

KAUK310018322024



**IN THE COURT OF THE ADDITIONAL CIVIL JUDGE AND JMFC
BHATKAL**

PRESENT

Smt.Dhanavathi. B.A.(law) LL.B.,
Addl. Civil Judge and J.M.F.C, Bhatkal

O.S.No.50/2024

Dated this the 29th day of January, 2025

PLAINTIFF :

Smt. Mamatha S/o Ullas Shet,
@ Mamatha W/o Praveen R. Ambiga,
Aged about: 37 years,
R/o: Siddanabavi, Kumta Taluk,
Uttara Kannada.

(By Sri.S.K.N., Advocate)

// Versus //

DEFENDANTS :

1. Yajmira Alda W/o Bernal Souza,
Aged about: 72 years,
R/o: Murdeshwar, Bhatkal Taluk (U.K)
2. Ludina W/o Patrol D'Souza,
Aged about: 63 years,
R/o: Church road, Chandrahitlu,
Mavalli-2, Bhatkal Taluk (U.K)
3. Lusy W/o Salfodar Fernandis,
Aged about: 41 years,

- R/o: Church road, Chandrahitlu,
Mavalli-2, Bhatkal Taluk (U.K)
4. Sujatha D/o Patrol D'Souza,
Aged about: 29 years,
R/o: Church road, Chandrahitlu,
Mavalli-2, Bhatkal Taluk (U.K)
 5. Alphans S/o Patrol D'Souza,
Aged about: 37 years,
R/o: Church road, Chandrahitlu,
Mavalli-2, Bhatkal Taluk (U.K)
 6. Francis Joseph D'Souza S/o Joseph D'Souza ,
Aged about: 58 years,
R/o: Siddanabavi, Kumta Taluk,
Uttara Kannada District.
 7. Asha W/o Ashoka Pawar,
Aged about: 56 years,
R/o: Lalubavi Compound, Mandavi,
Building No. 12/A, Room no. 301,
Mankurd Vest, Mumbai, Maharashtra.
 8. Geetha Sadananda Padthi,
Aged about: 53 years,
R/o: Sadique Post, Karki,
Honnavar Taluk.
 9. Namitha W/o Naveen Kamath,
Aged about: 42 years,
R/o: Kerekatte, Murdeshwar,
Mavalli, Bhatkal Taluk.
 10. Francis S/o Bastav D'souza,
Aged about: 56 years,
R/o: Puravarga, Yalvadikavoor, Bhatkal.
 11. Helan S/o Francis Gomes,
Aged about: 62 years,
R/o: Church road, Chandrahitlu,
Mavalli, Murdeshwar, Bhatkal Taluk
Uttara Kannada District.

12. Luvis S/o Anthon Perera,
Aged about: 69 years,
R/o: Mavalli-2, Murdeshwar,
Bhatkal Taluk.
13. Joseph Luis S/o Salfahora Luis,
Aged about: 45 years,
R/o: Divageri, Matadahitlu, Kaikini,
Bhatkal Taluk. Uttara Kannada District.
14. Mukesh S/o Ullas Shet,
Aged about: 35 years,
R/o: Siddanabavi, Kumta Taluk,
Uttara Kannada District.

(Defendant No. 1 by Sri.M.G., Advocate, D8 by Sri. M.T.N., Advocate, D9 by Sri. V.R.S.,Advocate, D10 by Sri. S.M.N Advocate, D11 & 13 by Sri. J.D.B., Advocate and D2 to 4, 6, 12 are placed Exparte)

Parties to I.A.No.II

APPLICANT/ PLAINTIFF :

Smt. Mamatha S/o Ullas Shet,,

// Versus //

RESPONDENT/DEFENDANTS :

Yajmira Alda W/o Bernal Souza and others

ORDER ON I.A.No.II FILED UNDER ORDER XXXIX RULE 1 AND 2 R/w SEC. 151 OF CIVIL PROCEDURE CODE.

I	Provision under which the applications are filed	U/o XXXIX Rule 1 and 2 and Sec. 151 of C.P.C
II	Relief sought for	For grant of ad-interim temporary injunction against the defendant No.1 to 14 restraining them from selling, creating any charge in any Bank over the suit schedule

		properties and also constructing permanent building in suit schedule property till the disposal of the suit.
III	The date on which the application filed.	03-06-2024
IV	Number of application.	I.A.No.II
V	The date on which the objection filed by opponent.	The counsel for the defendant No.1 has filed memo dated: 09-08-2024 praying to treat the written statement of defendant No.1 as objection to the I.A .No.II. The counsel for the defendant No.11 and 13 has filed memo dated: 15-07-2024 praying to treat the written statement of the defendant No.11 and 13 as objection to the I.A .No.II.
VI	The date of which the order passed on the application.	29-01-2025

2. Briefly, the plaintiffs case is as follows:-

ದಾವಾ ಪರಿಶಿಷ್ಟ

ಭಟ್ಟಳ ತಾಲೂಕು ಮಾವಳ್ಳಿ-2 ಗ್ರಾಮದ ಆಸ್ತಿಯ ವರ್ಣನೆ.

ಸ. ನಂ.	ಸ. ನಂ.	ಹಿಸ್ಸಾನಂ.	ಕ್ಷೇತ್ರ	ಆಕಾರ	ಚತುರ್ಗಡಿ
1.	98	7ಬ	00-07-08	ರೂ. 3.17	ಸರ್ವೆ ಯಾ ಹಿಸ್ಸಾ ಗಡಿಗಳು
2.	36	4	00-03-08	ರೂ. 0.54	ಸರ್ವೆ ಯಾ ಹಿಸ್ಸಾ ಗಡಿಗಳು
3.	60	1	00-15-00	ರೂ. 2.24	ಸರ್ವೆ ಯಾ ಹಿಸ್ಸಾ ಗಡಿಗಳು
4.	62	2	00-21-00 ಖರಾಬ ಉಳಿದಿದ್ದು ಪೈಕಿ 00-01-00 00-20-00 00-19-10	ರೂ. 3.09	ಸರ್ವೆ ಯಾ ಹಿಸ್ಸಾ ಗಡಿಗಳು
5.	86	6	00-03-00	ರೂ. 0.46	ಸರ್ವೆ ಯಾ ಹಿಸ್ಸಾ ಗಡಿಗಳು
6.	101	-	00-10-00 ಖರಾಬ ಉಳಿದಿದ್ದು 00-00-06 00-09-10	ರೂ. 4.07	ಸರ್ವೆ ಯಾ ಹಿಸ್ಸಾ ಗಡಿಗಳು

3. In the annexed affidavit to I.A.No.II, the plaintiff stated that, the suit properties are originally belonged to her great-grandfather by name Bernal Pascal D'Souza, after his death, the suit properties are mutated in the name of her grandfather by name Patrol through his mother by name Smt. Lucy as his gaurdian. The defendant No. 1 has filed Original Suit No. 2/1995 though she has no right in the suit property. The said suit was dismissed on 24-06-1998. Then said order of dismissal was challenged by the defendant No. 1 in Regular Appeal No. 173/2001, and the said regular appeal has been dismissed by the Hon'ble Appellate Court. Thereafter, the defendant No.1 has challenged the said judgment before the Hon'ble High Court of Karnataka, Dharwad Bench in RSA No. 294/2007, and said appeal was allowed on 08-10-2013 and the defendant No.1 granted 1/3 in the suit schedule properties. As per the said order, the defendant No.1 has filed FDP No. 4/2014 and same is pending for disposal. During the pendency of said final decree proceedings some of the suit properties are alienated by the defendant No. 1 to 8 and same is not valid under law.

4. Further, it is stated that, the defendant No.8 is the mother of the plaintiff. The defendant No.8 was first married to one Ullasa Shet, thereafter she got 2nd marriage with one Sadananda Padti and abonden the plaintiff. Without the signature and knowledge of the plaintiff, her great grandfather's properties were alienated. Further the plaintiff is residing in a rented house. The defendant No.8 is not helping to the plaintiff in any manner. If the defendant No.8 sells the suit property it may cause damage to the plaintiff's right over the suit schedule property. In order to preserve the property which comes to the share of the defendant No.8, the plaintiff has filed the present suit. The defendant No.1 to 8 has sold the item No.2 of the schedule property without the consent of the plaintiff to defendant No.9 as per document No. 1032/2023-24. Thereafter, the defendant No.1 and 6 to 8 have executed

consent deed bearing 1403/2023-24 which is against the law. As such the item No.5 of the suit property have been alienated to defendant No. 13 by the defendant No.1 and 6 to 8 and 11 and same is void. The defendant No.11 is not the family member of the defendant No. 1 to 8. The defendant No.12 has sold the item No. 3 of the suit property to the defendant No.10 as per document No. 1854/2012-13. Then the defendant No.1, 2, 5 to 8 have executed consent deed bearing No.12439/2022-23. All the above deeds were executed without the knowledge of the plaintiff and it will not affect the plaintiff's right over the suit property and same has to be cancelled. If the defendants are allowed to alienate the suit properties, the plaintiff's right over the suit property will be affected. The mother of the plaintiff i.e., defendant No.8 has married to her father Ullasa Vasant Shet and after his death, the defendant No.8 got 2nd marriage with Sadananda Padti and made the plaintiff is an orphan, and her mother, illegally agreeing to sell the suit properties to the defendant No. 9 to 13, when F.D.P No. 4/2014 pending before this court. If same is continued the plaintiff will not have any share in the properties of her deceased great-grandfather in the future. The defendant No.8 is trying to sell her right over the suit property completely and make the plaintiff homeless, until the disposal of the suit, she may restrained to sell her right to anyone. The documents already executed by the defendants No.9 to 13 are not binding on the plaintiff's right over the suit property. The plaintiff's father Ullasa Vasant Shet died when she was 4 years old, and she was under the protection of her stepfather and due to the difficulties she got love marriage. Because of that, the defendant No.8 is trying to make the plaintiff homeless. Hence, she prays to grant permanent injunction against defendants. If injunction is not granted, the plaintiff will suffer loss, which cannot be compensated with money. On the other hand , if injunction order is

granted, there will be no damages to the defendants. Therefore prays to allow the application.

5. Per contra, the defendant No. 1 prays to adopt her written statement as objection to this application. In the written statement, the defendant No.1 contended that, the suit of the plaintiff is not tenable both on question of law as well as on question of facts, it is liable to be dismissed with cost. The suit of the plaintiff is barred by limitation. The suit has been filed by the Plaintiff with malafide intentions to harass the Defendant No.1. The plaintiff has no cause of action for the suit or for any other reliefs, interim or otherwise. Further, the Plaintiff has not made out a prima face case for the grant of temporary injunction. It is admitted that the plaintiffs and the defendants No. 1 to 8 belongs to Christian Community and there is no concept of joint family, ancestral property or status of joint family property under the law governed by them, as alleged by the plaintiff. They are governed by Indian succession Act. The property inherited by any Christian is his/her personal property. It is admitted fact that the suit properties inherited by the defendant No.1 to 8 through their ancestors. The plaintiff is claiming to be the daughter of the defendant No. 8. The plaintiff has no right to claim share in the suit properties, during the life time of the defendant No. 8.

It is further submitted that whatever the properties sold by the defendant and Consent given by the Defendant No.1 to the properties which is already sold to purchasers are legal one and the Plaintiff has no right interest over the said properties. The said sale deed is duly binding upon the plaintiff and the aforesaid defendants. Hence the plaintiff has no right to claim share in the suit schedule property and to file this suit in the present form. The description of the suit schedule property is incorrect and wrong.

Further, the defendant No. 1 has already filed a suit in respect of the suit schedule properties as per OS No. 2/1995 against the defendant

No. 1 to 11 and a preliminary decree was passed in the said suit and FDP No. 4/2014 is pending for enquiry. The plaintiff is claiming share through her mother i.e. defendant No. 8 namely Geeta Sadananda Padti. The plaintiff aware of the said suit. The plaintiff's alleged right if any can be claimed in the said suit and in FDP, since the Court can pass any number of preliminary decree, before passing final decree. The issue, properties and parties in the said suit and in this suit are similar. Hence the said suit operates as res-judicate. It is further submitted that the Hon'ble High Court of Karnataka passed the Judgment in favour of the Defendant No.1 in earlier case and declared that the Defendant No.1 is having 1/3 share over the suit schedule properties. Hence, the plaintiff is not entitled to claim the relief of either permanent injunction or temporary injunction against the defendant No. 1. Hence, prays to dismiss the suit and this application.

6. The defendant No. 11 and 13 prays to adopt their written statement as objection to this application and contended that, the suit of the plaintiff is false frivolous, and experimental in nature and unsustainable in law and on merits. The plaintiff has no locus standi to file this suit. It is admitted facts that the plaintiffs and the defendants No. 1 to 8 belongs to Christian Community and there is no concept of joint family, ancestral property or status of joint family property. in the law governed by them, as alleged by the plaintiff. They are governed by Indian succession Act. The property inherited by any Christian is his/her personal property. It is admitted fact that the suit properties inherited by the defendant No. 8 through her ancestors. That the plaintiff is claiming to be the daughter of the defendant No. 8. The suit in respect of suit schedule item No. 5 property i.e. property bearing Survey No.86/6 measuring 00-03-00(A.G.A) N.A of Mavalli-2 Village, is not maintainable and plaintiff has no right to claim share or permanent injunction in respect of the said property. The item No. 5 of the suit schedule property

has been sold and conveyed by the defendants No. 1, 6, 7, 8 and 11 to the defendant No. 13 by way of registered sale deed dated 06-05-2023 vide Doc No. 248/2023-24 of SRO Bhatkal for a lawful sale consideration of Rs. 18,50,000/- and they put into possession of the said property to the defendant No. 13. As on the date of the suit the defendant No.13 being the lawful owner in possession of the said property. The said sale deed is duly binding upon the plaintiff and the aforesaid defendants. The plaintiff has no right title on possession or interest whatsoever nature over the item No. 5 of the suit property.

The description of the item No. 5 of the suit schedule property is incorrect and wrong. As on the date of the suit the said property is not the agricultural property and it is the Non agricultural property. The suit is not properly valued and Court fee paid is insufficient in respect of the item No. 5 of the suit schedule property. The plaintiff not in possession of the said property as on the date of the suit and the said property is the non agricultural property and as such the plaintiff ought to have valued the suit on the market value of the said property and to pay ad-valorem Court fee thereon. The defendant No. 1 has already filed partition suit in respect of the suit schedule properties in OS No. 2/1995 against the defendant No. 1 to 11 and a preliminary decree was passed in the said suit and FDP No. 4/2014 is pending enquiry. The plaintiff is claiming share through her mother i.e. defendant No. 8 namely Geeta Sadananda Padti. Hence the said suit binding upon the plaintiff. The plaintiff aware of the said suit. The plaintiff's alleged right if any can be claimed in the said suit and in FDP, since the Court can pass any number of preliminary decree, before passing final decree. The issue, properties and parties in the said suit and in this suit are similar. Hence the said suit operates as res-judicate, and the present suit is barred under the provision of CPC. Further the parallel proceedings is not maintainable

and hence this suit is to be stayed till the disposal of the said suit as provided under the provision of CPC.

The defendant No. 13 is the owner in possession of the item No. 5 of the suit schedule property. Hence the plaintiff is not entitled to claim the relief of either permanent injunction or temporary injunction against the defendant No. 13. Hence the temporary injunction application as well as plaint is to be dismissed in respect of the item No. 5 of the suit schedule property. The genealogy of the plaintiff's alleged family is false. Though it is admitted that plaintiff is the daughter defendant No. 8, but she is not the member of the alleged family. These defendants denies the averments in plaint para 3 and 4 as false. These defendants admit that the suit schedule properties belonged to Barnal Pascale D-souza. These defendants no way concerned to the personal matters of the plaintiff and her mother. The plaintiff has no right to claim permanent injunction against these defendants. The plaintiff is not entitled to claim share in the item No. 5 of the suit schedule property, much less 1/19 share therein. The plaintiff has no cause of action to file this suit.

It is submitted that the suit schedule item No. 5 property is the joint property of the defendant No. 1,6,7,8 and 11 and they inherited the said property from their respective ancestors. To meet their urgent financial needs, they decided to sell the said property and for which they entered into compromise out of the Court, during the pendency of the FDP petition filed by the defendant No. 1 and they sold and conveyed the item No. 5 of the suit schedule property to the defendant No. 13 by way of registered sale deed dated 06-05-2023 vide Doc No. 248/2023-24 of SRO Bhatkal for a lawful sale consideration of Rs. 18,50,000/- and they put into possession of the said property to the defendant No. 13. As on the date of the suit the defendant No. 13 being the lawful owner in possession of the said property. The said sale deed is duly binding upon the plaintiff and the aforesaid defendants. Hence the plaintiff has no

right to claim share in the said property. At any event the plaintiff's suit for bare partition and injunction as claimed in the plaint is not maintainable under law. Hence prays to dismissed the suit in respect of the item No. 5 of the suit schedule property and also prays to dismiss the I.A No.II.

7. Heard arguments, perused the pleadings and the documents available on record.

8. In view of above the following points that would arise for my consideration are as follows:-

1. Whether, at this stage the plaintiff has made out prima facie case in her favour?
2. Whether the plaintiffs proves the balance of convenience lies in her favour?
3. Whether the plaintiff proves that in event of not allowing I.A.No.II, she will be put to irreparable loss and injury?

4. What Order?

9. My answers to the above points for I.A.No.II is 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 final order |

for the following:-

REASONS

10. **Points No.1:** It is the specific case of the plaintiff is that, the suit properties are belong to the great-grandfather of the plaintiff by name Bernal Pascal D'Souza. The defendant No.8 is the mother of the plaintiff. As per the order dated: 08-10-2013 of Hon'ble High Court of Karnataka, Dharwd Bench in RSA No. 294/2007, the defendant No.1 has got 1/3rd right over the suit property and filed FDP No. 4/2014 before this court. During the pendency of the said

final decree proceedings, the defendant No.1, 6 to 8 are alienating the suit properties to others and causing damage to the plaintiff's right over the suit property. Hence, filed the suit and this application.

11. On the other hand, the defendant No.1, 11 and 13 have admitted the relationship between the plaintiff and defendant No. 1, 6 to 8 as stated in the plaint and contended that, the during the lifetime of the defendant No.8, the plaintiff has no right over the suit schedule property and prays to dismiss the application.

12. On perusal of documents produced by the plaintiff, it is clear that, there was suit already filed between the defendant No.1 and her family members with respect to the suit schedule property for partition as per O.S No. 2/1985 and the said suit was dismissed as per judgment and order dated: 24-06-1998. Thereafter, the defendant No.1 has preferred appeal as per RA No. 173/2001 and said appeal was dismissed. Then the defendant No.1 has challenged the said order before the Hon'ble High Court of Karnataka, Dharwad Bench as per RSA No. 294/2007 and said appeal was allowed by the Hon'ble High Court of Karnataka and the defendant No. 1 has granted 1/3rd share in the schedule property. Accordingly, the final decree proceeding is filed before this court as per FDP 4/14 and same is pending for disposal. Further, the plaintiff is claiming her right over the suit property through her mother i.e., the defendant No.8. When such being the case, the nature of the suit property is already decided in RSA No. 294 /2007. Hence, the question of deciding the same in the present suit does not arise.

13. While deciding the application filed U/o XXXIX the court has to decide that who is in the possession of the property and to whom hardship will be caused if the temporary injunction is not granted.

Admittedly, the possession of the schedule property is with the defendants. It is only the contention of the plaintiff is that the defendants are trying to alienate the suit property during the pendency of the final proceedings. On perusal of the documents and considering the arguments canvassed by the both parties, in the present case, both parties claims that, they have right over the suit schedule property. All the contentions taken by the both parties where already decided in the RSA No.294/2007 by the Hon'ble High Court of Karnataka, Dharwad Bench. Therefore, considering the above aspects and documents produced before the court and also taking into consideration of the arguments canvassed by both counsels, at this stage the plaintiff has not been able to adduce any cogent and reliable materials to show prima-facie case. Therefore, this court is of the opinion that the plaintiff has not made out prima-facie case seeking the relief of temporary injunction against the defendants. Hence, I proceed to answer point No.1 **in the Negative.**

14. **POINT NO. 2 & 3 :-** These Points are taken together for discussion in order avoid repetition of facts. Now it has to be seen whether the balance of convenience is lies in favour of the plaintiff and irreparable loss and injury would be caused to her if an order of temporary injunction is not granted. In view of findings on point no.1 the plaintiff has failed to prove a prima faice case. Where a party has failed to prove a prima facie case, injunction cannot be granted even if such party makes out case of balance of convenience and irreparable injury. It is so held by their Lordships in a decision reported in **AIR 2010 SC 296, between Kashi Math Samsthan Vs. Srimad Sudhindra Thirtha Swamy.** It is a well established principles of law that even if the plaintiff establishes the prima facie case in his favour. If granting of an order of injunction the defendant will be put to greater hardship than the plaintiff. Hence, the court has got power to refuse to grant an order of

injunction. Whereas in this case viewed from any angle the balance of convenience does not lean in favour of plaintiff. When there is no prima facie case, the question of considering the balance of convenience and irreparable loss and injury that would be caused to the plaintiff if temporary injunction is refused does not arise. Hence, I answer the **point No. 2 & 3 in the Negative.**

15. **Point No.4:-** In view of the findings on points No.1 to 3, I proceed to pass the following:-

ORDER

The I.A No.II filed U/o XXXIX Rule 1 and 2 and Section 151 of CPC is hereby rejected.

No order as to costs.

It is made clear that whatever discussion made by this court that opinion found are only for the purpose of disposal of this application and they are on the basis of the materials on the record. Therefore, the parties shall not take the benefit from said observations during the final disposal of this case.

(Dictated to the stenographer directly on computer, corrected by me and then pronounced in the open court this the 29th day of January, 2025)