

KABG500010262021



**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 16th day of December, 2021

O.S.No.539/2021

Plaintiff : Nagratna D/o. Shantappa Attimarad,
(After marriage her name
Smt. Nagaratna W/o. Shrikant Hallur,
Age: 50 years, Occ: Household,
R/o. Laxmi extension, Gokak,
Gokak taluk, Belagavi district.

(By Sri. SCG., Advocate)

V/s

Defendant : Siddveerchanabasappa S/o. Shantappa
Attimarad, Age: 60 years, Occ: Business,
R/o: Suvarna Book Stall, Gokak,
Gokak taluk, Belagavi district.

2. Veeresh S/o. Shantappa Attimarad,
Age: 53 years, Occ: Business,

R/o: Suvarna Medicals Near HP Gas Office,
Anand Talkies Road, Hosapet Galli, Gokak,
Gokak taluk, Belagavi district.

3. Madhushri W/o. Mohan Attimarad,
Age: 49 years, Occ: Household,
R/o: 303, 3rd floor, Mahalaxmi Apartment,
Bhagya Nagar, 2nd cross, Tilakwadi,
Belagavi taluk and district.
4. Kirans S/o. Mohan Attimarad,
Age: 27 years, Occ: Engineer,
R/o: 303, 3rd floor, Mahalaxmi Apartment,
Bhagya Nagar, 2nd cross, Tilakwadi,
Belagavi taluk and district.
5. Varun S/o. Mohan Attimarad,
Age: 23 years, Occ: Student,
R/o: 303, 3rd floor, Mahalaxmi Apartment,
Bhagya Nagar, 2nd cross, Tilakwadi,
Belagavi taluk and district.

(D1 by Sri. VVK., Advocate,
D2 by Sri. OBJ., Advocate &
D3 to 5 by Sri.SBK., Advocate)

I.A. No.1

Applicant	:	Nagratna V/s
Opponents	:	Siddaveerchanabasappa and others

ORDERS ON IA-1 FILED U/O 39 RULE 1 & 2 R/W SECTION 151 OF CPC

Plaintiff has made the present application and sought for grant of an order of temporary injunction against the defendants restraining them from alienating or creating any charge over the suit schedule properties till the disposal of the suit.

2. It is asserted in the accompanying affidavit of the application that the suit is filed for partition and separate possession in the suit properties and they are joint family properties and there is no partition by metes and bounds and the plaintiff and defendants have 1/4th share each. After the death of their mother Sonutai, they succeeded the suit properties jointly as a joint family properties. The relationship between them has become strained and in view of the same the defendants colluded with each other and tried to alienate the suit properties to the strangers with bad intention to cause loss to the plaintiff. She requested them in the last week to effect partition of the suit properties by metes and bounds. But, the defendants have refused to do so with a malafide intention to gulp the suit properties. Now, the defendants started to negotiate with some mischievous persons for the purpose of selling the suit plot to the strangers suppressing the existence of her joint share in the suit properties. If they are allowed to do so, the plaintiff will be put to heavy and irreparable loss as there is no partition in the suit properties and she has got a prima-facie case, balance of

convenience lies in her favour and if an order of temporary injunction is granted no loss would be caused to the defendants. On the other hand, if the temporary injunction is not granted, the plaintiff will be put to loss, which cannot be compensated in terms of money.

3. The 2nd defendant has resisted the application by denying the averments made in the accompanying affidavit of the IA as false and has contended that an equitable partition was already effected on 09.06.1993 in the family of the plaintiff and defendants. The suit is hopelessly barred by time. The plaintiff has not filed any suit challenging the family partition within three years from 09.06.1993 and she has admitted and acted upon the earlier partition and accordingly she waived of her right, if any to challenge the earlier partition. Therefore, the suit is hit by the doctrine of waiver and promissory estoppel. The 2nd defendant is an absolute owner and in possession and enjoyment of the suit properties i.e., plot No.28 measuring 00.02.02.16 of Sy.No.204/1D+1E+1F, situated at Laxmi extension area, Gokak, a portion measuring 10X14 feet of CTS.No.3294, 3295 and 3296 of Hospet Galli, Gokak, properties bearing CTS.No.3287/N-1 and 3287/B-2 of Gokak i.e., Sy.No.'g' and 'h', property NA plot No.27 of R.S.No.204/1D+1E+1F of Gokak in the the capacity of their exclusive and absolute owner, to the exclusion of the plaintiff and said other defendants. The plaintiff has filed the false suit with a malafide

intention to gulp the suit properties and harass the defendants by causing wrongful loss to them and to have wrongful gain to herself. The 2nd defendant who is a businessman needs financial assistance from banks, financial institutions and other credit agencies for doing his business activities and the defendants also need to exercise their lawful ownership rights of constructing the respective properties by taking aid of banks, financial institutions and other credit agencies. So also in order to purchase other valuable and beneficial properties, lands by alienating the suit properties. The defendants are under pressing necessities and find it appropriate to alienate the suit properties for the above said purposes. The plaintiff has neither any right nor any authority under law to claim any injunction against the defendants as prayed for. Accordingly, it is prayed for dismissal of the application with cost. The 1st defendant has adapted the said objections to the present IA.

4. The application is resisted by the defendants 3 to 5 by denying the averments made in the accompanying affidavit of the IA as false and have contended that the plaintiff has not approached this court with clean hands and has suppressed the material fact that a partition has already been taken place in respect of all the joint family properties long back among the parties to the suit. However, now, the plaintiff intentionally in order to harass the defendants 3 to 5 added the

properties, which are self acquired properties of the deceased Mohan Shantappa Attimarad, who was a government servant and purchased some of the suit properties with his own earnings. The prayer made in the application itself is multiple prayer in one application and secondly such application is curtailing the person from exercising his legal rights. Hence, it is not maintainable in the eye of law. The claim and contents made out in the accompanying affidavit are incorrect. Accordingly, it is prayed for dismissal of the application with cost.

5. I have heard the arguments of the learned counsel appearing for the plaintiff and defendants 1 to 5 and perused the material on record.

6. The 2nd defendant has relied upon the following decisions;

1. 2019 (2) KCCR 1437 (V.Krishna Char and others Vs. Sundara Murthy and another)
2. 2020 (1) KCCR 494 (Smt.Sudha Rao Vs. S.Srinivasa Reddy and another)
3. [2020] SCCR 525 (Bhagwat Sharan (Dead Through LRs) Vs. Purushottam and others)
4. [2018] SCCR 309 Ranvir Dewan Vs. Rashmi Khanna and another)

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

1. Whether the plaintiff has made out prima-facie case in her favour?

2. Whether balance of convenience lies in favour of the plaintiff?
3. Whether irreparable loss, which cannot be compensated by any means would be caused to the plaintiff if the present application is dismissed?
4. What order?

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

Point No.1: in negative

Point No.2: in negative

Point No.3: in negative and

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

R E A S O N S

9. Point No.1: as could be seen from the material on record, the plaintiff has knocked the doors of the court of law seeking decree of partition asserting that the suit properties are joint family properties of the plaintiff and defendants and there is no partition by metes and bounds. After the death of their mother Sonutai, they succeeded the suit properties jointly as a joint family properties. The relationship between them has become strained and in view of the same the defendants colluded with each other and tried to alienate the suit properties to the strangers with a bad intention to cause loss to the

plaintiff and she requested them in the last week to effect partition of the suit properties but same is refused by them.

10. Per contra, as noted above, the defendants have specifically taken up a defence that there was already partition in 1993 in respect of the suit properties and same is acted upon. Wherein, the plaintiff was also given share creating life interest and she borrowed loan independently as could be seen from the ME.No.8084 and 5788. Further, herself and her parents executed a consent letter in 2003. There is no pleadings to show that the properties were purchased out of the nucleus of the joint family. A report (varadi) was given to the concerned authority as per the partition and the plaintiff also signed the same and katha of the property was made based on it. But, after lapse of long time the suit is filed and the property CTS.No.3273/B was purchased by the 1st defendant but it is not included as it is his absolute property and STS No.3033/B2 was purchased by him after partition and plot No.28 was also purchased by him in the name of his wife. The plot No.11 and 12 also purchased by him and he obtained loans on the properties. Unless earlier partition is challenged within a period of limitation. The present suit is not maintainable. Accordingly, there exists no joint family and the suit properties are not available for partition.

11. In view of the above referred rival contentions of the parties, in order to grant an order of temporary injunction, the plaintiff has to show prima facie that the suit schedule properties are joint family properties of the defendants and herself and are available for partition.

12. At the out set, the alleged relationship and death of the parents of the plaintiff and defendants are not in dispute. The RTC and mutation register extracts of property Sl.No.1 i.e., Sy.No.204/1D+1E+1A produced by the plaintiff reveal that the katha of the said property is standing in the names of the plaintiff, her mother and defendants jointly. But, the said documents do not show that the said property is a joint family property of the plaintiff and defendants. Further, the photostat copies of endorsement of the pattan panchayath, Kittur, proceedings and relinquishment deed produced by the plaintiff go to show that the parents of the plaintiff and defendants 1 and 2 and Mohan relinquished their right over the property No.776/A/1/2 in favour of Mahantesh Virupakshappa Attimarad and Shivanand Virupakshappa Attimarad. The plaintiff has not produced documents relating to other suit properties. Therefore, at the out set, her oral assertions are not supported by the documents.

13. As held in the decision relied by the 2nd defendant and reported in 2019 (2) KCCR 1437, in the case of V. Krishna Char and

others Vs. Sundara Murthy and another, in order to grant temporary injunction the plaintiff has to produce documents to substantiate her case. At the inception, the plaintiff has to show prima-facie case by producing prima-facie material to believe her case. In the case at hand, the plaintiff has to convince the court with primafacie material in view of the defence taken up by the defendants.

14. The defendants have specifically contended that during the life time of the parents of the plaintiff, defendants 1 and 2 and deceased Mohan there was an equitable and valid partition in the family and subsequently it was reduced into writing by a memorandum of partition dated 09.06.1993 as per the instructions furnished by the plaintiff, defendants 1 and 2 and their parents and it was duly signed by them. The suit property R.S.No.204/1D+1E+1F, plot No.28 measuring 40X35 fell to the share of the 2nd defendant by creating a life interest therein of the deceased Shantappa and Sonutai observing that after their death the said property shall be taken by the 2nd defendant. The said partition is admitted and acted upon by the family members including the plaintiff. She was also allotted a life interest in the properties plot No.28 of R.S.No.207/2, house bearing Gram Panchayath No.776A of Kittur by observing that after her death the said properties go to her brother Mohan or his legal heirs. After the death of Shantappa and his wife the 2nd defendant alone became the owner of

the said properties. Based on the illegal entries made in the RTC in the names of the plaintiff and defendants, the false suit is filed. As the partition is acted upon and admitted by the plaintiff she waived her right to challenge the partition. OS.No.227/2011 was filed by the plaintiff for declaration. Wherein, she has admitted the earlier partition of 1993, and this fact is suppressed and same is suppressed in the present suit and she is residing in the plot No.28 of Sy.No.207/2 measuring 40X80, and the property GPC.No.776 of Kittur was sold by her in 1995 and suppressed the same in the suit. Even, she herself got entered her name as per the partition and after lapse of 28 years this suit is filed without seeking cancellation or reopening of the partition.

15. The photostat copies of applications and partition deed produced by the defendants 1 and 2 prima-facie go to show that the parents of the plaintiff, defendants 1 and 2 and Mohan had partitioned some of the suit properties and the plaintiff was also allotted share creating life interest. Photostat copies of the plain card and ruled card reveal that khatha of the property was mutated. Photostat copies of sale deeds and RTC extracts produced by the 1st defendant reveal that some of the suit properties are purchased by the defendants 1 and 2 out of their own earnings and khatha was mutated in their names.

16. The consent deed produced by the 2nd defendant further corroborates and goes to show that there was a partition in the family of the plaintiff and defendants. The true copies of the documents of Shree Beereshwara Co-Op-Credit Society Ltd., Examba prima-facie reveal that some amount is in FD in the name of the mother of the plaintiff and same is not included in the suit. The learned counsel for the plaintiff has argued that she is the nominee and her mother was residing with her only and 10 days prior to her death she was taken to the house of the defendants by executing an agreement. But, these things cannot be the reasons for non-inclusion of the said amount in the suit. Accordingly, the suit is bad for non-inclusion of all the properties of the family of the plaintiff and defendants. Further, as could be seen from the photostat copy of extract of ME.No.8084 produced by the 1st defendant, the plaintiff borrowed a loan on the property fell to her share in the said partition. The learned counsel for the plaintiff has argued that the plaintiff borrowed the alleged loan as the 2nd defendant took the loan in the name of the plaintiff in order to get the subsidy form the Industrial Co-operative Society. But, no supportive material is forthcoming to accept the said arguments and accordingly there is no hesitation to hold that the said partition is acted upon by the plaintiff.

17. The above referred documents prima-facie go to show that the alleged partition was taken place among the plaintiff, defendants 1 and 2, deceased Mohan and their parents in 1993 and is acted upon and inspite of having knowledge of the same the plaintiff has not pleaded the same in her plaint and suppressed the same. Therefore, as held in the decision relied by the 2nd defendant and reported in (2020) SCCR 525 SC, in the case of Bhaghat Sharma Vs. Purushotham and others, the plaintiff is estopped from denying the validity of the alleged partition deed and it's binding effect. It is argued by the counsel of the plaintiff that the alleged partition deed is unregistered one and created by the defendants and Siddavva is given share and the share of the plaintiff is not confirmed and there is no equal distribution of shares. But, nothing is pleaded in the plaint in this regard and no contra material is produced to disbelieve the alleged partition deed at this stage and it can be made use of for collateral purpose i.e., to know the division though it is an unregistered one. Hence, the said arguments of the plaintiff do not hold water.

18. Further, as rightly argued by the counsel of the 1st defendant, the plaintiff has not pleaded the fact that the suit properties standing in the names of the defendants 1 and 2 and deceased Mohan were purchased out of the nucleus of the joint family and that apart, no prima-facie material is produced by the plaintiff to show that the suit

properties are joint family properties. It is well settled in the rulings relied by the 2nd defendant and reported in 2019 (4) Civil LJ 65, in the case of S.Subramanian Vs. S. Ramasamy and others, AIR 2004 Karnataka 479, in the case of T.S. Subbaraju Vs. T.A. Shivarama setty, AIR 2008 NOC 1241=2008 (2) AIR Kar R 384, in the case of Smt. Revamma and another Vs. Basha Saab and another and AIR 2002 Orissa 110, in the case of Harihar Sethi and another vs. Ladukishore Sethi and others, that the properties acquired from the separate income without the aid of the joint family funds and it's nucleus are separate properties and are not liable for partition. Therefore, the suit properties cannot be treated as joint family properties and hold that they are available for partition. In the circumstances, the arguments canvassed by the learned counsel for the plaintiff that anything is earned by the defendants it is earned only out of the income of the ancestral joint family property do not hold water and the plaintiff has not made out a prima-facie case at this stage. Thus, the point No.1 is answered in negative.

19. Point No. 2 & 3 : these points are taken up together for common discussion in order to avoid repetition in discussion. As noted above, the plaintiff has not made out a primafacie case in her favour. Therefore, the question of considering other two requirements for grant

of an order of temporary injunction does not arise. Accordingly, the point No.2 and 3 are answered in negative.

20. 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

IA-1 filed under Order 39 Rule 1 & 2 R/w
section 151 of CPC is hereby dismissed.

There shall be no order as to cost.

(Dictated to the stenographer on computer, typed by
him, revised, corrected and then pronounced by me in the open
Court on this the 16th day of December, 2021)

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