

IN THE HIGH COURT OF KARNATAKA  
CIRCUIT BENCH AT DHARWAD

DATED THIS THE 30<sup>TH</sup> DAY OF MARCH 2012

PRESENT

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

AND

THE HON'BLE MR.JUSTICE RAVI MALIMATH

**Regular First Appeal No.1613/2007**

**C/w.**

**Cross Objection No.24/2008**

In RFA No.1613/2007

BETWEEN:

Shri Bhaskar Shantharam Kamat  
S/o.Shantaram Govind Kamat  
Aged 70 years,  
R/a: Main Road, Kajubag,  
Karwar-581301.

...Appellant

(By Sri.G.A.Bhat and Smt.Y.M.Habib, Advocates.)

A N D:

1. Shri F.M.Balakrishan Madhav Kamat  
S/o.Madhav Govind Kamat,  
Aged 68 years,  
R/a: Kajubag, Karwar-1.
2. Shri Jagannath Shantharam Kamat  
S/o.Shantharam Govind Kamat  
R/o.Main Road, Karwar-581301.

3. Smt.Malati W/o.Yashwant Chittal  
Age: 85 years,  
R/o.No.2, Band Stand Appt.,  
Bandra (West), Mumbai-400 050.
  4. Smt.Sarala D/o.Madhav Kamat  
Aged 83 years,  
R/a: Kamath Compound,  
Opp. Arts & Science College,  
Kajubag, Karwar-581301.
  5. Smt.Geeta W/o.Ramkrishna Doople  
Age: 73 years,  
R/a: No.33, Shri Vidyadhiraj Charkop,  
Kandivili (West), Mumbai-400 067.
- ...Respondents

(By Sri.K.L.Patil, Advocate, for R.1.)  
(Sri.Prashant T. Pandit, Advocate, for R.4.)  
(R.2, R.3, R.5 – Notice served.)

This Regular First Appeal is filed under Section 96 and Order 41 Rule 1 of CPC against the judgment and decree dated 10.4.2007 passed in O.S.No.69/1989 on the file of the Prl. Civil Judge (Sr.Dn.), Karwar, partly decreeing the suit for partition.

In CR.OB. No.24/2008

BETWEEN:

Sri.Balakrishna Madhav Kamat  
Aged about 68 years,  
Occ: Consulting Civil Engineer,  
R/a: Kajubag, Karwar.

...Cross Objector

(By Sri.K.L.Patil, Advocate.)



A N D:

1. Bhaskar Shantaram Kamat  
Age: 75 years, Occ: Business,  
R/a: Main Road, Karwar.
  2. Jagannath Shantaram Kamat  
Age: 63 years, Civil Engineer,  
R/a: Main Road, Karwar.
  3. Smt.Malati W/o.Yeshwant Chittal  
Aged 74 years, Household,  
R/a: No.2, Band Stand Apartment,  
21-A, Band Stand, Bandra West,  
Mumbai-400050, Maharastra.
  4. Sarala D/o.Madva Kamat  
Age: 72 years, Household work,  
R/a: Kamath Compound,  
Opp: Arts & Science College,  
Kajubag, Karwar.
  5. Smt.Geeta W/o.Ramakrishna Dhople  
Age: 72 years, Household,  
R/a: No.33, Shri.Vidyadhiraj Co.Op.  
Housing Society, Sector-4, Charkop,  
Kandivili (West), Mumbai-400067.
- ...Respondents

(By Sri.G.A.Bhat, Smt.Y.M.Habib, Advocates, for  
R.1 and R.2.)

(Sri.Pradeep M. Naik, Advocate, for R.4)  
(R.3 and R.5 – Notice served.)

This Cross Objection in Regular First Appeal is filed under Order 41 Rule 22 of CPC against the judgment and decree dated 10.4.2007 passed in O.S.No.69/1989 on the file of the Prl. Civil Judge (Sr.Dn.), Karwar, partly decreeing the suit for partition.

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These Appeal and Cross Objection coming on for final hearing this day, K.L.Manjunath, J, delivered the following judgment:

**JUDGMENT**

The appeal and cross objection are filed by the parties being not satisfied by the judgment and decree challenging the legality and correctness of the judgment and decree dated 10.4.2007, passed in O.S.No.69/1989 on the file of the Prl.Civil Judge (Sr.Dn.), Karwar.

2. The facts leading to this case are as hereunder:

3. F.M.Balakrishna Madhav Kamat filed a suit against Bhaskar Shantaram Kamat and his brother Jagannath Shantaram Kamat, claiming half share in the plaint schedule properties. According to the plaint averments the father of the plaintiff and father of the defendants namely Madhav Kamat and Shantaram Kamat were direct brothers and that there was a partition between the brothers of Madhav Kamat and Shantaram



Kamat. However Shantaram Kamat and Madhav Kamat continued the grocery business and thereafter certain properties were purchased out of the income of the said business in the name of Shantaram Kamat who was the father of the defendants No.1 and 2. Later on the defendants father executed a registered document conveying his half share in the properties purchased by him and thereafter several buildings were constructed and a hotel is also being run. In the circumstances the plaintiff filed the suit for partition and separate possession of his half share and for accounts based on the sale deed executed by the defendants father in favour of his father.

4. The defendants contested the suit on several grounds. According to them the suit filed by the plaintiff is barred by limitation and is also not maintainable due to non impleading the sisters of the plaintiff. According to them their father S.G.Kamat was the absolute owner of the land and he got the suit land converted for non agricultural



purpose and the same was purchased after the partition between the defendants father S.G.Kamat and plaintiffs father M.G.Kamat. According to them the partition had taken place in the year 1942. They also admit that the joint family was carrying on the business in the partnership running grocery shop in the name and style of Govind Sheshagiri Kamat and sons. After 1942 any property purchased by the father of the defendants, he was the absolute owner of the same. They denied the execution of a registered sale deed by their father in the year 1964 in favour of father of the plaintiff. They also denied that the plaintiff and defendants are enjoying the suit property as co-owners. In the circumstances they request the Court to dismiss the above suit.

5. Subsequently the plaintiff impleaded the defendants No.3 to 5 who are his sisters. They did not contest the suit. As a matter of fact, one of the sisters of the plaintiff namely Sarala Kamat had

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filed a suit in O.S.No.14/1985 which suit also clubbed along with the present suit.

6. On the basis of the pleadings of parties, the trial Court framed the following issues:

### **ISSUES**

1. Whether the suit of the plaintiff is barred by law of limitation?
2. Whether Malati Yashwant Cittal, Nirmala Ramakrishna Dhople and Sarala Madhav Kamat the sisters of plaintiff are necessary parties to the suit along with L.Rs of deceased Ghanshyam Santaram Kamat?
3. Whether the plaintiff proves that after the death of his father he became the manager of the family?
4. Whether the plaintiff proves that the suit N.A.land of 'A' schedule property is the joint property of plaintiffs and defendants?
5. Whether plaintiff proves that out of the joint funds of the firm Govind

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Sheshagiri Kamat and sons 'A' and 'B' Schedule properties were purchased in the name of Shantaram Govind Kamat in the year 1954 in Court Auction?

6. Whether the plaintiff proves that Shantaram Kamat executed registered sale deed on 14.8.1964 in favour of Madhav Govind Kamat his half right in property purchased in Court auction thus became the co-owner?
7. Whether the plaintiff proves that after the death of his father stepped in the shoe of his father and started managing all the family properties including the suit properties?
8. Whether the plaintiff proves that the construction in 'C' schedule property is constructed out of this joint funds of plaintiff and defendants called as Madhav Nivas in the year 1978-79?
9. Whether the Tourist Home is the property of partnership firm of

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plaintiff and defendants and Sarala Kamat?

10. Whether the plaintiff is entitled for mesne profit?
11. Whether the plaintiff is entitled for partition and separate possession of suit properties as prayed for?
12. Whether defendants prove that the family partition between Shantaram Kamat and Madhav Kamat took place in the year 1942 and since then all of them are residing separately as divided members and brothers?
13. Whether defendants prove that the building in 'C' schedule property was constructed by S.G.Kamat and defendant No.1 as such it is their exclusive property?
14. Whether the present suit and O.S.No.14/1985 filed by the sister of plaintiff Sarala Kamat shall be clubbed together and disposed of simultaneously as contended in para 'B' of written statement?



15. Whether defendants prove that sale deed dated 14.8.1964 is in the capacity as partners of the firm by Shantaram Kamat in favour of another partner Madhav Kamat without consideration and it was only book adjustment of the said firm?
16. Whether defendants prove that the Tourist Home building was constructed in the year 1962 out of the funds of Mrs.G.S.Kamat and sons. Thereafter the said firm is closed and the funds and assets transferred to new firm by name Tourist Home Firm on 29.10.1962?
17. Whether defendants prove that in the year 1964 there was a partition in between the S.G.Kamat his children and others, thereafter the defendants have become the partners of Tourist Home, along with late M.G.Kamat father of plaintiff?
18. Whether defendants prove that after the death of M.G.Kamat his wife defendant and plaintiff



became the partners of the said firm by executing a fresh partnership deed and after the death of wife of M.G.Kamat her daughter Sarala Kamat became the partner along with other?

19. Whether defendants prove that defendants are in possession and enjoyment of suit property A, B, C?
20. Whether the defendants prove that the partnership of plaintiff and Sarala Kamat were released by them by executing a document of agreement in the year 1981 from the said firm as contended in para 9(ii)(iii)(iv) of written statement as such plaintiff and Sarala Kamat have no right interest in the said firm?
21. Whether the Court fee paid by the plaintiff on suit valuation made by him is proper?
22. Whether defendants are entitled for exemplary costs?
23. What relief or reliefs the parties are entitled to?

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24. What order or decree?

**Additional issue:**

1. Whether the Court fee paid by plaintiff on suit and valuation made by him is proper?

7. The trial Court after appreciating the evidence let in by the parties held issues No.1, 2, 10, 13, 15, 16 and 22 in negative, issues No.3 to 8, 9, 19 and 21 and additional issue No.1 in affirmative and issues No.11 and 23 partly in affirmative, issues No.17, 18 and 20, as does not survive for consideration. Ultimately the suit of the plaintiff came to be decreed in part holding that he is entitled for southern half portion of the schedule property along with rental benefit, shops, coconut trees. Accordingly, final decree was passed. The suit filed by the sister of the plaintiff in O.S.No.14/1985 is dismissed. Challenging the judgment and decree passed by the Court below the defendants No.1 and 2 have preferred the appeal. Cross objection is filed by the plaintiff.



8. We have heard the counsel for the parties. Though several grounds are urged in the appeal memo and cross objection, during the course of arguments, only the following grounds are raised by the parties.

9. According to the appellant, even if the plaintiff is entitled for half share in the suit for partition, the trial Court was not justified in drawing a final decree and therefore he requests the Court to set aside the judgment and modify the decree suitably. The plaintiff has filed the cross objection stating that, the trial Court without assigning any reasons has denied mesne profit or accounts to the plaintiff, therefore the cross objection is filed.

10. Having heard the counsel for the parties, considering the arguments put forth by them, we have to consider the following points in this appeal.

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- i) Whether the trial Court is justified in granting the decree for southern half portion of the property to the plaintiff?
- ii) Whether the trial Court is justified in not considering the case of the plaintiff for mesne profit or accounts?

11. Admittedly, if a suit is filed for partition the duty of the Court is only to determine the share of the parties. After determining the share of the parties, the Court is required to draw the preliminary decree and thereafter it is for the parties to file a final decree proceedings and in the final decree proceedings after appointing the commissioner and if it is found feasible to divide the properties, divide the same in terms of the share allotted under the preliminary decree and after hearing both the parties to allot the share to the respective parties and it is also the duty of the Court to record evidence on the question of mesne profits or accounts and determine the mesne profits if the plaintiff is entitled. But the trial

Court without considering the fact that the suit is for partition has straight away drawn final decree, which according to us is bad in law and liable to be set aside. Therefore we are of the view that the appeal and cross objections are to be allowed.

12. The judgment and decree passed in O.S.No.69/1989 on the file of Prl. Civil Judge (Sr.Dn.), Karwar, is hereby set aside and modified holding that the plaintiff and the defendants 3 to 5 are together entitled to half share and the defendants 1 and 2 are entitled for remaining half share. Accordingly preliminary decree has to be drawn and the mesne profits are to be considered in the final decree proceedings. The parties to bear their cost.

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JUDGE

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JUDGE