

IN THE COURT OF THE CIVIL JUDGE & JMFC
HEGGADADEVANAKOTE

PRESENT

Sri Mohammed Shaiz Chouthai, B.A.,LL.B. (Hons.), LL.M.(M.L.)
Civil Judge & JMFC.,
Heggadadevanakote

Dated: 9th day of November 2020

O.S.No.387/2018

Plaintiff/s : Smt.Nagamma W/o.Late H.N.Basappa,
D/o.Late Mallappa, Aged about 58 years,
Harohally Village, Jayapura Hobli,
H.D.Kote Taluk.

(By Sri.D.Suresh, Advocate)

V/s

Defendant/s : 1. Smt.Prabhamani W/o.Annaiah Swamy,
D/o.Late Puttaswamappa,
Aged about 46 years,
2. Mallesha S/o.Late Puttaswamappa,
Aged about 42 years,
3. Chandra S/o.Late Puttaswamappa,
Aged about 40 years,
4. Basavanna S/o.Late Puttaswamappa,
Aged about 38 years,
5. H.P.Kumara S/o.Late Puttaswamappa,
Aged about 37 years,
6. Smt.Gowramma W/o.Late Nanjappa,
D/o.Late Mallappa, Aged about 60 years,

All are R/o.Hathwalu Village,
Hampapura Hobli, H.D.Kote Taluk.

(D-2 by Sri.M.M., Advocate,
D-1, 3 to 6 - Exparte)

Applicant : Smt.Nagamma (Plaintiff)

V/s

Opponents : Smt.Prabhamani & Others (Defendants)

ORDER ON I.A.No.I FILED UNDER ORDER 39
RULE 1 AND 2 OF C.P.C.

This instant application is filed by the plaintiff U/O.39 Rule 1 and 2 of C.P.C., to restrain the defendants, their family members and persons acting on their behalf from alienating the suit schedule property.

2. The plaintiff has filed affidavit in support of her application deposing that, herself, defendant No.6-Gowramma and father of defendant No.1 to 5, i.e., Puttaswamappa, are the children of Mallappa S/o.Malaiah. Likewise, plaintiff and defendant No.6 are the grand-children, defendant No.2 to 5 are great-grand-children of Late Basamma and Late Madaiah.

3. According to plaintiff, the suit schedule property is the ancestral joint family property of herself and defendants. The suit property originally belonged to grand-mother of plaintiff, i.e., Basamma W/o.Late Madaiah, which devolved on her after the death of her parents. During her lifetime, Late Basamma got mutated her name in the revenue records and was in cultivation of the suit property. Late

Basamma performed the marriage of her daughter-Kalamma with Mallappa, i.e., the father of plaintiff. After the marriage, they continued to cultivate the suit land along with Basamma. Likewise, the plaintiff and 6th defendant got married and residing at their matrimonial home, however they are jointly cultivating the suit property along with other family members. It is stated that, Late Basamma died leaving behind her daughter, i.e., the mother of plaintiff-Kalamma as a sole legal heir. Similarly, the father of the plaintiff died leaving behind his wife-Kalamma, plaintiff, defendant No.6 and father of defendant No.1 to 5. Thereafter, the mother of plaintiff-Kalamma died 12 years ago intestate leaving behind the plaintiff, defendant No.6, father of defendant No.1 to 5 as her legal heirs. The Khatha of the suit schedule property is still standing in the name of grand-mother of plaintiff, i.e., Late Basamma W/o.Madaiah.

4. As stated above, according to plaintiff, she is cultivating the suit property along with defendants. The defendants in collusion with Revenue Officials and by suppressing the name of plaintiff, are trying to change the Khatha with an intention to alienate the suit property to third person. The plaintiff requested defendants to keep the property in joint names of plaintiff and defendants, which was agreed by them on 15/01/2017. However, later the

defendants refused and questioned the right of plaintiff over the suit property. The plaintiff approached defendants and demanded her equal share and sought for partition and separate possession in respect of suit property. It is stated that, the plaintiff has right, title, interest in the suit property even after her marriage. The defendants are trying to alienate the suit property to deprive the legitimate share of the plaintiff. It is stated that the plaintiff has *prima-facie* case, the balance of convenience stands in her favour. If the temporary injunction is not granted in her favour and against the defendants, much hardship would be caused to her.

5. After service of summons, the defendant No.2 appeared through his learned Counsel and filed written statement and objections to the instant application. Even after service of summons on defendant No.1, 3 to 6, they remained absent and are placed *exparte*.

6. The defendant No.2 denied that the suit property is ancestral joint family property of plaintiff and defendants. The plaintiff has no right over the suit property and she is not in possession of the same. Though the defendant No.2 in clear terms did not challenge the genealogy as set up by the plaintiff in her plaint, but according to him, Late Mallappa and Kamma had seven children, namely Puttamma,

Gowramma (defendant No.6), Shivamma, Nagamma (Plaintiff), Punnathamma, Puttaswamappa (father of defendant No.1 to 5) and Kariyappa. Out of seven children, only the plaintiff and defendant No.6 are alive. The defendant No.2 is one of the son of Late Puttaswamappa.

7. It is stated that, the 1st daughter-Puttamma was given in marriage at Gowdarahundi Village, Nanjanagudu Taluk and out of her wedlock, there is one son who is still living. Likewise, the 3rd daughter-Shivamma is also given in marriage at Chikkanandi Village, H.D.Kote Taluk and out of her wedlock, there are five children amongst whom one child is already dead. Similarly, the 5th daughter-Punnathamma is also given in marriage at Managanahalli Village, H.D.Kote Taluk and out of her wedlock, there are four children amongst whom one child is already dead. The other son of Mallappa and Kamma, i.e., Kariyappa died leaving behind five children. Though the plaintiff is well aware of the above facts, the same has been suppressed by her.

8. According to defendant No.2, his father-Puttaswamappa and uncle Late Kariyappa during his lifetime have partitioned family properties and are enjoying their respective shares of property. It is stated that, the suit schedule property fell to the share of father of defendant

No.2. Thereafter, the defendant No.2 to 5 have entered into partition, wherein the suit property fell to the share of defendant No.2 and other family properties fell to the respective share of defendant No.3 to 5. As such, the suit property is in exclusive possession of defendant No.2 and he has excavated borewell and cultivating sugarcane and other crops. With a view to harass the defendants, the present suit is instituted by the plaintiff. On these grounds, the defendant No.2 prayed to dismiss the application.

9. I have heard the learned counsels for the plaintiff and defendants. Perused the records.

10. The points that arise for my consideration are:-

1. Whether the plaintiff proves that she has *prima-facie* case in her favour?
2. Whether the plaintiff proves balance of convenience in her favour?
3. Whether the plaintiff proves that irreparable loss would caused to her if injunction is not granted?
4. What order?

11. My answer on the above points are as follows:-

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| Point No.1 | : | In the Affirmative |
| Point No.2 | : | In the Affirmative |
| Point No.3 | : | In the Affirmative |
| Point No.4 | : | As per final order
for the following:- |

REASONS

12. **POINT NO.1 TO 3:-** The plaintiff in order to prove her *prima-facie* case has produced R.T.C. of land Sy.No.165 measuring 3.37 acres situated at Hathwalu Village, Hampapura Hobli, H.D.Kote Taluk, for the year 2015-16 to 2018-19 and Genealogy. The defendants on the other hand, have produced xerox copy of Partition Deed dated 26/02/1992, R.T.C. of land Sy.No.165 for the year 1975-76 to 1994-95, 2018-19, R.T.C. of land Sy.No.168, 46/1, 51/1, 51/2, 52/1, 52/2, 46/2, 35/2 and 73/2.

13. The rule that before the issue of temporary injunction the Court must satisfy itself that the plaintiff has a *prima-facie* case. The *prima-facie* doesn't mean that the Court should examine the merits of the case exclusively and come to a conclusion that the plaintiff has a case in which is likely to succeed, as this would amount to prejudging the case. All that the Court has to see is that on the face of it the person applying for the injunction has a case which needs consideration and which is not bound to fail by virtue of some apparent defects, but which has also balance of convenience in plaintiff's favour. In other words, while considering the question of *prima-facie* what the Court is required to see is whether there is a fair question involved in the suit for decision, and it will suffice if the plaintiff has

strong probability of ultimate success. All that the plaintiff is required to show is that, she has a fair and serious question to be tried.

14. At the outset, though the plaintiff claim that the suit property is ancestral property, which was previously standing in the name of her grand-mother-Basamma W/o.Madaiah, she has not produced any old records except producing the R.T.C. of suit property from the year 2015-16 to 2018-19. In column No.10 of R.T.C. reveals the nature of property, which is shown as ancestral. The documents produced by defendant No.2 more particularly the R.T.C. of land Sy.No.165 would reveal that the suit property is still standing in the name of Basamma W/o.Madaiah, since 1995-96 to till date. The defendant No.2 claim that, there is already partition between Puttaswamappa and Kariyappa, in which the suit property fell to the share of Puttaswamappa, which thereafter came to be divided between defendant No.1 to 5. The partition deed produced by defendant No.2 is xerox unregistered document. The defendant No.2 till today did not mutate his name in the revenue records with respect to suit property even after alleged partition in the family. The reason given by defendant No.2 is that, there is a mention of 'Government' in old R.T.C.s with respect to suit property and as such much time has been consumed for removing the

same from the R.T.C. However, the R.T.C. of suit property for the year 2018-19 do not make any reference to Government. Since from 2000-01 to till date the defendant No.2 did not make any efforts to mutate his name in the property records with respect to suit property. The xerox copy of unregistered partition deed can't be looked into for appreciation of the facts at this stage. No doubt, the R.T.C. of land Sy.No.51/2, 52/1, 73/2, 35/2 and 46/2 discloses the name of one H.N.Kariyappa S/o.Mallappa. In fact, in column No.10 of R.T.C. of land Sy.No.35/2 and 73/2 gives a reference of nature of property as 'ancestral'. The said Kariyappa is none other than the son of Mallappa S/o.Madaiah. In other words, the said Kariyappa is the brother of plaintiff. The defendant No.2 has taken contention that, all necessary parties have not been joined in the present suit. However, the question of non-joinder or mis-joinder of necessary or proper party would only be looked into at the time of trial. What requires to be considered at this stage is only the *prima-facie* case. Since the plaintiff claim that the suit property is the ancestral property, the available records at this juncture goes to show that the suit property is ancestral property of the plaintiff and the defendants. Whether the parties have entered into partition will have to be looked into during the course of trial. If in case after full fledged trial

the Court comes to the conclusion that, previously partition has not taken place and during trial the suit property is alienated to third party, the suit itself gets complicated and the situation may arise for impleading the third party who is unconcerned with the family.

15. It must be noted that, Rule 1 of Order 39 of the Code clearly provides for interim injunction restraining the alienation or sale of the suit property and if the doctrine of *lis pendens* as enacted in Section 52 of T.P.Act was regarded to have provided all the panacea against *pendente lite* transfers, the legislature would not have provided in Rule 1 of Order 39 for interim injunction restraining the transfer of the suit property. Rule 1 of Order 39 clearly demonstrates that *notwithstanding* the rule of *lis pendens* in Section 52 of T.P.Act, there can be occasion for the grant of injunction restraining *pendente lite* transfers under the circumstances existing in the instant case. As such, the balance of convenience lay in granting temporary injunction as it will not be possible to compensate with damages caused by not granting temporary injunction. Therefore, the plaintiff has shown arguable case in her favour, balance of convenience also tilts in her favour. If the injunction is not granted, irreparable loss would be caused to her. There is a fair question involved in the suit for decision, which could be

gone during the trial. As such, it is necessary that the defendants be restrained from alienating the suit property till the disposal of the suit on merits. Hence, this Court answers Point No.1 to 3 in the **Affirmative**.

16. **POINT NO.4:-** In view of the above findings and discussions, I proceed to pass the following:-

ORDER

The application filed by the plaintiff U/O.39 Rule 1 and 2 of C.P.C., is hereby allowed.

The defendants are hereby restrained from alienating the suit property to third person or create any kind of right in favour of third person till the disposal of the suit.

The parties are called upon to assist the Court for early disposal of the suit.

The observations made in this order shall not come in the way of, affect or cause prejudice to the rights of the parties to prove their case by leading evidence during the trial.

*(Dictated to the Stenographer directly on computer, typed by him, the same is corrected, revised, signed and then pronounced by me in the open Court, the **9th day of November 2020**).*

(MD SHAIZ CHOUTHAI)
CIVIL JUDGE & JMFC.,
H D Kote