family properties and possession of one of the parties is presumed to be possession on behalf of other parties. The plaintiff also contended regarding receipt of income of Rs 2 lakhs from the suit property which aspect is not substantiated by any materials. The said contention of plaintiff is not substantiated by corroborative materials. Except the averment in the plaint, no supportive material is placed before the court to consider the aspect of annual income derived from the suit property. Further, no materials are placed to consider that defendant no 2 alone is utilizing the income derived from the suit property. As stated above, in a joint family, possession of one is considered to be possession of all the members and in the present case, possession of defendant no 2 is considered to be possession for and on behalf of other members of joint family.

13. As per the definition of mesne profits, it is the profits which the person in wrongful possession of property actually

received or might have received. As per the definition, the question of mesne profits arises when the person is in wrongful possession of property and derives income from the property when he is in such wrongful possession. In the present case, the possession of defendant no 2, does not appear to be wrongful. The possession of defendant no 2 appears to be for and on behalf of joint family consisting of plaintiff and other defendants. The said aspect is substantiated by the materials placed on record. The possession of defendant no 2, cannot be considered as wrongful and as such, the question of mesne profit does not sustain for consideration. The question of mesne profits arises only when the person is in wrongful possession of the property. There is neither averment nor sufficient materials to consider that defendant no 2 is in wrongful possession of suit property. Under such circumstances, the question of determination of mesne profits does not sustain for consideration. Further, plaintiff also failed to establish the aspect of income derived from the suit property as contended by him. As the plaintiff failed to establish the aspect of income derived from the suit properties, the question of receipt of same by defendant no 2, do not sustain for consideration. The question of mesne profits also does not sustain for consideration since possession of properties by defendant no 2, cannot be considered as wrongful. It is incumbent on the part of plaintiff to establish the aspect of income derived from the suit properties but no sufficient and satisfactory materials are placed in order to ascertain the actual income derived from the suit properties. Under such circumstances, it cannot be considered that defendant no 2 is

receiving Rs 2 lakhs from the suit properties. Plaintiff failed to prove that Rs.2 lakhs income is derived from the suit properties and without proving the aspect of income derived from the suit properties, the receipt of the same by defendant No.2 does not sustain for consideration. No sufficient and satisfactory materials are placed before the court in order to consider the possession of defendant no 2 as wrongful. The question of mesne profits arise only when the possession is wrongly and profit is derived from such wrongful possession. As the possession of defendant no 2 cannot be considered to be wrongful and as the plaintiff failed to establish the aspect of receipt of income of Rs 2 lakhs from the suit properties by defendant no 2, the question of mesne profits does not sustain for consideration. On consideration of the said aspects this Court answers **issue No.2 and 6 in the negative.**

14. **ISSUE NO.3:-** Defendants No.1 to 3 specifically contended that the property bearing Survey No.181/1 situated at Kallabbe village is also joint family property belonging to plaintiff and defendants and the suit is barred for non-inclusion of suit property. In order to substantiate the said defence, the defendant not produced any material documents and during the cross of PW-1 also nothing is elicited from PW 1 to substantiate the said contention. Defendants could have produced RTC extract belonging to the said Survey number in order to show that the property omitted by the plaintiff is also joint family property. But defendant No.1 to 3 not at all produced any documents in order to show that the property bearing Survey No.181/1 of Kallabbe

village is also joint family property belonging to them. On perusal of Ex.P8, M.R. extract, it does not reveal regarding allotment of property bearing Sy no 181/1 of Kallabbe Village, as contented by defendant No.1 to 3, in favour of Parameshwar Devappa Naik, who is father of plaintiff and defendants. If at all the property mentioned in the Written Statement belonged to the joint family, then there might have been entry in that regard in Ex.P8, wherein the properties are allotted to the respective shares of legal heirs of deceased Parameshwar Devappa Naik. The entry in Ex.P8 does not reveal about allotment of property bearing Survey No.181/1 of Kallabbe village to the share of Parameshwar Devappa Naik, who is father of plaintiff and defendants. Defendant No.1 to 3 also not produced any material in order to substantiate the claim of non-inclusion as contended in their Written Statement. Primarily the burden is on defendant No.1 to 3 to show that property bearing Survey No.181/1 of Kallabbe village is also joint family property. The defendants failed to discharge said burden by producing cogent and substantive materials. In the cross examination of PW-1, suggestion is put-forth to the witness regarding the said aspect, but the same is denied by the PW-1. The contention of non-inclusion of property is raised by defendants No.1 to 3 and burden is on them to prove and substantiate their contentions. But defendants failed to substantiate said defence through cogent and substantial materials. Defendant No.1 to 3 not placed any sufficient and satisfactory material to consider the property bearing Survey No.181/1 of Kallabbe village is also joint family property and in the absence of satisfactory materials, the

contention of non-inclusion of said property cannot sustain for consideration. As defendant No.1 to 3 failed to prove that Survey No.181/1 of Kallabbe village is also joint family property, the question of non-conclusion of the same in the suit does not sustain for consideration. Defendant No.1 to 3 failed to substantiate their contentions that Survey No.181/1 of Kallabbe village is joint family property and in such circumstances, the suit of plaintiff cannot be considered as bad for non-inclusion of said property. As the said property is not proved to be joint family property, non-conclusion of the same, does not defeat the suit of the plaintiff. The suit of plaintiff cannot be considered as bad for non-inclusion of said property since the defendants have failed to substantiate and prove that Survey No.181/1 of Kallabbe village is also joint family property. Hence this Court answer **issue No.3 in the negative.**

15. **ISSUE NO 4** : It is contended by defendants that defendant no 1 intends to relinquish right of his share in favour of defendant no 3. The right of plaintiff and defendants is not completely determined and adjudicated. Unless and until the right of the parties is determined and adjudicated, no complete right will be accrued for disposal of the said property. Defendant no 1 intends to relinquish his 1/5th share in the suit property which is pending for adjudication and not completely determined and adjudicated. The right to relinquish or dispose the property accrues only after determination of share in the property. Though defendant no 1 is having right by birth in the property, the same is

not crystallized and it is being adjudicated in the present suit. The extent of share for which defendant no 1 is entitled, is not determined and as such, defendant no 1 will not be having right to relinquish the share which is not yet determined completely. The right to relinquish the share in favour of defendant no 3 or third person accrues to defendant no 1 after determination and adjudication of extent of share to which he is entitled. Decree cannot be passed with respect to the share in the property which is pending for adjudication. Defendant no 1 will be at liberty to relinquish the share allocated to him after determination and adjudication of extent of share to which he is entitled. Until complete adjudication of extent of share to which defendant no 1 is entitled, he cannot relinquish the right over the property in favour of other. The suit is filed by plaintiff for partition which involves determination and adjudication of shares of the parties and until such determination, no right accrues in favour of defendant no 1 to relinquish his share which is not yet determined. Hence, on consideration of the above stated aspects, this court answers **issue no 4 in the negative.**

16. **ISSUE NO 5** : The suit of the plaintiff is for the relief of partition and separate possession. The plaintiff and defendant no 1 to 3 are stated to be children of Parameshwar Devappa Naik from his first wife and defendant no 4 is stated to be son of Parameshwar Devappa Naik from his second wife. No satisfactory materials are placed before the court in order to consider whether Parameshwar Devappa Naik contracted second marriage during

the subsistence of first marriage or not. The suit properties are stated to have been acquired by Parameshwar Devappa Naik and the properties are not stated to be the ancestral properties of Parameshwar Devappa Naik. As the properties are the self-acquired properties of Parameshwar Devappa Naik, the question of legitimacy or illegitimacy of defendant no 4 does not sustain for consideration as illegitimate child is also entitled to share in the property of the parent. The plaintiff proved the aspect of existence of joint family and also proved that the properties are the joint family property belonging to him and defendants. Hence, on consideration of the materials placed before the court, the plaintiff and defendants are entitled to have share in the suit property and are entitled for partition and separate possession of their shares.

17. It is not in dispute that Parameshwar Devappa Naik died intestate leaving behind plaintiff and defendant no 1 to 4 as the legal heirs. Plaintiff and defendant no 1 to 4 are the Class I heirs of deceased Parameshwar Devappa Naik and the properties devolve in accordance with S. 8 and 10 of Hindu Succession Act. Plaintiff and defendant no 1 to 4 comes in the category of Class I legal heirs and are entitled to equal share in the suit properties. On applying the principles laid down in the provisions of Hindu Succession Act, the plaintiff is entitled to $1/5^{\text{th}}$ share and defendant no 1 to 4 are entitled to $1/5^{\text{th}}$ share each in the suit schedule properties. Hence, the plaintiff and defendants are succeeded in establishing that they are entitled for partition and

separate possession with respect to suit properties. Hence, **issue no 5 answered in the affirmative.**

18. **ISSUE NO.7** :- On the basis of above discussions, this court proceed to pass the following:

ORDER

The suit of the plaintiff is partly decreed.

The plaintiff is entitled to 1/5th share in the suit properties. The defendant no 1 to 4 are entitled to 1/5th share each in the suit properties.

The relief for mesne profits is hereby dismissed.

No order as to cost.

Draw preliminary decree accordingly.

(Dictated to the stenographer transcribed by him, corrected by me, signed and then pronounced by me in the open Court on this **14th day of March, 2022**).

Sd/-

(Narendra B.R)

Prl. Civil Judge and JMFC., KUMTA

: ANNEXURE :

List of witnesses examined on behalf of the Plaintiff:-

P.W.1: Gopal Parameshwar Naik

List of witnesses examined on behalf of defendants:-

D.W.1 : Raghavendra Parameshwar Naik
D.W.2 : Rajesh Parameshwar Naik
D.W.3 : Meera Uday Naik

List of documents marked on behalf of the Plaintiff:-

Ex.P. 1 to 4 : RTC extracts
Ex.P.5 : Form-12 House tax report
Ex.P.6 : Certified copy of the M.E.No.3566,
Ex.P.7 : Certified copy of the M.E.No.3472,
Ex.P.8 : Certified copy of the M.E.No.3534,
Ex.P.9 : Certified copy of the M.E.No.4386,
Ex.P.10 : Death Certificate of Parameshwar Naik

List of documents marked on behalf of the Defendants :-

- NIL -

Sd/-

Prl. Civil Judge, Kumta.