

**IN THE HIGH COURT OF KARNATAKA
KALABURAGI BENCH
DATED THIS THE 31ST DAY OF JANUARY, 2022
BEFORE
THE HON'BLE MRS. JUSTICE J.M.KHAZI**

RSA No.200210/2015 (PAR/SEP-POSS)

BETWEEN:

1. BASANNA S/O DHARMANNA HOLAKUNDI
OCC : AGRI, OCC: AGRIL,
R/O : TAJ SULTANPUR
TQ & DIST : KALBURAGI
2. BASAMMA W/O MAILARI HOLAKUNDI
AGE; 58 YEARS, OCC : HOUSEHOLD
R/O : TAJ SULTANPUR
TQ & DIST : KALABURAGI
3. BABURAO S/O MAILARI HOLAKUNDI
AGE: 41 YEARS, OCC : AGRI
R/O : TAJ SULTANPUR
TQ & DIST : KALABURAGI
4. RAMESH S/O MAILARI HOLAKUNDI
AGE: 38 YEARS, OCC : AGRI
R/O : TAJ SULTANPUR
TQ & DIST : KALABURAGI
5. BHEERANNA S/O MAILARI HOLAKUNDI
AGE: 32 YEARS, OCC : AGRI
R/O : TAJ SULTANPUR
TQ & DIST : KALABURAGI
6. MALKAMMA W/O JAGANNATH BELAMBKAR
AGE: 42 YEARS, OCC : HOUSEHOLD
R/O : VAKKALGERA

BHAVANI NAGAR,
RING ROAD, KALABURAGI

7. JANUBAI @ RAJESHWARI
W/O SIDDALING KURPPENAVOR (KOTTARGI)
AGE: 33 YEARS, OCC : HOUSEHOLD,
R/O : MOMINPURA
GUNJ ROAD, KALABURAGI.

...APPELLANTS

(BY SRI.S.B.HANGARKI, ADVOCATE)

AND

1. MANDAKINI W/O ARJUN HOLKUNDI
AGE: 48 YEARS,
OCC : AGRI & ANGANWADI TEACHER
R/O : TAJ SULTANPUR
TQ & DIST : KALABURAGI-585101.
2. SRIKANT @ LINGANNA W/O ARJUN
SINCE DECEASED BY HIS LRS
- 2A. ARUNA W/O SRIKANT @ LINGANNA
AGE: 24 YEARS, OCC : HOUSEHOLD,
- 2B. ARJUN S/O SRIKANT @ LINGANNA
AGE: 11 YEARS, MINOR BY
GUARDIAN NATURAL MOTHER
ARUNA W/O SRIKANT @ LINGANNA
BOTH R/O TAJ SULTANPUR
TQ & DIST : KALABURAGI-585101.
3. VITHAPPA S/O DHARMANNA HOLKUNDI
AGE: 58 YEARS, OCC : SERVICE
R/O : TAJ SULTANPUR
NOW AT 383 DWARKA FLATS
PONNA KINARU STREET

VILLIVKAM
CHENNAI-600049

4. SHANTAPPA S/O DHARMANNA HOLKUNDI
AGE: 52 YEARS, OCC :AGRI
R/O : TAJ SULTANPUR
TQ & DIST : KALABURAGI-585101.
7. NINGANNA S/O DHARMANNA HOLKUNDI
AGE: 50 YAERS, OCC :AGRI
R/O : TAJ SULTANPUR
TQ & DIST : KALABURAGI
8. DEVENDRAPPA S/O DHARMANNA HOLKUNDI
AGE: 48 YEARS, OCC : STATION MASTER
R/O : TAJ SULTANPUR
NOW AT VINNAMANGAM
RAILWAY STATION NEAR
JOLARPETAL JUNCTION/JANCHAR
DIST: TITIPATTUR
TAMILNADU STATE-600050.

... RESPONDENTS

(BY SRI.A.M.BIRADAR, ADV. FOR R-1 & R2(A)
R2(B) IS MINOR U/G R2(A), R-3 SERVED,
SRI.A.P.JAHAGIRDAR, ADV. FOR R4 & R5
SRI. VINAYAK APTE, ADV. FOR R6)

THIS REGULAR SECOND APPEAL IS FILED UNDER SECTION 100 OF CODE OF CIVIL PROCEDURE PRAYING TO SET ASIDE THE JUDGMENT AND DECREE DATED 25.03.2015 PASSED IN R.A.NO.84/2011 BY THE COURT OF THE IV ADDL. DISTRICT JUDGE, KALBURGI, CONFIRMING THE JUDGMENT AND DECREE DATED 29.06.2011 PASSED IN O.S.NO.65/2006 ON THE FILE OF THE I ADDL. CIVIL JUDGE (S.D) GULBARGA IN RESPECT OF SUIT ITEM NO.A TO C & E AND CONSEQUENTLY THE SUIT OF THE PLAINTIFF BE DISMISSED BY ALLOWING THIS APPEAL WITH COST AND ETC.

THIS APPEAL HAVING BEEN HEARD AND RESERVED FOR JUDGMENT ON 03.01.2022, COMING ON FOR PRONOUNCEMENT THIS DAY, THE COURT DELIVERED THE FOLLOWING:-

JUDGMENT

Defendant Nos.2, 6 to 11 have filed this appeal challenging the concurrent judgments of trial Court as well as First Appellate Court.

2. For the sake of convenience, the parties are referred to by their rank before the trial Court.

3. The trial Court has granted $1/7^{\text{th}}$ share to the plaintiffs together. Similarly, $1/7^{\text{th}}$ share to defendant Nos.1 to 5 and $1/7^{\text{th}}$ share to defendant Nos.6 to 11 collectively in all suit properties except item No.2(d) property.

4. The first appeal filed by the defendant Nos.2, 6 to 11 came to be dismissed.

5. While admitting this appeal vide order dated 22.07.2015, this Court has framed the following two substantial questions of law;

- (i) Whether the Courts below have committed any serious legal error in ignoring the admission of the plaintiffs regarding previous partition and consequently, erroneously decreed the suit of the plaintiffs even in respect of the properties in item Nos.C and E of the suit schedule properties by holding that there was no earlier partition between the parties?
- (ii) Whether the First Appellate Court has committed any serious legal error in not considering I.A.No.II under which an amendment was sought for written statement of the appellant and without disposing I.A.No.II, whether the First Appellate Court was right in disposing of the appeal on the merits itself?

6. During the course of arguments, the learned counsel representing the appellants submitted that in spite of there being an admission by DWs.2, 3 and 5, about the prior partition, the trial Court is not justified in granting partition and separate possession in suit item Nos.A to C and E. He further submitted that before the First Appellate Court, they filed IA.No.II under Order VI Rule 17 CPC, seeking amendment of the written statement to the effect that in the event of Court coming to the conclusion that there is no earlier partition, then house constructed in the name of defendant No.5 in a site measuring 40' x 60' situated at Badepur, Gulbarga and another house bearing Corporation No.4-601/69A measuring 30' x 40' situated at M.B.Nagar, Gulbarga standing in the name of defendant No.1 and his wife Shanta and another house bearing VP No.3-7/8 situated at Taj Sultanpur, Tq: Gulbarga, standing in the name of

Smt.Champavati, wife of defendant No.4 is also acquired through the joint family property and grant partition. The appellants have sought this as an alternative prayer.

7. Learned counsel representing appellants submitted that even though defendant No.4 who is respondent No.5 before the First Appellate Court as well as before this Court, has filed objections to IA.N.II, the trial Court has not disposed of the said application, but proceeded to pass the judgment on the main appeal. He would further submit that this is covered by the judgment of this Court reported in **2015 (1) KCCR 304** in the matter of **Shri Kedari Mashnu Gurav and Another Vs. Shri Pandurang Mashnu Gurav and Others**, (Kedari's case) and in the light of the said judgment, the matter requires to be remanded back to the First Appellate Court to decide the pending application i.e. IA.No.II filed under

Order VI Rule 17 CPC and thereafter to decide the main appeal.

8. Learned counsel representing the respondent No.1, 2(A) and (B), who are plaintiff Nos.1, 2(A) and (B) has fairly conceded that in view of non disposal of IA.No.II before the First Appellate Court and in the light of the above decision, the matter requires remand to the First Appellate Court to decide the interim application and to dispose of the main appeal.

9. In view of the *Kedari's* case, I am of the considered opinion that the matter requires remand to the First Appellate Court for disposal of IA.No.II and thereafter to dispose the main appeal and accordingly the substantial question No.2 is answered in the affirmative. Hence, I proceed to pass the following;

ORDER

- (a) The appeal is allowed.
- (b) The matter is remanded back to the First Appellate Court to dispose off IA.No.II filed under Order VI Rule 17 CPC and thereafter proceed in accordance with law.
- (c) Registry is directed to send back the trial Court records as well as the records of the First Appellate Court to the First Appellate Court forthwith.
- (d) The parties who are represented before this Court are directed to appear before the First Appellate Court on 28.02.2022 without awaiting for further notice from the First Appellate Court. So far as other parties are concerned, the First Appellate Court shall issue notice to them and proceed in accordance with law.

**Sd/-
JUDGE**

msr