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**IN THE COURT OF THE CIVIL JUDGE AND JMFC, YADGIRI****PRESENT****SRI. ARUN CHOUGULE**

B.A.,LL.,B.(HONS.)

CIVIL JUDGE & JMFC, YADGIRI.**DATED THIS THE 16TH DAY OF JULY-2024.****ORIGINAL SUIT NO.39/2024**

<u>PLAINTIFF/S:</u>	<ol style="list-style-type: none">1. Nandini D/o Bhimappa @ Bhimaraya Danakayor, Age: 17 years minor,2. Ajay S/o Bhimappa @ Bhimaraya Danakayor, Age: 13 years minor,3. Palavi D/o Bhimappa @ Bhimaraya Danakayor, Age: 08 years minor, <p>All are minors represented by their natural mother by name Anantamma W/o Bhimappa @ Bhimaraya Danakayor, Age: 30 years. Occ: Agriculture R/o Sourastrahalli village, Tq: & Dist: Yadgiri.</p>
	(By Sri. D.M Advocate)
	//V/s//
<u>DEFENDANT/S:</u>	<ol style="list-style-type: none">1. Shivamma W/o Late Tayappa Danakayor, Age: 65 Years, Occ: Agriculture, R/o Sourastrahalli village, Tq: & Dist: Yadgiri.

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	<p>2. Bhimawwa W/o Venkatesh, Age: 45 Years, Occ: Agriculture, R/o Varkur, Magnur Mandal, Dist: Maheboob Nagar (TS).</p> <p>3. Ravindra S/o Late Tayappa Danakayor, Age: 42 Years, Occ: Agriculture, R/o Sourastrahalli village, Tq: & Dist: Yadgiri.</p> <p>4. Bhimappa @ Bhimaraya S/o Late Tayappa Danakayor, Age: 65 Years, Occ: Agriculture, R/o Sourastrahalli village, Tq: & Dist: Yadgiri.</p> <p>5. Chowdamma W/o Anjappa, Age: 36 Years, Occ: Agriculture, R/o Bairampalli Magnur Mandal, Dist: Maheboob Nagar (TS).</p> <p>6. Savitramma W/o Bhimappa Danakayor, Age: 52 Years, Occ: Agriculture, R/o Sourastrahalli village, Tq: & Dist: Yadgiri.</p> <p>All are R/o Kakalwar village, Tq: Gurumatkla, Dist: Yadgiri.</p>
	<p>(D-1, 2, 5 and 6 By Sri S.B.P Advocate) (D-4 By Sri R.B.J Advocate) (D-3 placed <i>ex parte</i>)</p>

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**ORDER ON PRELIMINARY ISSUE**

The minor plaintiffs have filed the present suit through their next friend/natural mother seeking the relief of partition and separate possession claiming 1/3rd share in the 1/4th share of their father defendant No.4, and declaration that the registered sale deed dated 05.05.2016 is null and void and not binding upon them.

SCHEDULE

i) The agriculture land bearing Sy. No.71/1 measuring 2 acres 22 guntas, situated at village sourstrahalli, Tq & Dist: Yadgiri, with the following:

BOUNDARIES

East : Nalla.
West : Land of Bhimappa.
North : Land of Ashok.
South : Land of Sharnappa Gouda.

ii) The agriculture land bearing Sy. No.71/2 measuring 00 acres 10 guntas, situated at village sourstrahalli, Tq & Dist: Yadgiri, with the following:

BOUNDARIES

East : Land of Thayappa & Ashok.
West : Land of Tipanna.

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North : Land of Ashok & Gajalappa.
South : Land of Bhimappa.

iii) The agriculture land bearing Sy. No.71/3 measuring 00 acres 12 guntas, situated at village sourstrahalli, Tq & Dist: Yadgiri, with the following:

BOUNDARIES

East : Land of Nalla.
West : Land of Tayappa.
North : Land of Gajalappa.
South : Land of Ashok.

iv) The agriculture land bearing Sy. No.71/4 measuring 2 acres 05 guntas, situated at village sourstrahalli, Tq & Dist: Yadgiri, with the following:

BOUNDARIES

East : Land of Venkatappa.
West : Land of Tippanna.
North : Land of Gajalappa.
South : Land of Gajalappa.

v) The agriculture land bearing Sy.No.84/1 measuring 1 acres 29 guntas, situated at village sourstrahalli, Tq & Dist: Yadgiri, with the following :

BOUNDARIES

East : Land of Mallamma.
West : Land of Venkatesh.

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North : Land of Husenappa.
South : Land of Tayappa.

vi) The agriculture land bearing Sy.No.84/2 measuring 1 acres 12 guntas, situated at village sourstrahalli, Tq & Dist: Yadgiri, with the following :

BOUNDARIES

East : Land of Mallamma.
West : Land of Husenappa.
North : Land of Hasan Ali.
South : Land of Tayappa.

vii) The agriculture land bearing Sy. No. 128 measuring 00 acres 20 guntas, situated at village sourstrahalli, Tq & Dist: Yadgiri, with the following :

BOUNDARIES

East : Land of Mallamma.
West : Land of Husenappa.
North : Land of Hasan Ali.
South : Land of Tayappa.

viii) The House bearing No.2-80/1 measuring 30*50-1500 situated at village sourstrahalli, Tq & Dist: Yadgiri, with the following :

BOUNDARIES

East : House of Mallamma.
West : House of Parvati.

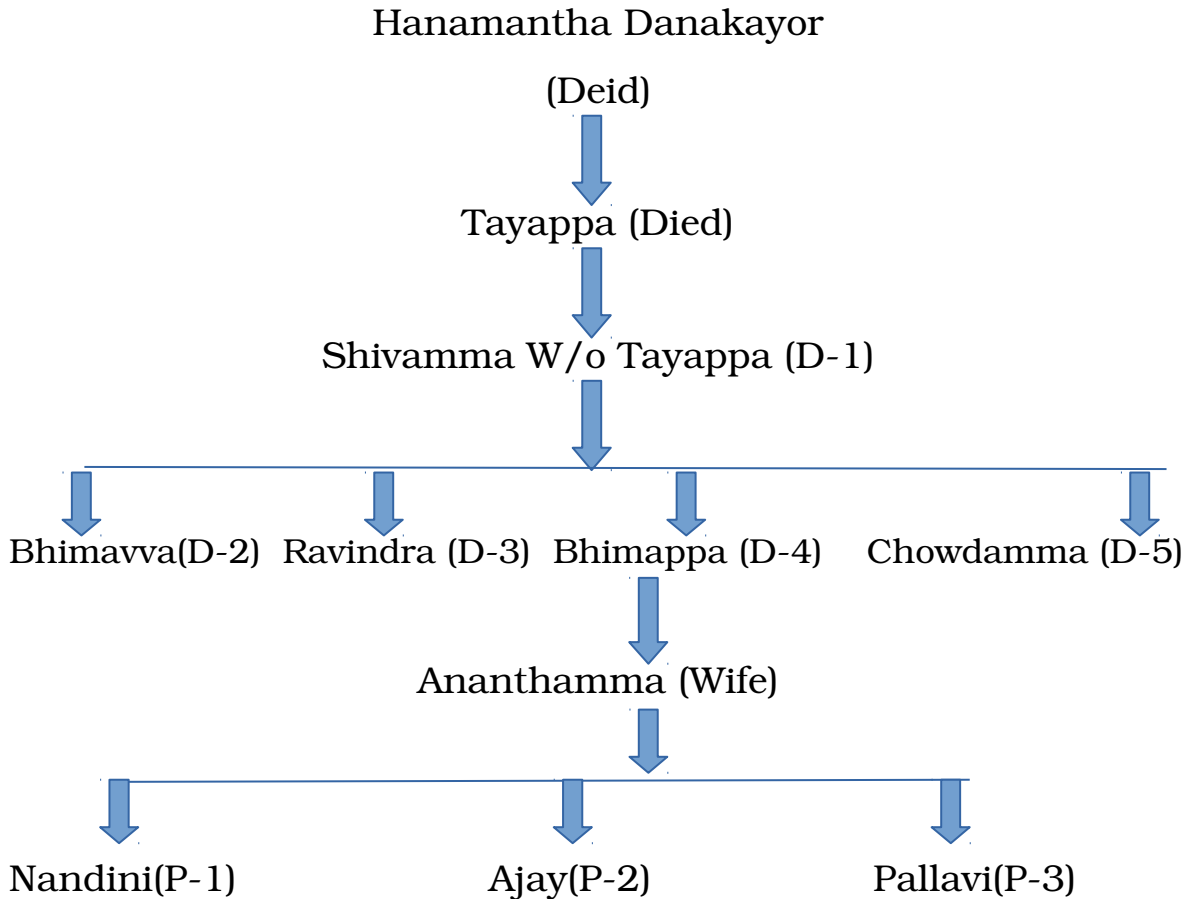
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North : Road and House of Kajamainudin.
 South : House of Tajuddin.

2. The brief facts of the plaintiff's case are as under;

The plaintiffs have furnished the genealogical tree of their family in para No.3 of the plaint as under:



2.1 That, the plaintiffs are the minor children of defendant No.4, and the defendants No.2 to 5 are children of defendant

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No.1 Smt.Shivamma and deceased Tayappa. That, the plaintiffs and the defendant No.1 to 5 are members of Hindu Joint Family and the suit properties are their ancestral and joint family properties. It is stated that the plaintiffs and defendant No.1 to 5 are in joint possession and enjoyment of suit properties and no partition has taken place among them by metes and bounds. However, after the death of plaintiffs' grandfather Tayappa, his wife defendant No.1 got entered her name to the records of suit property without the knowledge and consent of the plaintiffs and sold the suit property in favour of defendant No.6 under registered sale deed dated 05.05.2016 without there being any legal and family necessity. That, the plaintiffs demanded their share in the suit properties, but the defendants refused to allot shares to the plaintiffs. Hence, the plaintiffs were constrained to file the present suit.

3. After registration of the suit, summons was issued to the defendants. The defendants No.1, 2, 5 and 6 appeared through their counsel and filed written statement denying the plaintiffs' case contending that the suit properties were self-acquired properties of deceased Tayappa and he being the absolute owner has sold suit item No.4 land bearing No.71/4

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measuring 02 acres 05 guntas in favour of defendant No.6 under registered sale deed dated 03.05.2016 for valid consideration amount. Since the date of sale deed, the defendant No.6 is in exclusive possession and enjoyment of the suit land, as such, the plaintiffs have no rights in the suit properties and the suit is barred by limitation. It is contended that, the defendant No.4 being the father of minor plaintiffs had filed a suit O.S No.52/2019 on the file of Hon'ble Additional Civil Judge, Yadgiri against his father deceased Tayappa and the defendant No.3 herein seeking declaration that himself, his brother defendant No.3 and father deceased Tayappa are joint owners and in possession of suit lands with consequential relief of permanent injunction. The said suit was transferred to Hon'ble Court of Senior Civil Judge, Yadgiri, which was re-numbered as O.S No.11/2021, and it was dismissed as withdrawn on 22.03.2022. Thereafter, defendant No.4 got filed a fresh suit through the plaintiffs herein represented by their mother seeking the relief of partition and separate possession on the file of this court in O.S No.5/2022. The said suit was also dismissed for non-prosecution and the counter claim filed by the defendant No.4 herein, who was the defendant No.3 in the said suit, was also dismissed on 06.01.2024. After dismissal

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of said suit and counter claim, the defendant No.4 has got filed the present false suit through his minor children. On these grounds, defendants No.1, 2, 5 and 6 sought to dismiss the suit with exemplary costs.

4. The defendant No.4, though appeared through his counsel in response to summons, has not filed the written statement.

4.1 The defendant No.3 has remained *ex parte*.

5. This court, having regard to pleadings of both the parties, has framed following :

ISSUES

1. Whether the plaintiffs prove that the suit properties are the ancestral and joint family properties of themselves and the defendants?
2. Whether the plaintiffs prove that themselves and the defendants are the co-owners of the suit properties?
3. Whether there is a cause of action to file the above suit?
4. Whether the plaintiffs are entitled to the reliefs as sought for?
5. What order or decree?

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The Issue No.3 was ordered to be treated as a preliminary issue.

6. I have heard arguments of both side on preliminary issue.

7. Having regard to the pleadings and documents on record, this court proceeds to answer the preliminary issue as under:

ISSUE No.3 : In the Affirmative, for the following:

REASONS

8. ISSUES NO.3: The plaintiffs have filed the present suit through their next friend/natural mother seeking the relief of partition and separate possession claiming 1/3rd share in the 1/4th share of their father defendant No.4, and declaration that the registered sale deed dated 05.05.2016 is null and void and not binding upon them.

8.1 As pleadings of the parties would reveal, the minor plaintiffs are the children of defendant No.4, and defendants No.2 to 5 are the children of defendant No.1 Smt.Shivamma and deceased Tayappa. The plaintiffs state that themselves and the

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defendant No.1 to 5 are the members of Hindu Joint Family and they are in joint possession and enjoyment of suit properties and no partition has taken place among them by metes and bounds. The plaintiffs allege that, after the death of Tayappa, the defendant No.1 being his wife got her name entered to the records of suit property and sold the suit land in favour of defendant No.6 under sale deed dated 05.05.2016 without there being any legal or family necessity. On the other hand, the defendants No.1, 2, 5 and 6 contend that the suit properties were self-acquired properties of deceased Tayappa and he being the absolute owner has sold the suit item No.4 land in favour of defendant No.6. These defendants further contend that the defendant No.4 herein had filed a suit in O.S No.52/2019 on the file of Additional Civil Judge, Yadgiri which was transferred to Hon'ble Senior Civil Judge, Yadgiri and re-numbered as 11/2021. The said suit was dismissed as withdrawn on 22.03.2022 and thereafter, the defendant No.4 got filed fresh suit through the plaintiffs herein on the file of this court in O.S No.5/2022 for partition and separate possession, which also came to be dismissed for non-prosecution. Thereafter, the defendant No.4 has got filed the present false suit through the minor plaintiffs.

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8.2 From the above it can be seen that, the plaintiffs claim that the suit properties are ancestral and joint family properties, and the defendants No.1, 2, 5 and 6 contend that the suit properties were self-acquired properties of deceased Tayappa and that the plaintiffs have no rights to claim share in the suit properties. This court is of the opinion that, the contention regarding nature of the suit properties is a mixed question of law and fact and the same has to be decided only after recording evidence on merits. Merely on the basis of contention in the written statement, it cannot be said that the plaintiffs have no rights to claim share in the suit properties and that there is no cause of action to file the present suit.

8.3 Further, defendants No.1, 2, 5 and 6 contend that in view of dismissal of previous suit of the plaintiffs for non-prosecution, the present suit is not maintainable. It is no doubt true that as per the provisions of Order 9 Rule 9 of CPC fresh suit in respect of same cause of action is not maintainable when the previous suit was dismissed for non-prosecution under Order 9 Rule 8 of CPC. The defendants have produced certified copy of entire order sheet of suit OS No.5/2022 filed by the plaintiffs herein for partition. The proceedings show that the

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defendant No.4 herein being the defendant No.3 in the said suit had filed counter claim. It can be seen that, as the plaintiffs did not come forward to lead evidence inspite of giving sufficient time, the suit was dismissed for non-prosecution on 20.09.2023 and the matter was posted for evidence on the counter claim. However, as the defendant No.3 in the said suit also failed to lead evidence, the counter claim came to be dismissed for non-prosecution on 06.01.2024 and the suit came to be disposed off.

8.4 Now the question is whether the present suit is barred by the provisions of Order 9 Rule 9 of CPC. In that regard it is just and necessary to refer to a judgment of Hon'ble Karnataka High Court rendered in the case of **Sangappa S/o Earappa Madabhavi Vs. Shivaraya S/o Earappa Madabhavi decided on 06.12.2023**, wherein it is held that a joint owner can file a suit for partition, until partition is actually effected, irrespective of the fact whether earlier suit for such partition were dismissed for default or withdrawn or an earlier decree for partition was not acted upon. Applying the ratio of said judgment to the facts of present case it can be safely said that there is no merit in the contention of the defendants and the suit is very much maintainable.

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8.5 Further, in para No.6 of the plaint it is stated that, on 03.02.2024 the defendants refused to allot legitimate shares to the plaintiffs in the suit properties and therefore, cause of action to file the present suit arose on 03.02.2024. At this stage of the matter without providing an opportunity to the plaintiffs to prove the averments of the plaint merely on the basis of contentions in the written statement it cannot be said that there is no cause of action to file the present suit. Hence, this court proceeds to pass the following:

ORDER

Issue No.3 is answered in Affirmative.

No order as to costs.

(Dictated to the stenographer directly on computer, typed by him, the same is corrected and then pronounced by me in the open court on this the **16th day of July- 2024**).

(ARUN CHOUGULE)
CIVIL JUDGE & JMFC,
YADGIRI