

: 1 :

**IN THE HIGH COURT OF KARNATAKA  
CIRCUIT BENCH AT DHARWAD**

Dated this the 31<sup>st</sup> Day of March 2011

Present

**THE HON'BLE MR.JUSTICE K.L.MANJUNATH**

and

**THE HON'BLE MR.JUSTICE H.N.NAGAMOHAN DAS**

Regular First Appeal No.1165/2005  
& Misc. Civil No.111634/2010

BETWEEN:

1. Sri. Mallappa Sivappa Mokashi,  
since dead by his L.Rs.
- a) Smt. Belawwa, W/o Mallappa Mokashi,  
age 50 years, Occ: Household work,  
Agril., R/o Musalmari, Tq. Gokak-591307.
- b) Smt. Ningawwa, W/o Appayya Gadagaanal,  
age 30 years, Occ: Household work,  
R/o Paschapur, Tq. Hukkeri-591309.
- c) Smt. Shantakka, W/o Basappa Kurbet,  
age 28 years, Occ: Household work,  
R/o Melmatti, Tal. Hukkeri-591309.
- d) Smt. Ratnawwa, W/o Dundappa Malagali,  
age 26 years, Occ: Household,  
R/o Musalmari, Tal. Gokak-591307.



: 2 :

e) Smt. Gangawwa, W/o Channappa Iranavan,  
age 24 years, Occ: Household work,  
R/o Kurani, Tal. Hukkeri-591309.

f) Smt. Sevakka, W/o Basavanni Satagatti,  
age 22 years, Occ: Household work,  
R/o Davalatti,  
Tal. Gokak-591309.

...Appellants  
(common in RFA and Misc.Civil)

(By Sri. Madanmohan M.Khannur, Advocate)

A N D :

1. Sri Kadappa Ramappa Mokashi,  
R/o Mastinoli, since dead by  
His L.Rs.

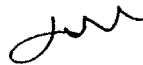
a) Smt. Gangawwa, W/o Kadappa Mokashi,  
age: 75 years, Occ: Household work,  
R/o Avargol, Tal. Hukeri-591309.

b) Smt. Shivalila, W/o Gangappa Kavalapure,  
age: 35 years, Occ: Household,  
R/o Bellad Bagewadi, Tal. Hukeri-591309.

c) Basavaraj Kadappa Mokashi,  
age: 32 years, Occ: Agril.,  
R/o Avargol, Tal. Hukeri-591309.

d) Ramappa Kadappa Mokashi,  
age: 30 years, Occ: Agril.,  
R/o Avargol, Tal. Hukeri-591309.

2. Sri. Satappa Bharama Mokashi,  
age: major, Occ: Agril.,  
R/o Avargol, Tal. Hukeri-591309.



: 3 :

3. Sri. K.Shiddappa Bhatramappa Mokashi,  
age: major, Occ: Agril.,  
R/o Avargol, Tal. Hukeri-591309.

4. Sri. Basavant @ Basavanni,  
S/o Bharama Mokashi,  
age: major, Occ: Agril.,  
R/o Avargol,  
Tal. Hukeri-591309.

...Respondents

(common in RFA and Misc.Civil)

(By Sri. M.G.Naganuri, Advocate for R4)  
(R1a to R1d & R3 are served; R2 – service held  
sufficient)

- - - - -

This regular first appeal is filed under Section 96 of CPC against the judgment and decree dated 17.06.2005 passed in O.S.No.77/1999 on the file of the Civil Judge (Sr.Dn.), Hukkeri, dismissing the suit for partition and separate possession.

Misc. Civil No.111634/2010 is filed by respondent No.4 under Order XLI Rule 27 read with Section 151 of the Code of Civil Procedure praying to permit him to produce the documents as per list by way of additional evidence.

This regular first appeal along with Misc. Civil application coming on for hearing this day, **H.N.Nagamohan Das, J**, delivered the following:

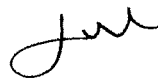


: 4 :

**JUDGMENT**

This appeal is directed against the judgment and decree dated 17.06.2005 in O.S.No.77/1999 passed by the Civil Judge (Sr. Dn.) at Hukkeri, dismissing the suit for partition.

2. It is the case of the plaintiff that the propositor Ningappa died living behind his three sons by name Rama, Bharma and Jeevappa. Plaintiff is the son of Jeevappa. When the plaintiff demanded his 1/3<sup>rd</sup> share in the plaint schedule properties, the defendants refused to partition the same. Having no other alternative, plaintiff filed O.S.No.77/1999 for decree of partition. Defendant No.1 supported the case of the plaintiff in part. Defendant Nos.2 to 4, who are the children of Bharma, contested the proceedings by filing separate written statement. These contesting defendants contended that item No.2 of plaint 'A' schedule property was purchased in the name of Smt.



: 5 :

Rayawwa, who is the mother of defendant Nos.2 to 4 and the same is not a joint family property and not liable for partition. It is further contended that plaintiff schedule item No.3 was granted by the Government in the name of 2<sup>nd</sup> defendant and the same is not a joint family property and not liable for division. Insofar as the plaintiff schedule item No.1 is concerned, the defendants contend that the same was the subject matter in O.S.No.104/1986 (new number O.S.No.46/1997) and the same came to be divided among defendant Nos.1 to 4. Further, it is contended that the preliminary decree passed in O.S.No.104/2006 is confirmed in R.A.No.165/1997 and R.S.A. No.604/1999 and now the matter is pending in final decree proceedings in F.D.P. No.4/1999 and therefore, the same is not liable for division. Based on these pleadings, the Trial Court framed the following issues for its consideration:

- “1. Whether the plaintiff proves that suit properties are the joint family properties



: 6 :

of himself and the defts and they were in their joint possession as on the date of the suit?

2. Whether the plaintiff proves the cause of action to file the suit?
3. Whether the defts 3 and 4 proves that the decree passed in O.S.No.104/1986 New No.46/1997 is binding on the plaintiff?
4. Whether the defts-3 and 4 proves that land Sy.No.116A/3/9 is the self-acquired property of their mother by name Smt.Rayawwa, W/o. Bharama Mokashi and after her death themselves and the deft No.2 have got 1/3<sup>rd</sup> share in the houses constructed therein?
5. Whether the d-3 and 4 proves that land Sy.No.14/1C was the tenanted property of D-2 Satappa and after it submerge in the Hidkal dam the Govt. has granted the land Sy.No.118/7 to D-2?
6. Whether the defts proves that suit of the plaintiff is barred by limitation?



: 7 :

7. Whether the D-3 and 4 proves that the court fee paid by the plaintiff is not proper and correct?
8. Whether the defts are entitled for compensatory costs of Rs.5,000/-?
9. Whether the plaintiff is entitled for the relief of partition and separate possession of his 1/3<sup>rd</sup> share in the suit property as prayed for?
10. What decree or order?"

3. During the pendency of the proceedings before the Trial Court, plaintiff and 1<sup>st</sup> defendant died and their legal representatives are brought on record and they are prosecuting the proceedings.

4. Before the Trial Court, plaintiffs examined two witnesses as P.W.1 and P.W.2 and got marked Exs.P.1 to P.28; the defendants examined one witness as D.W.1. The Trial Court, on appreciation of the pleadings, oral



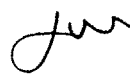
: 8 :

and documentary evidence held that plaint schedule properties are not the joint family properties and not liable for division. Consequently, under the impugned judgment, the Trial Court dismissed the suit for partition. Hence this appeal.

5. We have heard arguments on both the side and perused the entire appeal papers.

6. Shri. Madanmohan M.Khannur, learned counsel for the plaintiffs on the instructions of the plaintiffs fairly submits that plaintiffs are not pressing their claim in respect of plaint schedule item Nos.2 and 3 in 'A' schedule and plaint schedule 'B' house properties. The submission of the learned counsel for the plaintiff is placed on record. Therefore, the suit of the plaintiff in respect of these properties are liable to be dismissed.

7. The only grievance of the appellants-plaintiffs is in respect of plaint schedule item No.1 measuring 4 acres



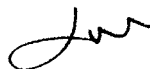


: 9 :

20 guntas in Sy.No.116A/1/54 + 48/1 situated at Mastiholi village in Hukkeri Taluka. Plaintiffs contend that this property belongs to the joint family and the same is not divided. Admittedly, plaintiffs are not parties to the earlier suit in O.S.No.104/1986 and, therefore, the judgment in the said suit is not binding on them.

8. On the other hand, Shri M.G.Naganuri, learned counsel for defendants 2 to 4 submits that they were the tenant in Sy.No.8/5 and 8/7 and the lands got submerged at the time of construction of Hidkal dam. The Government, in lieu of submergence of these lands, granted item No.1 in favour of 1<sup>st</sup> defendant and father of defendant Nos.2 to 4. Therefore, it is contended that plaintiff schedule item No.1 is not joint family property and not liable for division.

9. On this rival contention, there is no specific finding by the Trial Court. The Trial Court has also not considered the evidence placed by both the parties in this



: 10 :

regard. Therefore, the impugned judgment and decree is liable to be set aside. The matter is required to be remanded for fresh disposal in accordance with law only insofar as it relates to plaint schedule item No.1

10. For the reasons stated above, the following:

**ORDER**

- i) The appeal is hereby allowed.
- ii) The impugned judgment and decree of the Trial Court dated 17.06.2005 in O.S.No.77/1999 is hereby set aside.
- iii) The suit of the plaintiffs insofar as it relates to item Nos.2 and 3 of plaint 'A' schedule properties and house properties in plaint 'B' schedule is hereby dismissed.
- iv) The matter is remanded to the Trial Court for fresh disposal in accordance with law insofar as it relates to plaint 'A' schedule item No.1



: 11 :

- v) The final decree proceedings in FDP No.4/1999 pending on the file of Civil Judge (Jr. Dn.) at Sankeshwar is subject to the result in the suit in O.S. No.77/1999.
- vi) All contentions are left open.
- vii) In view of order of remand, Misc. Civil No.111634/2010 for production of additional evidence is allowed. Parties are permitted to lead evidence before the Trial Court.
- viii) Ordered accordingly.

**Sd/-  
JUDGE**

**Sd/-  
JUDGE**

Kms