

IN THE HIGH COURT OF KARNATAKA, AT DHARWAD

DATED THIS THE 27TH DAY OF FEBRUARY 2026

BEFORE

THE HON'BLE MR JUSTICE MOHAMMAD NAWAZ

AND

THE HON'BLE MRS JUSTICE GEETHA K.B.

REGULAR FIRST APPEAL NO.100389 OF 2025

BETWEEN

SURESH @ SURESHAYYA
S/O. GURULINGAYYA BALAGANOR,
AGE: 55 YEARS, OCC: AGRICULTURE,
R/O. PATTALACHINTI VILLAGE,
TQ: KUSHTAGI, DIST: KOPPAL.

...APPELLANT

(BY SRI. ANAND R. KOLLI, ADVOCATE)

AND

SHARANAYYA
S/O. GURULINGAYYA BALAGANOR,
AGE: 48 YEARS, OCC: AGRICULTURE,
R/O. PATTALACHINTI VILLAGE,
TQ: KUSHTAGI, DIST: KOPPAL.

...RESPONDENTS

(NOTICE TO RESPONDENT IS HELD SUFFICIENT)

THIS RFA IS FILED UNDER SECTION 96 READ WITH ORDER
41 RULE 1 OF CPC., PRAYING TO SET ASIDE THE JUDGMENT
AND DECREE PASSED BY THE SENIOR CIVIL JUDGE AND JMFC
KUSHTAGI IN O.S. NO.533/2015, DATED 03.05.2025 AND

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DISMISS THE SUIT OF THE PLAINTIFF IN THE INTEREST OF JUSTICE AND EQUITY.

THIS APPEAL HAVING BEEN HEARD AND RESERVED FOR JUDGMENT ON 19.02.2026 AND COMING ON FOR PRONOUNCEMENT OF JUDGMENT THIS DAY, DELIVERED THE FOLLOWING:

CAV JUDGMENT

(PER: THE HON'BLE MRS JUSTICE GEETHA K.B.)

Appellant/defendant has filed this appeal under Section 96 read with Order XLI Rule 1 of C.P.C., praying for setting aside the judgment and decree dated 03.05.2025 passed in O.S.No.533/2015 on the file of Senior Civil Judge and J.M.F.C., Kushtagi (for short, 'Trial Court') and to dismiss the suit of plaintiff.

2. Parties would be referred with their ranks, as they were before the Trial Court for the sake of convenience and clarity.

3. Plaintiff has filed the suit before the Trial Court praying for partition and separate possession of his half share in the suit schedule properties by metes and bounds;

to direct the defendant to hand over possession to plaintiff; to pass final decree under Section 54 of Code of Civil Procedure; for court costs and for such other reliefs.

4. The case of plaintiff before the Trial Court in nutshell is that defendant is the elder brother of plaintiff. One Basamma is the maternal grandmother's sister of plaintiff and defendant. Her husband is Basayya, who was owner of suit schedule properties. They had no issues. They were looked after by the plaintiff in his house at Pattalachinti till their last breath. During their lifetime, due to love and affection, the said Basayya has executed a registered Will dated 28.06.2006 bequeathing his properties in favour of plaintiff and defendant. Defendant is looking after the affairs of joint family as manager of the family. Thus, the original Will is in his custody. During lifetime of Basayya, suit 'A' and 'B' schedule properties were in possession and enjoyment of Basayya and after his death, plaintiff and defendant are in possession of it. The revenue records are mutated into the joint names of plaintiff and defendant in respect of suit 'A' schedule property. Behind

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the back of plaintiff, defendant got mutated suit 'B' schedule property into his name. Defendant was addicted to bad vices, mismanaging the suit schedule properties and also trying to alienate them. Hence, the plaintiff requested and demanded his half share in suit schedule properties with defendant, but he refused to give share to plaintiff. Hence, the suit for appropriate reliefs.

5. On service of notice, defendant appeared through his counsel, filed his written statement wherein, he admitted the relationship of plaintiff and defendant. He also admitted that Basayya S/o Mallayya Gadad was the owner in possession of suit schedule properties and both Basayya and his wife Basamma died without issues. However, he denied all other averments made in the petition regarding execution of the Will, joint possession of plaintiff and defendant over suit schedule properties, etc.

6. Further, the defendant took contention that Basayya had brothers called Shivayya, Sangayya, Gurubasayya and Shekharayya and they are joint owners in

possession of suit schedule properties and some other properties. There was difference amongst them and hence Sangayya had taken his share and parted from joint family long back. Basayya and his wife were living with his other three brothers and they were looking after Basayya and his wife during their lifetime. They never resided with plaintiff or defendant and not executed any Will. The brothers of Basayya i.e., Gurubasayya, Shekharayya and legal heirs of Shivayya are proper and necessary parties to the suit. Hence, prayed for dismissal of suit with exemplary costs of ₹.10,000/-.

7. From the above facts, the Trial court has framed the following issues:

1. *Whether the Plaintiff proves that the Plaintiff and Defendant are joint family members and they are in joint possession of the suit properties?*
2. *Whether the Plaintiff proves that Basamma executed registered will to plaintiff and defendant on 28/06/2006 and hence they are co-owners?*
3. *Whether the plaintiff proves that, the defendant addicted to bad habit and wasting the property on the strength of his name and denied the share of the Plaintiff?*
4. *Whether the plaintiff is entitled for half share as prayed?*

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5. *Whether the defendant proves that Basayya has not executed the Will?*
6. *Whether the defendant proves that brothers of Basayya that is Gurubasayya, Shekarayya and legal heirs of Shivayya are necessary parties?*
7. *What order or decree?*

8. On behalf of plaintiff, plaintiff was examined as P.W.1, examined a witness as P.W.2, got marked Exs.P.1 to P.56 and closed his side before the Trial Court. On behalf of defendant, defendant was examined as D.W.1 apart from marking Exs.D.1 to D.4 and closed his side before the Trial Court.

9. After recording evidence of both sides and hearing arguments of both sides, learned Trial Judge came to the conclusion that plaintiff has established due execution of the Will by deceased Basayya and plaintiff and defendant are legatees under the Will and thus decreed the suit with costs.

10. Aggrieved by the said judgment and decree, the appellant/defendant has filed the present appeal.

11. Even after service of notice, respondent/plaintiff has not appeared in this appeal and he is unrepresented.

12. Heard arguments of learned counsel for appellant.

13. Learned counsel for appellant, Sri Anand R. Kolli would submit that the plaintiff has not produced the original Will and has not produced proper evidence to prove the Will. Suit 'B' schedule property is not the part and parcel of the Will. Plaintiff and defendant are not in possession and enjoyment of suit schedule properties. They are in possession and enjoyment of brothers of Basayya. Plaintiff has not taken proper steps to summon the original Will from the alleged custody of defendant. Instead of doing so, he has produced its certified copy, which is inadmissible in law. There are several suspicious circumstances in respect of this Will. Those suspicious circumstances are not removed by the plaintiff. Hence, the Will is not established in accordance with law. Hence, prayed for allowing the appeal and to dismiss the suit of plaintiff.

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14. Having heard the arguments of learned counsel for the appellant, verifying the appeal papers and Trial Court records, the points that arise for consideration are:

1. Whether the respondent/plaintiff proves due execution of the Will by the deceased Basayya?
2. Whether both suit 'A' and 'B' schedule properties are bequeathed by the deceased Basayya in favour of plaintiff and defendant?
3. Whether the respondent/plaintiff is entitled for half share in suit 'A' and 'B' schedule properties?

15. Finding of this Court on the above points is as under for the following:

REASONS

16. The contention of plaintiff is that Basayya has executed registered Will dated 28.06.2006 bequeathing suit 'A' and 'B' schedule properties in favour of plaintiff and defendant, who are brothers and thus he is entitled for half share in suit 'A' and 'B' schedule properties. Suit 'A' schedule property consists of two survey numbers. The item

No.1 is Sy.No.9 measuring 17 acres 10 guntas situated in Akkeri Village, Kushtagi Taluk, Koppal District. Item No.2 of suit 'A' schedule property bearing Sy.No.54 measuring 30 guntas situated at Pattalachinti Village, Kushtagi Taluk, Koppal. Suit 'B' schedule property consists of House No.119 situated at Ward No.1 at Madalgatti (GP) in Pattalachinti village, Kushtagi Taluk, Koppal District.

17. It is to be noted here that the plaintiff has produced certified copy of registered Will, said to have been executed by deceased Basayya in favour of plaintiff and defendant. He contended that the defendant being the elder brother of plaintiff, the original Will deed is in possession of the defendant. Thus, plaintiff has produced the certified copy of registered Will and it is marked as Ex.P.4 without any objection from defendant.

18. In this regard, plaintiff has filed application under Section 65 of the Indian Evidence Act, 1872 before the Trial Court and it was allowed. Thus, plaintiff has created base for production of secondary evidence. It is to be noted here

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that both plaintiff and defendant are legatees under the Will. Based on the said Will, the defendant has given application to revenue authorities immediately after the death of Basayya and then land revenue authorities have mutated suit 'A' schedule property in the joint names of both plaintiff and defendant based on the said Will.

19. Plaintiff has produced said requisition letter given by defendant to the revenue authorities as per Ex.P.6. This is the application given by defendant to revenue authorities on 25.06.2009. It is stated in this application that Basayya died on 12.04.2009 bequeathing his properties in favour of plaintiff and defendant, who are legatees under the Will. Hence, he has given application as per Ex.P.6. Based on Ex.P.6, the revenue authorities have mutated Item Nos.1 and 2 of suit 'A' schedule properties in the name of plaintiff and defendant jointly.

20. Exs.P.7 to P.25 are the RTC extracts of Sy.No.54/6 measuring 30 gutnas from 2006-07 to 2024-25.

These documents establish that, this Sy.No.54/6 is standing in the joint names of plaintiff and defendant.

21. Exs.P.26 to P.40 are the RTC extracts of Sy.No.9 from 2006-07 to 2021. They reveal that, this Sy.No.9 was standing in the name of Basayya from 2006-07 to 2008-09 and after his death from 2009-10 onwards till 2019-20 as per Exs.P.29 to P.39, this survey number was standing in the joint names of both plaintiff and defendant.

22. In Ex.P.40 for the year 2020-21, this property was mutated into the names of brothers of Basayya based on the compromise decree amongst them. It is stated in Ex.P.40 that as per court order, MR No.H2/2019-20 dated 24.09.2019, these properties are jointly mutated into the names of Shekharayya, Gurubasayya and Shantayya S/o Shivayya.

23. Plaintiff has produced certified copies of order sheet, plaint and compromise decree passed in O.S.No.333/2017 as per Exs.P.49 to P.51. The present plaintiff and defendant are not parties to said suit. They are

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not parties to the compromise decree. Based on this compromise decree, the names of brothers of Shivaiah were jointly shown in respect of Sy.No.9. without giving any notice to plaintiff and defendant, even though, this property was standing in their joint names, only based on compromise decree in the court, for which plaintiff and defendant are not parties, this mutation was effected. In this regard, plaintiff contended that he has already filed private complaint against those brothers of Basayya contending that said compromise decree was obtained based on concocted documents. Furthermore, there is continuous dispute amongst brothers of deceased Basayya. Ex.P.45 to 47 are the certified copy of order sheet, plaint and written statement of O.S. No.153/2023 filed by one of the brothers of Basayya against children of his another brother-Shivayya.

24. In the written statement of said suit, defendant No.2 had taken contention that there was partition amongst brothers in the year 1978 itself and in that partition which properties were fallen to whose share is narrated in his

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written statement and contended that plaintiff has obtained more share in Sy.Nos.38 and 54 in that partition and hence prayed for equitable partition in respect of those properties also. This suit Sy.No.9 is not included in that suit.

25. O.S.No.78/2023 is also between the children of brother of Basayya-Shivayya, wherein they have prayed for partition in respect of several properties, which does not include the present Item Nos.1 and 2 of suit 'A' schedule properties.

26. The plaintiff has mortgaged Sy.No.9 to the bank and obtained loan. Plaintiff has produced Exs.P.54 and P.55 to establish this fact. Ex.P.56 is the mutation register extract in respect of mutating Sy.No.9 in the name of plaintiff and defendant jointly as per MR No.8 dated 25.06.2009. Thus, without impleading the plaintiff and defendant in whose names Item Nos.1 and 2 of suit 'A' schedule properties were standing, the brothers of Basayya have compromised the suit and got this suit 'A' schedule properties into their names, which is contrary to law.

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Anyway plaintiff and defendant are not parties to the said suit and thus the finding in that suit does not bind them.

27. The present suit is pertaining only in respect of proof of the Will.

28. The defendant has produced certified copies of plaint, written statement, judgment and decree of O.S.No.342/2010 filed by the sister of plaintiff and defendant against the plaintiff and defendant praying for partition and separate possession. The said suit was decreed. That suit is not in respect of present suit schedule properties, but it was in respect of ancestral properties of plaintiff and defendant and thus their sister was entitled for share in those properties. Hence, Exs.D.1 to D.4 are in no way concerned to the present suit.

29. As discussed above, the application for change of Khata of Item Nos.1 and 2 of suit 'A' schedule properties was given by defendant as per Ex.P.6 to the revenue authorities.

30. With this background, it is to be analyzed that whether plaintiff able to prove the due execution of the Will by Basayya.

31. Will is to be proved in accordance with Sections 68 and 69 of the Indian Evidence Act. According to the Proviso to Section 68 of the Indian Evidence Act, one of the attesting witnesses is to be examined to prove due execution of the Will. In this regard, in this case, plaintiff examined P.W.2, who is one of the attestors to the Will.

32. P.W.2 has stated in his affidavit evidence regarding execution of this registered Will by Basayya on 28.06.2006. He identified the certified copy of the said Will as per Ex.P.4. The original LTM register maintained in the office of Sub-Registrar was summoned from the Sub-Registrar's Office, Kushtagi, wherein this witness has identified the signatures of deceased Basayya Gadad. He was cross-examined in length by the learned counsel for defendant, but nothing was elicited in his cross-examination by the defendant. Except putting some suggestions to this

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witness, which are denied by him, nothing was elicited to prove that P.W.2 was not present at the time of Basayya signing the Will. According to this witness, Basayya and Basamma were residing with plaintiff. Even the recitals of the Will establish that both Basayya and Basamma were residing with plaintiff and defendant.

33. The above discussion reveals that plaintiff has proved the due execution of the Will by Basayya. No suspicious circumstance is forthcoming to disprove the same. Furthermore, both plaintiff and defendant are legatees under the Will. Hence, there is no occasion of defendant to dispute the Will.

34. On perusal of recitals of the Will, they reveal that Item Nos.1 and 2 of suit 'A' schedule properties are mentioned in the Will. There is no mention about suit 'B' schedule property i.e., house property in the Will. Ex.P.5 is the property extract for 2014-15 in respect of suit 'B' schedule property. It is standing in the name of defendant. How defendant acquired this property is not forthcoming

from Ex.P.5. Hence, it is to be said that the plaintiff has not established that suit 'B' schedule property is the part and parcel of the Will and it was also bequeathed by Basayya in favour of plaintiff and defendant. However, there is clear recital about Item Nos.1 and 2 of suit 'A' schedule properties in the Will and the Will was established by the plaintiff in accordance with law.

35. For the above reasons, we hold that plaintiff has proved the due execution of the Will by Basayya and Basayya has bequeathed suit 'A' schedule property under the Will and not suit 'B' schedule property. Hence, plaintiff is entitled for half share in suit 'A' schedule property and not in suit 'B' schedule property. However, the trial court has not examined the recitals of the Will in proper manner and wrongly decreed the suit in respect of suit 'B' schedule property also. Hence, to that extent, interference on the judgment and decree of trial court is required. Accordingly, point No. 1 is answered in **Affirmative** and Point Nos.2 & 3 are answered **Partly in Affirmative**.

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36. Thus, we pass the following:

ORDER

1. Appeal filed under Section 96 read with Order XLI Rule 1 of C.P.C. is partly allowed by modifying the judgment and decree dated 03.05.2025 passed in O.S.No.533/2015 on the file of Senior Civil Judge and J.M.F.C., Kushtagi.
2. The judgment and decree is confirmed in respect of suit 'A' schedule property and suit is dismissed in respect suit 'B' schedule property.
3. Parties to bear their own costs.
4. Draw preliminary decree accordingly.

**Sd/-
(MOHAMMAD NAWAZ)
JUDGE**

**Sd/-
(GEETHA K.B.)
JUDGE**

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