

KABG210055842022



IN THE COURT OF THE III ADDITIONAL CIVIL JUDGE & JMFC

AT: ATHANI

DATED THIS THE 10th DAY OF FEBRUARY 2023

: **PRESENT:**

SRI. **SAYED MOHIUDDIN URF KHAWAJA PEERAN.**, BA. LLB.,(Spl.)

III ADDITIONAL CIVIL JUDGE & JMFC., ATHANI.

O.S. No.1261/2022

PLAINTIFF/s : 1) Sri. Narayan S/o Sidram Shinde,
Age: 28 years, Occu: Agriculture and Driver,
R/o: Yalihadalgi,
Tal. Athani, Dist. Belagavi.

Vs

DEFENDANT/s : 1) Sri. Sidram S/o Dondiba Shinde,
Age: 59 years, Occu: Agriculture,
R/o: Yalihadalgi, Tal. Athani, Dist. Belagavi.

2) Sri. Sadashiva S/o Sidaram Shinde,
Age: 29 years, Occu: Agriculture,
R/o: Athani, Dist. Belagavi.

3) Smt. Shalan W/o Sidram Shinde,
Age: 49 years, Occu: Agriculture and Household,
R/o: Yalihadalgi, Tal. Athani, Dist. Belagavi.

4) Sri. Hanumanth S/o Mahadev Borade,
Age: 35 years, Occu: Agriculture,
R/o: Yalihadalgi, Tal. Athani, Dist. Belagavi.

IA No.II

APPLICANT/DEFENDANT NO.4: Sri. Hanumanth S/o Mahadev Borade,

(D.1 to 3 -Rep. by Sri. C.S.V., Advocate)

(D.4 - Rep. by Sri. K.H.A., Advocate)

V/s

RESPONDENT/PLAINTIFF: Sri. Narayan Sidram Shinde.

(Rep. by Sri. T.G.A., Advocate)

ORDER ON IA No.II

The defendant No.4 has filed IA No.II under Order 7 Rule 11(d) R/w Section 151 of CPC for rejection of plaint as suit is not maintainable as per law.

2. In the accompanying affidavit to the IA., it is stated by the defendant No.4 that, the plaintiff has not included all the joint family properties of plaintiff and defendant No.1 to 3 in the present suit. The suit schedule property is the self acquired property of defendant No.3. As per Section 14 of Hindu Succession Act it is the absolute property of defendant No.3, as such the suit is not maintainable. If the application is allowed no injustice will be caused to the plaintiff. If application is not allowed injustice will be caused to the defendant No.4. Hence, he prays to allow the IA.

3. To the said application, the counsel for the plaintiff has filed objection by contending that, the said application is not maintainable either in law or on fact. The suit schedule property is the ancestral and joint family property of plaintiff and defendant No.1 to 3. The suit schedule property valued more than Rs.30 lakhs. The father of the plaintiff availed the hand loan of Rs.1,00,000/- from the defendant No.4 for development of the suit schedule property. The defendant No.4 in the agreement of sale shown the value of the property is only of Rs.5,00,000/-. The plaintiff is not the signatory to the said transaction. It is false to say that the plaintiff has not included all the family properties in the present suit. If the application is allowed injustice will be caused to the plaintiff. If the application is not allowed no injustice will be caused to the defendant No.4. As such, he prays to dismiss the suit.

4. The defendant No.1 to 3 filed memo by adopting the objection filed by the plaintiff.

5. Heard counsel for the plaintiff. Perused the same.

6. The following points arise for my consideration:

1. Whether the defendant No.4 has made out proper grounds to allow the IA and reject the plaint?

4. What order?

7. My answers to the above points are as under:

Point No.1 : In the **NEGATIVE**

Point No.2 : As per final order for the
following: -

REASONS

8. Point No.1 : The present suit is filed by the plaintiff against the defendants for the relief of partition and separate possession with respect of suit schedule property bearing Sy.No.222/1C measuring 1 Acre 7 Guntas of Yalihadalgi village of Athani Taluk.

According to the plaintiff, the plaintiff and defendant No.2 are the children of defendant No.1 and 3. The defendant No.4 is claimed to be purchaser of the suit schedule property. The suit schedule property acquired by father of the plaintiff under partition between their brothers. From the date of partition, the defendant No.1 is in possession and enjoyment of the suit schedule property along with family members. Except the source of income from the suit schedule property there is no other source to the plaintiff and defendant No.1 to 3 family. The defendant No.1 availed hand loan of Rs.1,00,000/- from Vilas Anand Jadhav in the year 2002. For

the purpose of security to the said hand loan he had executed agreement of sale dated.12.08.2002 for amount of Rs.1,60,000/- and in the said document he shows that Rs.1,20,000/- received by the defendant No.1, but the defendant No.1 availed only Rs.1,00,000/- as hand loan. Accordingly, on 25.10.2005 deed of cancellation of agreement of sale was executed. The defendant No.1 again availed hand loan from the said Vilas Anand Jadhav for Rs.81,500/- and executed the nominal agreement of sale deed dated. 25.10.2005 with respect of suit schedule property in favour of the said Vilas Anand Jadhav for the purpose of security to the said hand loan. The defendant No.1 repaid the said loan amount to the said Vilas Anand Jadhav and re-conveyed the suit schedule property in the name of defendant No.3 for avoiding raising of loan repeatedly by the defendant No.1. The defendant No.1 in the year 2013 raised the hand loan of Rs.1,00,000/- for the period of two years from defendant No.4 behind the back of the plaintiff and defendant No.2. For the purpose of security to the said hand loan the defendant No.1 executed nominal agreement of sale in favour of defendant No.4 through defendant No.3. The defendant No.4 filed a suit in O.S.No.988/2017 against the defendant No.3 for the relief

of specific performance of contract with respect of suit schedule property before the IV Addl. Civil Judge and JMFC Athani on the basis of agreement of sale dated.18.06.2013. The said suit was came to be decreed on 18.10.2019. Against the said judgment and decree the defendant No.3 preferred an appeal before the Hon'ble appellate Court in R.A.No.150/2019. The said appeal was also dismissed on 04.06.2022. The said fact is came to the knowledge of the plaintiff very recently. The plaintiff is having 1/4th share in the suit schedule property. As such, he prays to decree the suit.

9. The contention of the defendant No.4 is that the suit schedule property is the absolute property of defendant No.3. She purchased the same from Vilas Anand Jadhav in the year 2009. For his legal and family necessities, he agreed to sell the suit schedule property in favour of defendant No.4 for valuable consideration amount of Rs.5,00,000/- and executed the agreement of sale in his favour on 18.06.2013 after receiving advance sale consideration amount of Rs.1,72,000/-. When the defendant No.3 not performed her part of contract as per the above said agreement of sale he filed suit against defendant No.3 for the relief of specific

performance of contract in O.S. No.988/2017. The said suit was decreed and the said decree also confirmed in R.A.No.150/2019. He has filed the execution petition No.176/2019 for executing the above said decree and he deposited the balance sale consideration amount in the said execution petition. The Court commissioner also appointed in the said execution petition for executing the sale deed. Now the plaintiff and defendant No.1 to 3 have colluding with each other have filed the false suit against the defendant No.4 without including all the joint family properties in the present suit.

10. On the other hand the defendant No.1 to 3 are also filed their written statement by admitting the entire case of the plaintiff and they also prays to decree the suit by allotting their share in the suit schedule property.

11. It is the suit for partition and separate possession with respect of suit schedule property. As per the plaintiff averments the suit schedule property is the ancestral property of defendant No.1. As per the plaintiff averments the plaintiff and defendant No.2 are the children of defendant No.1 and 3. According to the plaintiff he is having 1/4th share in the suit schedule property. The contention of the

defendant No.4 in the written statement that, the suit schedule property is the self acquired property of defendant No.3 as per Section 14 of the Hindu Succession Act it is the absolute property of defendant No.3. Further the contention of the defendant No.4 is that the plaintiff has not included all the joint family properties in the present suit. The above said contentions will be decided only after full pledge trail. In the reported decision **(2021) 9 SCC 99 (Srihari Hanumandas Totala vs Hemant Vithal Kamat)** in Para No.25 the **Hon'ble Supreme Court of India** held as under.

25. On a perusal of the above authorities, the guiding principles for deciding an application under Order 7 Rule 11(d) can be summarized as follows:

25.1 (i) To reject a plaint on the ground that the suit is barred by any law, only the averments in the plaint will have to be referred to;

25.2 (ii) The defense made by the defendant in the suit must not be considered while deciding the merits of the application;

25.3 (iii) To determine whether a suit is barred by res judicata, it is necessary that (i) the 'previous suit' is decided, (ii) the issues in the subsequent suit were directly and substantially in issue in the former suit; (iii) the former suit was between the same parties or parties through whom they claim, litigating under the same title; and (iv) that these issues were adjudicated

and finally decided by a court competent to try the subsequent suit; and

25.4 (iv) Since an adjudication of the plea of res judicata requires consideration of the pleadings, issues and decision in the 'previous suit', such a plea will be beyond the scope of Order 7 Rule 11 (d), where only the statements in the plaint will have to be perused.

In the above decision the Hon'ble Supreme Court of India clearly held that for deciding the application u/Order 7 Rule 11(d) of CPC the Court has to look into the averments in the plaint. Further in the said decision it is clearly held that to reject a plaint on the ground that suit is barred by any law only the averments in the plaint will have to be referred to. It is also held that the defence made by the defendant in the suit must not be considered while deciding the merits of the application. Under such circumstances I am of the opinion that the application filed by the defendant No.4 is not maintainable. On the basis of above reasons and discussions I hold **Point No.1** in the **NEGATIVE**.

12. Point No.2 :- For the aforesaid reasons and discussions made above, I proceed to pass the following:-

ORDER

I.A.No.II filed by the defendant No.4
under Order 7 Rule 11(d) R/w Section 151 of
CPC is hereby dismissed.

*(Dictated to the Stenographer, transcribed and computerized by her,
corrected by me, and then pronounced in the open court on this the **10th day of
February 2023.**)*

Sd/-
(SAYED MOHIUDDIN URF KHAWAJA PEERAN)
III ADDITIONAL CIVIL JUDGE & JMFC., ATHANI.