

IN THE COURT OF THE SENIOR CIVIL JUDGE & JMFC,  
SEDAM

**PRESENT:**

Sri SAGAR GURUGOUDA PATIL  
B.A., LL.B(Spl.)  
Senior Civil Judge & JMFC, Sedam

Dated: 19-03-2024.

**OS No.70/2023**

Plaintiff/s :  
Indrabai  
  
(Smt/Sri J.A.P., Advocate)

VS

Defendant/s :  
Sabanna and others  
  
(D.2 to 5 Smt/Sri M.V.A., Advocate)  
(D6 by Sri.N.R. Advocate)

**RANK IN IA 2**

Indrabai : Applicant/s

VS

Sabanna & others : Opponent/s

i.	Provision under which the application is filed	U/O 21 Rule 29 of CPC
ii	Relief sought for	Suit for partition and separate possession
iii	The date on which the application is filed	16-11-2023
iv	Number of application	One
v	The date on which the objections are filed by different opponents	15-12-2023
vi	The date on which the orders were passed on the said application	19-03-2024

**ORDERS ON IA 2**  
**Under Order 21 Rule 29 of CPC**

The plaintiff / applicant has filed this application under Order 21 Rule 29 of CPC and sought to stay the execution petition in EP No.21/2021 pending on the file of this court.

The plaintiff has sworn to an affidavit in support of IA and stated that she has filed this suit for partition and separate possession. The suit property is ancestral and joint family property of the plaintiff and defendants 1 to 5 as it is succeeded by the defendant No.1. The plaintiff and defendants 1 to 5 are in possession and enjoyment of the suit property. Recently the plaintiff came to know that the defendant No.6 got executed sale deed in collusion with defendant No.1 based on the bogus agreement of sale alleged to have executed by defendant No.1 in the year 2014.

2) The suit property is coparcenary property of the plaintiff and defendants 1 to 5. The plaintiff and defendants 1 to 5 are having 1/6th share each in the suit property. The defendant No.1 executed the agreement of sale without knowledge to the plaintiff and there was no legal necessity for the family. The alleged transaction is not binding on the plaintiff. The defendant No.6 had filed execution petition in EP No.21/2021 on the file of this court and seeking to issue warrant for delivery of possession of the suit property. If the warrant is issued the plaintiff will be put to irreparable loss and her valuable rights will be lost. Hence, prays to allow the IA.

3) The defendant No.6 has filed objections to IA and denied the contents of the affidavit filed in support of the IA and contended that the suit land came to defendant No.1 from one Dhulappa S/o Tippanna. Therefore, the defendant No.1 is absolute owner of the suit land. The plaintiff has no right or interest in the suit land. The plaintiff has suppressed the real facts and she has not come to the court with clean hands. Hence, prays to dismiss the IA.

4) On the basis of the above facts the following points arise for my consideration:

- 1) Whether the plaintiff has made out a case to stay the Execution Petition in EP No.21/2021?

2) What order?

5) Perused the records. Heard arguments.

6) My answer to the above points are as under:

1) IN THE NEGATIVE

2) AS PER THE FINAL ORDER

for the following:

### **REASONS**

7) **POINT No.1:** It is the specific case of the plaintiff that previously the suit property was belonged to one Sabanna and he had two sons viz Narasappa and Tippanna. The said Narasappa had a son-defendant No.1 and the said Tippanna had a son by name Dhulappa. The said Narasappa and Dhulappa succeeded the suit properties and the said Dhulappa died issueless. The said Narasappa succeeded the suit properties. After his death the defendant No.1 inherited the properties. The plaintiff and defendants 2 to 5 are daughters and sons of defendant No.1. The suit properties are ancestral and joint family properties of the plaintiff and defendants 1 to 5. The defendant No.1 is Karta of the joint family. The defendant No.1 without there being any legal necessity alienated the land measuring 7 acres 9 guntas in Sy.No.109/1 to defendant No.6. The said sale deed is not binding on the plaintiff.

8) On the other hand the defendant No.6 has contended that the defendant No.1 for his family and private necessity alienated the suit properties for valuable sale consideration amount of Rs.25,00,000/-. The suit property was owned by one Dhulappa S/o Tippanna who was collateral of defendant No.1. After the death of said Dhulappa the defendant No.1 succeeded the suit property. Therefore the plaintiff and defendants 2 to 5 are entitled for any right and interest in the said property.

9) The certified copy of the sale deed dated 12.7.2023 shows that the court commissioner executed sale deed in respect of the suit property in favour of defendant No.6. The same goes to show that already sale deed is executed and only the delivery of possession is remaining in EP No.21/2021.

10) In order to decide the issue at hand it has to be considered that whether the plaintiff is having right or interest in the suit property. Perused the records. The revenue records of the year 1955-56 to 1958-59 show that earlier the land measuring 5 acres 37 guntas in Sy.No.109/Aa was standing in the name of Narasappa S/o Sabanna. The RTC extracts from the year 1968-69 to 1990-91 show that during the said period the suit property was standing in the name of one Dhulappa S/o Tippanna. The RTC extracts from the year 1988-89 to 1992-93 shows that the name of Dhulappa

was rounded off and the name of the defendant No.1 was entered. The RTC extract from the year 1993-94 to 2014 show that during the said period the suit property is standing in the name of defendant No.1. the above documents make it clear that the suit properties were standing in the name of Dhulappa S/o Tippanna and the defendant No.1 succeeded the same. As per the plaint averments the said Dhulappa is uncle's son of the defendant No.1. The same goes to show that the defendant No.1 did not acquire the suit properties from his father, father's father, father's father's father or maternal grand father. But he has acquired the suit properties from his collateral brother by way of succession. The learned counsel for the defendant NO.6 has argued that since the defendant No.1 acquired the suit property from his collateral brother it was his absolute property and therefore, the said property absolute property of defendant No.1. In support of his arguments he has relied on the decision of the Hon'ble Supreme Court in the case of Madanlal Phulchand Jain V/s State of Maharashtra reported in LAWS (SC)-1992-4-73, wherein the Hon'ble Supreme court held as under:

*"It is equally well settled that excluding the property inherited from a maternal grandfather the only property which can be characterized as ancestral property is the property inherited by a person from his father, father's father or father's father's father. That means property inherited by a person from any other relation becomes his separate property and his male issue does not take any interest therein by birth. Thus property inherited by a person from collaterals such as a*

*brother, uncle, etc., cannot be said to be ancestral property and his son cannot claim a share therein as if it were ancestral property. There can, therefore, be no doubt that the property which the appellant inherited from his uncle (natural father) was his separate property in which his major son could not claim any share whatsoever.*

11) The above principle of law is aptly applicable to the case at hand. In this case the defendant No.1 acquired property by way of inheritance from his collateral brother and not from his father, father's father or father's father's father. Therefore, the said property was separate property of defendant No.1. Hence, his children the plaintiff and defendants 2 to 5 are not entitled for any right or interest in the said property during the lifetime of their father defendant No.1.

12) It is on record that the defendant No.1 alienated the suit property for a valuable sale consideration amount of Rs.25,00,000/- and the court commissioner had already executed registered sale deed in favour of defendant NO.6 on 12.7.2023 and now only the delivery of possession is remained. The plaintiff has filed this suit for partition and separate possession and she has also challenged the sale deed executed in favour of defendant No.6. If during the trial she succeeds to prove that the suit property is ancestral and joint family property and there was no legal necessity to alienate the same then she will get share in the suit property irrespective of the fact that the defendant No.6 is in

possession of the suit property. Therefore, already sale deed was executed in favour of defendant No.6 and if the possession is not delivered to him it should tend to deprive the fruits of the decree. Further the plaintiff has failed to show her right or interest in the suit property. Therefore, it can be said that good cause is not shown for staying the decree.

13) The learned counsel for the plaintiff in support of his application has relied on the decision of the Hon'ble High Court of Karnataka in the case of Harshad K. Patel (H.K.Patel) @ Harshad Bhai K.Patel V/s S.V.Srinivasa Rao reported in 2015(1) KCCR 386, wherein the Hon'ble High Court at para 8 of its judgment held that "*having regard to the nature of the proceedings that have taken place the parties and the relief claimed by the petitioner herein in O.S.No.6270/2003 as against the respondent and the nature of the decree, which the respondent has obtained as against the petitioner in O.S.No.6867/1996, I am of the view that Order XXI Rule 29 of the Code of Civil Procedure squarely applies to the present case*".

14) I have gone through the above judgment of the Hon'ble High Court in details. With due respect I must agree with the proposition of law laid down by the Hon'ble High Court. But in that case the Hon'ble High Court looking to the nature of the proceedings and the relief claimed came to the

conclusion that the provisions of Order XXI Rule 29 of CPC squarely applies to the present case. But in the case at hand the nature of proceedings is entirely different from the nature of the proceedings in the above case dealt by the Hon'ble High Court. Therefore, the above principle of law is not applicable to the case at hand.

15) In this case the defendant No.6 has prima facie shown that the suit property is separate property of defendant No.1 and already sale deed is executed in his favour through court commissioner and only delivery of possession is remained. Therefore, if at this stage the execution is stayed the defendant No.6 will be deprived from enjoying the fruits of the decree. Moreover, the plaintiff has failed to show that she is having any right or interest in the suit property. Therefore, it can be said that the plaintiff has not shown any good cause for staying the execution of the decree. Hence, I answer point No.1 in the Negative.

16) **POINT No.2**: For the foregoing reasons, the following:

### **ORDER**

The application filed by the plaintiff under Order 21 Rule 29 of CPC is hereby dismissed.

(Typed to my dictation by the Stenographer, the same

revised, corrected and pronounced in the open court on this the 19<sup>th</sup> day of March 2024.)

(SAGAR GURUGOUDA PATIL)  
Senior Civil Judge & JMFC, Sedam.