

**IN THE COURT OF CIVIL JUDGE AND JMFC
AT HOLENARASIPURA**

Present:- Sri. **R.Mahesha**, B.A.L., LL.B,
Civil Judge and J.M.F.C,
Holenarasipura.

Dated this the 7th day of July, 2018

O.S.No.161/2017

H.K.Ramesha & another : Plaintiff

(By Sri.B.H.VP., Adv.,)

V/s

1. Kalegowda H.N. & others : Defendants

**(D1 By Sri.M.E.S., Adv.,
D2 & 3 By Sri.U.R.S.Adv.,)**

ORDERS ON IA-II

H.N.Puttaraju : Applicant/ Plaintiff

VS

H.N.Kalegowda & others : Defendants

**ORDER ON IA U/O 39 RULE 1 AND 2 OF CPC FILED BY THE
PLAINTIFF**

This suit filed by the plaintiff against the defendants for the relief of partition and separate possession of suit schedule properties.

2. The present application filed by the plaintiff under order 39 rule 1 and 2 of C.P.C against the defendant for the relief of temporary injunction to restrain the defendant from not to alienating and creating charge mortgage over the suit schedule properties.

3. The above deponent sworn in the an accompanying an affidavit is that he is the second plaintiff in the above case. The first defendant is

the father of plaintiff No.1 and 2 and defendant No.2 to 4. First defendant had 4 male children and 1 female children. The suit schedule items are Hindu undivided and ancestral properties of plaintiff and defendants. The plaintiff and the defendants are the members of Hindu undivided joint family. The suit schedule item No.A property ancestral property of plaintiff and defendant. Suit B schedule property granted by the government for the benefit of joint family. Suit C schedule property purchased by the first defendant from the nucleus accrued by the joint family fund and income. C schedule item as a karta of the family purchased in the name of 1st defendant. D schedule item it is residence house ancestral property of the plaintiff and defendant. The deponent further sworn in the affidavit that suit C schedule property the 1st defendant colluding with 2nd and 3rd defendant created gift deed in favour of the defendant No.2 and 3 before office of the Sub register, Holenarasipura. C schedule item No.1 property bearing Sy.No.74/4 extent 16 guntas the 1st defendant executed gift deed in favour of 2nd defendant which is registered as document No.HLN2998/2016-17 dated 6/1/2017 and C schedule item No.2 property situated at Amanikere Village bearing Sy.No.74/2 extent 20 guntas the 1st defendant executed gift deed in favour of the 3rd defendant in the office Sub register Holenarasipura which is registered as document No.HLN2998/2016-17. The present plaintiffs having equal rights in the B and C schedule property the above gift deed are not binding to the share of the plaintiff. The plaintiff demanding for his legal share but 1st defendant refused to effect partition he colluding with other defendants and created gift deed in favour of the defendant No.2 and 3. Therefore this suit filed for partition of all suit schedule properties.

4. Per contra 1st defendant filed by opposing application and filed his objection stating that the present application is not maintainable either in law or facts. The relationship stated in the affidavit is true and correct. The plaintiff stated in the plaint para No.3 are totally false. suit schedule B

to D properties are not ancestral properties. The above B to D schedule properties are self acquired properties of 1st defendant. A schedule item property only ancestral property of plaintiff and defendant Suit B schedule property granted by the Government for the benefit of joint family is also false. C schedule properties purchased out of joint family income is also false. D schedule house property ancestral property of plaintiff and defendant is also false. Suit schedule C item No.1 gifted in favour of the 2nd defendant C schedule item No.2 gifted in favour of 3rd defendant is correct. The plaintiffs have not right of partition in the C schedule items. Plaint para No.5 totally false and not tenable under law. The plaintiff created false story to claim false. The 1st defendant specifically stated in his written statement that, suit schedule A property item No.1 to 5 are originally belongs to one Channegowda @ Mategowda. After the death of said Channegowda @ Mategowda properties fallen to the share of 1st defendant. Suit schedule B item Sy.No.115/6 extent 16 guntas granted in favour of 1st defendant by bagaruhukum committee and darakatsu property. The 1st defendant as per direction given by the Bagaruhukum Committee he paid kimmathu by his own earnings and get khatha in favour of 1st defendant and in possession of 1st defendant. It is self acquired property of 1st defendant, plaintiff and other defendants have no right to claim partition. Suit schedule C item No.1 to 3 and suit schedule D property purchased by 1st defendant he was appointed in the school teacher in year 1961, he purchased C and D schedule properties out of his own earnings and retirement benefit. The 1st defendant purchased C schedule item No.1 and 2 on 4/3/2002 from one Nanjamma W/o Annajigowda for the valuable of Rs.69,000/-. On the basis of sale deed he gets khatha in his favour M.R No.2/2003-04. He pay the revenue regularly to the government. The suit C schedule item No.1 and 2 are the self acquired properties of the 1st defendant and same gifted in the favour of the defendant No.2 and 3 on 4/6/2017. Suit C schedule Sy.No.90 extent of 2 acre 13 gunts purchased on 16/10/1989 from Patel Mallappa

S/o Doddaiiah and his children's Chandrashekaraih S/o Patel Mallappa, for the value of Rs.20,000/-. On the basis of this sale deed the 1st defendant get khatha in his favour MR No.10/1991-92, 1st defendant is in possession of the property. Suit schedule D item sy.No.75/3 extent 0.03 guntas 1st defendant purchased by one Manjegowda and his children dated 7/7/1977. After purchase of Sy.No.75/3 0.03 guntas 1st defendant apply for conversion and gets conversion for the purpose of constructing house. He constructed Mangalore tiled house E-W 12.4968 meter and N-S: 15.8496 meter constructed house it is self acquired property of the 1st defendant and he is in possession of the 1st defendant and he regularly pay tax to concern authority. The above plaintiff filed this suit without include all ancestral properties. On this ground this suit is not maintainable and liable to be dismissed. The plaint A schedule property ancestral property of plaintiff and defendant rest of B to D properties are the self acquired properties of the 1st defendant. The plaintiff have not right of partition. The present suit filed only harass the defendant Therefore pray for dismissal of the suit.

5. Heard the argument of both the counsels.

6. The points that arise for my consideration are as follows.

1. Whether the plaintiff proves that he has made out prima-facie case in his favour?
2. Whether the plaintiff proves that balance of convenience lies in his favour?
3. Whether the plaintiff proves that irreparable loss or injury will be caused to him if TI not granted as prayed?
4. What order?

7. I answer the above points are as follows.

Point No.1: In the Negative

Point No.2: In the Negative

Point No.3: In the Negative

Point No.4: As per the final orders for the
following reasons.

REASONS

8. **Point No.1 to 3:-** Since these points are interconnected to each other, hence I propose to take up these points together for discussion.

9. In order to obtain an order of temporary injunction, the plaintiff have to establish that he has got prima facie case in their favour. If it will establish principles of law that prima facie case does not mean that in all probability. The plaintiffs should succeed in the suit. On the other hand the plaintiffs have to establish that he has got prima facie case to go for trial. Off course, it is well-settled principle of law that prima facie case does not mean that in all probabilities. The plaintiffs should succeed in the suit. Moreover the suit filed by the plaintiff should not to be barred by any other law.

10. It is the contention of the plaintiff, the suit schedule items are Hindu undivided and ancestral properties of plaintiff and defendants. The plaintiff and the defendants are the members of Hindu undivided joint family. The suit schedule item A property ancestral property of plaintiff and defendant. Suit B schedule property granted by the government for the benefit of joint family. Suit C schedule property purchased by the first defendant from the nucleus occurred by the joint family fund and income. C schedule item as a karth of the family purchased in the name of 1st defendant. D schedule item it is residence house ancestral property of the plaintiff and defendant. The suit C schedule property the 1st defendant colluding with 2nd and 3rd defendant created gift deed infavour of the defendant No.2 and 3 before office of the Sub register, Holenarasipura. C schedule item No.1 property bearing Sy.No.74/4 extent 16 guntas the 1st defendant executed gift deed infavour of 2nd defendant and C schedule

item No.2 property situated at Amanikere Village bearing Sy.No.74/2 extent 20 guntas the 1st defendant executed gift deed in favour of the 3rd defendant. The present plaintiffs having equal rights in the B and C schedule property the above gift deed are not binding to the share of the plaintiffs. The plaintiff demanding for his legal share but 1st defendant refused to effect partition he colluding with other defendants and created gift deed in favour of the defendant No.2 and 3. Therefore this suit filed for partition of all suit schedule properties.

11. To substantiate his affidavit averment, the plaintiffs are produced original copy of genealogical tree certified by Deputy Tahasildar, Halekote Hobli H.N.Kalegowda, Original copy of computerized RTC Sy.No.36/4 for the year 2016-17 of Haradanahalli village, Original copy of computerized RTC Sy.No.75/10 for the year 2016-17 of Haradanahalli village, Original copy of computerized RTC Sy.No.96/2 for the year 2016-17 of Haradanahalli village, Original copy of computerized RTC Sy.No.96/7 for the year 2016-17 of Haradanahalli village, Original copy of computerized RTC Sy.No.112/1 for the year 2016-17 of Haradanahalli village, Original copy of computerized RTC Sy.No.115/6 for the year 2016-17 of Haradanahalli village, Original copy of computerized RTC Sy.No.74/4 for the year 2016-17 of Amani Doddakere village, Original copy of computerized RTC Sy.No.90 for the year 2016-17 of Malledevarapura village, Xerox copy E khatha extract, certified copy of MR 5/2003-04, certified copy of MR 3/1994-95, original copy of MR 2/2002-03 two in nos. xerox copy of gift deed dated 6/1/2017, executed by the 1st defendant 6-1-2017 in favour of one Kumara, original copy of gift deed 6-1-2017 executed by the 1st defendant in favour of Ravikumara,

12. On the other hand, the defendants disputed the plaint averments. They specifically contended that suit schedule A property item No.1 to 5 are originally belongs to one Channegowda @ Mategowda. After

the death of said Channegowda @ Mategowda properties fallen to the share of 1st defendant. Suit schedule B item Sy.No.115/6 extent 16 guntas granted in favour of 1st defendant by bagaruhukum committee and darakatsu property. The 1st defendant as per direction given by the Bagaruhukum Committee he paid kimmathu by his own earnings and get khatha in favour of 1st defendant and in possession of 1st defendant. It is self acquired property of 1st defendant, plaintiff and other defendants have no right to claim partition. Suit schedule C item No.1 to 3 and suit schedule D property purchased by 1st defendant he was appointed in the school teacher in year 1961, he purchased C and D schedule properties out of his own earnings and retirement benefit. The 1st defendant purchased C schedule item No.1 and 2 on 4/3/2002 from one Nanjamma W/o Annajigowda for the valuable of Rs.69,000/-. On the basis of sale deed he gets khatha in his favour M.R No.2/2003-04. He pay the revenue regularly to the government. The suit C schedule item No.1 and 2 are the self acquired properties of the 1st defendant and same gifted in the favour of the defendant No.2 and 3 on 4/6/2017. Suit C schedule Sy.No.90 extent of 2 acre 13 guntas purchased on 16/10/1989 from Patel Mallappa S/o Doddaiiah and his children's Chandrashekaraih S/o Patel Mallappa, for the value of Rs.20,000/-. On the basis of this sale deed the 1st defendant get khatha in his favour MR No.10/1991-92, 1st defendant is in possession of the property. Suit schedule D item sy.No.75/3 extent 0.03 guntas 1st defendant purchased by one Manjegowda and his children dated 7/7/1977. After purchase of Sy.No.75/3 0.03 guntas 1st defendant apply for conversion and gets conversion for the purpose of constructing house. He constructed Mangalore tiled house E-W 12.4968 meter and N-S: 15.8496 meter constructed house it is self acquired property of the 1st defendant and he is in possession of the 1st defendant and he regularly pay tax to concern authority. The above plaintiff filed this suit without include all ancestral properties. On this ground this suit is not maintainable and liable to be dismissed. The plaint A schedule property

ancestral property of plaintiff and defendant rest of B to D properties are the self acquired properties of the 1st defendant. The plaintiff have not right of partition.

13. To substantiate this aspect the defendant produced original sale deed dated 4/3/2002 executed by Smt. Nanjamma W/o Annajigowda in favour of Kalegowda S/o Channegowda for the valuable consideration of 69,000/-. certified copy of Sale deed dated 16/10/1989 in favour of Channegowda S/o Motegowda and H.N. Kalegowda by Chandrashekara, Patel Mallappa for valuable consideration of Rs.20,000/-, xerox copy of sale deed dated 7/7/1977 in favour of H.N.Kalegowda S/o Channegowda @ Mategowda by Manjegowda S/o Kengegowda and his minor sons for valuable consideration of Rs.600/-, xerox copy of the notice issued by ADLR office, Halekote Hobli, xerox copy of E swathu khatha extract of D schedule property, original copy of 4 tax paid receipts, xerox copy of saguvali cheeti. two xerox copy of kimmatu paid receipt, original copy of M.R. 5/2003-04, original copy of MR. 3/1994-95, notarized copy of the pensioner payment order, notarized copy of last pay certificate, original copy of gift deed executed by the 1st defendant 6-1-2017 in favour of one Kumara, original copy of gift deed 6-1-2017 executed by the 1st defendant in favour of Ravikumara, certified copy of judgement and decree passed by PCJ and JMFC, Hassan in OS No.571/2010, certified copy of valuation slip furnished in OS NO.571/2010 original copy of computerized RTC extract for the year 2005-06 Haradanahalli village for Sy.No.115/6, original copy of RTC 2006-07 Haradanahalli village 115/6, original copy of RTC 2007-08 Haradanahalli village 115/6, xerox copy of RTC 2017-18 Amanidoddakere village Sy.NO. 74/2 , , xerox copy of RTC 2017-18 Amanidoddakere village Sy.NO. 74/4, , xerox copy of computerized RTC of Sy.NO.115/6 of Haradanahally village for the year 2017-18, , xerox copy of computerized RTC 2017-18 Haradahalli village Sy.NO. 75/3A2 , original

copy of computerized RTC 2015-16 Malledevarapura village Sy.NO.90, original copy of MR 2/2002-03 two in numbers.

14. Upon perusal of affidavit averments and objections and documents placed before this court clears that the defendant No.1 admitted in his pleadings the suit schedule item No A schedule properties only ancestral and joint family properties of plaintiff and defendants rest of B to D schedule properties are self acquired properties of defendant No.1. He has been produced source of income proof, title deed, revenue records stands in the name of defendant No.1. During his lifetime he has right to dispose his own properties as his wish, he has legal right over B to C schedule properties. This right cannot be restrained by way of injunction.

15. The burden on plaintiff to establish that the defendant No.1 had purchased the properties out of joint family funds and B to D schedule properties and also prove that the plaintiff have contributed any funds towards purchase of B to D schedule properties which in the name of defendant No.1. It is settled preposition of law that a cosharer cannot seek any injunction against other cosharer. The only remedy available to such cosharer is to seek partition of the joint family property by metes and bounds. This suit is pending for same relief, if defendant dispose any property without seek partition of court, automatically come to rescue of plaintiff under section 52 of transfer of property Act i.e. "**lis pendency**". The plaintiff has legal right to get relief against purchaser also. But at this stage the defendant No.1 made out that he has purchased B to D schedule properties out of own hard-earned skilled money. He had lawful right dispose as his will and wish, it cannot be restrained by way of injunction by court also. If this court consider this application definitely infringe the right of defendant No.1. The plaintiffs have effecious remedy in the suit itself. By looking into the above facts and circumstances and

taking into consideration, the totality of the circumstances its need full pledge trial, it is very premature to consider both contention of both parties.

16. Moreover it is affected to lawful right of defendant No.1. It is just worth to mention Apex court decision delivered by full Bench in **Bharthu Vs Ram Sarup 1981 PLJ 204** Punjab and Haryana High Court, where in it was held that right and liabilities of co-sharers interse are:

1. A co owner has interest in the whole property and also in every parcel of it.

2. Possession of joint property by one co sharer, is in the eye of law, possession of all even if all but one are actually out of possession.

3. A mere occupation of larger portion or even if entire join property does not necessarily amount to ouster as the possession of one is deemed to be behalf of all.

4. The above rule admits of an exception when there is ouster of a owner by another but in order to negative the presumption of joint possession on behalf all, on the ground of ouster of co owner must not only exclusive but also hostile to knowledge of the other as when co owner openly alerts his own tittle and denied that of the other.

5. Passage of time does not extinguish the right of the co owner who has been out of possession of the joint property except in the event of ouster or abandonment.

6. Every co owner has right to use the joint property in a husband like manner not in consistent with similar rights of the other co owners.

7. When a co owner is in possession of separate parcels under an arrangement consented by the other co owners, it is

not open to anybody to disturb the arrangement without the consent of others except by filing a suit for partition.

The legal partition clarified in the above said full bench judgement that "co sharer in possession exclusively of some portion of joint holding not more than his share is entitled to continue in possession till joint holding is partitioned and that transfer under Section 44 of Transfer of Property Act get right of transferor to joint possession and to enforce partition whether property sold is fractional share or specified portion it is clearly held that "sale of specific portion of land out of joint holding by one of the co owner is nothing but sale of a share out of joint holding".

Sopan sukhdeo sable and others vs Alssistant Charity commissioner and others 2004(3) SCC 137 has observed that "no injunction can be granted against the true owner".

From the above guidelines issued by the apex court and above foregoing reasons at this stage the plaintiff failed to establish made out prima facie and balance of convenience and irreparable injury caused to his favour. He has effacious remedy at end of trial no prejudice will be caused. Hence, I answer Point No.1 to 3 in the Negative.

17. **Point No.4:-** In view of the above findings on point No.1 to 3, I proceed to pass the following order.

::O R D E R::

The application filed by the plaintiffs IA.No.II U/o 39 rule 1 and 2 of C.P.C which numbered as IA No.2 is hereby dismissed.

No order as to cost.

(Dictated to stenographer and transcribed by her, revised and corrected by me then pronounced in the open court dated this 7th day of July, 2018)

(R.Mahesha)
Civil Judge and J.M.F.C,
Holenarasipura.