



IN THE COURT OF THE I ADDITIONAL SENIOR CIVIL JUDGE, GOKAK

Present: K.M. SHANKAR, B.A.L., LL.B.,
I Addl. Senior Civil Judge, Gokak

Dated, this the 21st day of April, 2023

O.S.No.376/2018

Plaintiff : Ishwar Basavanneppa Vannur

(By Sri.MNC., Advocate)

V/s

Defendants: 1. Ningawwa Basavanneppa Vannur
and 49 others.

(D1 & 2 by Sri.MKD., Advocate)

(D3 by Sri.BKJ., Advocate)

(D5 Absent)

(D4 to 12, 14 to 18, 21 to 27, 30 to 33, 36,
38, 39, 41, 43 to 45 & 47 exparte)

I.A. No.11

Applicant : Irappa

V/s

Opponents : Ishwar

ORDERS ON IA-11 FILED UNDER ORDER 39 RULE 1 AND 2 R/W

SECTION 151 OF CPC

The 3rd defendant has made the instant application and sought for grant of an order of temporary injunction against the



plaintiff restraining him, his men, agents, servants or anybody acting on his behalf from making any construction by changing the nature of the landed property bearing R.S.No.357/3, measuring 02 acres and 02 guntas of Devegoudanahatti (Khanagaon) village, Gokak taluk till disposal of the suit.

2. In the application the 3rd defendant has asserted that, the plaintiff has filed the suit against the defendants for the relief of partition in respect of an agricultural landed property R.S.No.74/3 of Pudkalakatti village. The 3rd defendant appeared and filed his detailed written statement by denying the alleged claim of the plaintiff. The 3rd defendant has specifically contended in the paragraph 9 of his written statement that, the land measuring 02 acres and 02 guntas of R.S.No.357/3, land measuring 02 acres and 08 guntas of R.S.No.357/4 and land measuring 09 acres and 26 guntas, out of it 03 acres of R.S.No.423/1+2+3+4+5, situated at Devegoudanahatti village are the ancestral properties and there is no partition by metes and bounds in respect of the said properties between the 3rd defendant and plaintiff but inspite of taking such defence the said properties are not included in the suit and trying to construct a building in Sy.No.357/3.



3. The plaintiff has no right to change the nature of the property and he has no right to alter the same. Without there being partition, he has no right to make any construction in the said property. The 3rd defendant requested the plaintiff not to indulge in such illegal activities, but he did not heed the same. On the contrary, he is collecting the raw materials and there is possibility of changing the nature of the property. The Civil courts will be closed due to summer vacation. If the plaintiff is allowed to make such construction, he would complete the same and thereby the 3rd defendant would be put to heavy and irreparable loss which cannot be compensated in terms of money. He has got a prima facie case and balance of convenience is in his favour.

4. This application is resisted by the plaintiff contending that the averments made therein are false. It is contended that the suit is filed for the relief of partition and the 3rd defendant is residing at Devegoudanahatti village by constructing a house. Likewise, if the plaintiff is residing in the land measuring 01 acre and 01 gunta of Sy.No.357/3 by constructing a house and also a shed of cattle long back. The said property belong to the plaintiff and defendants 1 to 3. As the said shed was in dilapidated condition and fell down a shed has been constructed therein and



it has been completed. Such being the case, when the shed was under construction in order to trouble the plaintiff, the 3rd defendant took the photographs of the same and produced before this court with CD. But, the construction of the so called shed has been constructed and its photographs and CD are produced. The 3rd defendant will get 10 guntas of land in Sy.No.3573 towards his share. The plaintiff has constructed a residential house and cattle shed in 01 gunta of the land of the said survey number. If the said building comes in the share of the 3rd defendant, then the plaintiff will give him the same to the 3rd defendant. Accordingly, it is prayed for dismissal of the application with cost.

5. I have heard the arguments of the learned counsels appearing for the parties and perused the material on record.

6. Points that arise for consideration of the court are:

1. Whether the 3rd defendant has made out prima-facie case in his favour?
2. Whether balance of convenience lies in favour of the 3rd defendant?
3. Whether irreparable loss, which cannot be compensated by any means would be caused to the 3rd defendant if the present application is dismissed?
4. What order?



7. Findings of this court on the above points are:

Point No.1: in the affirmative

Point No.2: in the negative

Point No.3: in the negative and

Point No.4: as per final order for the following:

R E A S O N S

8. Point No.1: as could be seen from the material on record, the plaintiff is claiming share in the suit property asserting that, it is an ancestral joint family property of the defendants and himself and are in joint possession and cultivation of the same and there is no partition in the suit property. Katha of the suit property is in the name of the 3rd defendant, who is the manager of the Hindu Undivided joint family and now he is trying to alienate the suit property. On the other hand, it is a specific case of the 3rd defendant that the suit property is his self acquired property as he acquired the same independently and it is not an ancestral property and no joint family is in existence. Further, it is contended that the suit is not maintainable as it is bad for non-inclusion of the lands of the R.S.No.357/3, R.S.No.357/4, R.S.No.423/1+2+3+4+5 and house property bearing GPC.No.254



as they are ancestral joint family properties of the plaintiff and defendants and there is no partition among them in these properties.

9. Now, the 3rd defendant has come up with the present application seeking an order of temporary injunction against the plaintiff restraining him from making any construction by changing the nature of the land of R.S.No.357/3, measuring 02 acres and 02 guntas of Devegoudanahatti, Gokak taluk till disposal of the suit contending that the plaintiff without there being a partition has no right to change or alter the nature of the property and make any construction therein.

10. At the out set, the plaintiff has not denied the defence of the 3rd defendant made in relation to non-inclusion of the above referred ancestral properties in the suit and nothing is pleaded in the plaint in relation to the said properties. However, by the pleadings and documents produced by the parties, one could gather that the above referred properties are ancestral properties of the plaintiff and defendants and are in their joint possession and enjoyment and there is no partition in relation to the said properties. No doubt, the suit becomes bad if the said properties



are not included. But, while finding out a prima facie case in favour of the plaintiff non-inclusion of the properties alone would not be a ground to hold that there is no prima facie case in favour of the plaintiff as he can include such properties even till passing of judgment in the suit.

11. However, now the 3rd defendant has come up with the present application. Therefore, he has to make out a prima facie case in his favour. No doubt, the property in relation to which the temporary injunction is sought is not the subject matter of the suit but the 3rd defendant has pleaded about the said property in his pleadings and the plaintiff has admitted its non-inclusion in the suit and also non effecting of partition in relation to that property. Therefore, all the plaintiff and defendants will get share in the said properties, which are not included in the suit and the plaintiff can include those properties henceforth. Therefore, at the out set, there is a triable issue in the case at hand and accordingly, this court has no hesitation to hold that there is a prima facie case in favour of the 3rd defendant. Accordingly, the point No.1 is answered in the affirmative.



12. Point No. 2 & 3: these points are taken up together for common discussion in order to avoid repetition in discussion. It is well settled that, mere establishing a prima facie case is not sufficient to grant an order of temporary injunction either in favour of the plaintiff or 3rd defendant. Apart from showing the prima facie case, the person who seeks a temporary injunction has to show that the balance of convenience lies in his favour and irreparable loss, which cannot be compensated by any means would be caused to him if a temporary injunction is not granted.

13. In the case at hand, the 3rd defendant has specifically contended that the plaintiff is making a construction in the property measuring 02 acres and 02 guntas of R.S.No.357/3. As could be seen from the photographs produced by the 3rd defendant, the alleged construction was on the half way when he filed the application but now the photographs produced by the plaintiff prima facie go to show that the construction has been completed by erecting a shed with the help of hollow bricks and it is roofed by zinc sheets and no further construction could be possible as according to the plaintiff the said shed has been constructed for cattle farming.



14. As noted hereinabove, the plaintiff has admitted the said construction in the said property asserting that the 3rd defendant is also having share of 10 guntas of land in the said property. If his share is given in the place where the shed has been constructed he will give up the same to the 3rd defendant. It is not the case of the 3rd defendant that he is residing in the said property and by usage of the alleged shed by the plaintiff, he will be put to hardship. Under these circumstances, absolutely, the balance of convenience does not lie infavour of the 3rd defendant.

15. If the plaintiff is restrained from usage of the said shed for cattle farming, he would be put to heavy hardship and irreparable loss, which cannot be compensated by any means and no such loss would be caused to the 3rd defendant if a temporary injunction is not granted. However, in order to keep the nature and position of the said property in tact till disposal of the suit and meet the ends of justice, the plaintiff can be directed to maintain status quo in relation to the nature of the said property where he has constructed the alleged cattle shed and holding residence with a liberty to use the same as usual. Further, as the plaintiff admitted that the above referred properties are ancestral properties and there is no partition in them, he must be directed



to include the same in the suit. In view of the said discussion, material and reasons, the point No.2 and 3 are answered in the negative.

16. Point No.4: in view of the findings arrived on the point No.1 to 3, I proceed to pass the following:

O R D E R

The IA.No.11 filed under Order 39 Rule 1 & 2 R/w section 151 of CPC, is hereby dismissed.

There shall be no order as to cost.

The plaintiff is directed to include all the properties referred hereinabove in the suit and maintain status quo in relation to the nature of the said property where he has constructed the alleged cattle shed and holding residence with a liberty to use the said shed and residence as usual.

(Dictated to the stenographer on computer, typed by him, revised, corrected and then pronounced by me in the open Court on this the 21st day of April, 2023)

Sd/-
(K.M.SHANKAR)
I Addl. Senior Civil Judge, Gokak