

KAUK320009492023



**IN THE COURT OF SENIOR CIVIL JUDGE AND JUDICIAL
MAGISTRATE OF THE FIRST CLASS AT BHATKAL**

**PRESENT : SMT. ROOPASHRI., B.Com., LL.B.
SENIOR CIVIL JUDGE AND JMFC
BHATKAL**

M.A. No.12/2023

DATED THIS THE 01ST DAY OF AUGUST, 2026

APPELLANT/S :-

01. Smt. Madevi W/o Venktappa Naik,
Aged about 82 years,
Occ: Household,
R/o Kelaginmane, Chowthani,
Mundalli, Tq: Bhatkal, (U.K).
02. Smt. Rukmini W/o Manohar Naik,
Aged about 42 years,
Occ: Household,
R/o Nayakaramane, Hadeen,
Sodigade, Tq: Bhatkal, (U.K).
03. Sri. Dayanand S/o Venktappa Naik,
Aged about 40 years,
Occ: Agriculturist,
R/o Kelaginmane, Chowthani,
Mundalli, Tq: Bhatkal, (U.K).

(By Sri. MLN, Advocate)

VERSUS**RESPONDENT :-**

01. Smt. Durgamma W/o Kuppayya Naik,
Aged about 90 years,
Occ: Household,
R/o Kelaginmane, Chowthani,
Mundalli, Tq: Bhatkal, (U.K).
02. Sri. Suresh S/o Jattayya Naik,
Aged about 45 years,
Occ: Agriculturist,
R/o Kelaginmane, Bailamane,
Puravarga, Tq: Bhatkal, (U.K).
03. Sri. Laxman S/o Jattayya Naik,
Aged about 43 years,
Occ: Agriculturist,
R/o Kelaginmane, Bailamane,
Puravarga, Tq: Bhatkal, (U.K).
04. Sri. Manjunath S/o Jattayya Naik,
Aged about 41 years,
Occ: Agriculturist,
R/o Kelaginmane, Bailamane,
Puravarga, Tq: Bhatkal, (U.K).
05. Sri. Maruti S/o Jattayya Naik,
Aged about 39 years,
Occ: Agriculturist,
R/o Kelaginmane, Bailamane,
Puravarga, Tq: Bhatkal, (U.K).
06. Smt. Padmavati W/o Lachmayya Naik,
Aged about 45 years,

Occ: Household,
R/o Kelaginmane, Chowthani,
Mundalli, Tq: Bhatkal, (U.K).

07. Smt. Laxmi W/o Sankus Naik,
Aged about 48 years,
Occ: Household,
R/o Kayamanmane, Kudre Beerappa Road,
Chowthani, Mundalli, Tq: Bhatkal, (U.K).
08. Smt. Nagamma W/o Mohan Naik,
Aged about 46 years,
Occ: Household,
R/o Dasimane, Puravarga,
Sarpanakatte, Tq: Bhatkal, (U.K).
09. Smt. Gangamma W/o Mastappa Naik,
Aged about 44 years,
Occ: Household,
R/o Murdeshwar, Tq: Bhatkal, (U.K).
10. Smt. Savitri W/o Gajanan Naik,
Aged about 42 years,
Occ: Household,
R/o Hosadu, Honavar,
Tq: Honavar, (U.K).
11. Sri. Manjunath S/o Lachmayya Naik,
Aged about 38 years,
Occ: Agriculturist,
R/o Nagolli, Tq: Sagar,
District: Shimogga.

(R-2 to 6 by Sri. VFG, Advocate)
(R-11 by Sri. NSN, Advocate)

Date and nature of the Decree or Order appeal	:	Order on IA No.III and V in OS No.28/2023 dated 03-11-2023 on the file of the Additional Civil Judge and JMFC., Bhatkal		
Date of Institution of Appeal	:	04-12-2023		
Date of Order	:	01-08-2026		
Duration of the appeal	:	Year/s 02	Month/s 07	Day/s 28

ORDER

The appellants are the plaintiff No.1, 3 and 4 in OS No.28/2023 on the file of the Additional Civil Judge and J.M.F.C., Bhatkal (hereinafter referred to as the trial court). The respondents are the defendants before the trial court. For convenience the parties will be referred to as per the ranks assigned in the trial court.

02. The plaintiffs in the trial court had filed IA No.III and V under Order XXXIX Rule 1 and 2 of C.P.C. The trial court by its impugned order dated 03-11-2023 has dismissed the I.A. No.III and V. The plaintiffs feeling aggrieved by the said orders on I.A. No.III and V have preferred this appeal.

03. Subsequent to the filing of this appeal, respondent No.2 to 6 and respondent No.11 have entered appearance

through their counsel and remaining respondents did not appear before the court, hence they are placed ex-parte.

04. The plaintiffs have filed suit for a partition and injunction to declare that they have got 1/3rd share in the 'A' and 'B' schedule property and put them in physical possession of the shares allotted to them, free from all encumbrances and to restrain the defendants from constructing new building in the suit 'A' and 'B' schedule properties till the properties are divided by metes and bounds.

05. The plaintiffs have also filed I.A. No.III and V for temporary injunction against the defendants restraining them from alienating, transferring or creating any charge or putting up any construction in the suit schedule properties pending disposal of the suit.

06. It is stated by the plaintiffs that, the suit schedule properties are acquired by late. Kuppayya S/o Nagayya Naik., Lachmayya S/o Nagayya Naik and Venkatappa S/o Nagayya Naik by way of Varisa entry No.427 of Chowthani Village. The Land Tribunal, Bhatkal granted the same in LRM No. 14/295. The plaintiffs are the legal heirs of Venktappa, defendant No.1 to 6 are the legal heirs of Kuppayya and defendant No.7 to 11 are the legal heirs of Lachmayya. After the death of the father of the parties to the suit, the

properties were mutated in the name of the parties to the suit. Hence they are the joint owners in possession of the suit schedule properties. The suit schedule properties was developed jointly by them. The suit schedule properties are not divided between the parties by metes and bounds. On 03-03-2023, the defendant No.6 cleared the Item No.I of the 'B' schedule property in order to construct a shop without the permission of the joint family members. On 04-03-2023, he ignored the words of the plaintiffs and stored the construction materials. On 15-03-2023 the plaintiffs requested to stop the construction work. The defendant No.6 continued with her works to curtail the rights of the plaintiffs. Hence the plaintiffs prayed to restrain the defendants from continuing the said acts till the properties are divided by metes and bounds.

07. The defendant No.6 has filed the written statement and objection on IA No.III and V. The defendant No.1 has adopted the written statement of defendant No.6. The defendant No.1 and 6 while admitting that suit schedule properties are their joint family properties have taken the contention of oral partition held among the ancestors of the plaintiffs and defendants and on the basis of the said oral partition the defendant No.1 to 6 are put in half share in Sy. No.23/1 and 23/2 of Chowthani Village, Bhatkal Taluk as shown in Serial No.1 and 2 of the 'B' schedule property. It is

further submitted that in pursuance of the said partition, the plaintiffs have constructed their residential house and are in possession of the same. The defendant No.1 has constructed a residential house in the year 2004, a shop, a Naga Bana and also planted Coconut and other valuable trees. The son of the defendant No.6 constructed a new shop much prior to the institution of the suit. In the previous year due to flood the entire shop and goods was ravished in the flood, in order to over come the said situation in the mere future the son of the defendant No.6 has constructed a new shop much prior to the institution of the suit by making it height to save from the flood. The defendants No.1 to 6 are in possession of Item No.1 and 2 of the suit 'B' schedule property. Hence submitted to reject the application.

08. The trial court has formulated three points.

01. Whether plaintiffs have made out a prima-facie case against the defendants?
02. Whether the plaintiffs have made out a balance of convenience, lies in their favour?
03. Whether plaintiffs have made out grounds to prove that in case, if the defendants dispossess them, they will be put to irreparable loss?
04. What Order?

09. The learned trial judge after hearing both sides answered Point No.1 to 3 in the negative and thereby dismissed the application.

10. It is that order of the trial court which has been challenged by the plaintiffs on the following grounds.

The order passed by the trial court is arbitrary, capricious, perverse and not sustainable under law. The trial court has failed to note that the suit under question is a partition suit under such circumstances till the disposal of the suit, the property is to be maintained as it is. The trial court has failed to note that IA No.III is filed against defendant No.1 to 3 seeking Temporary Injunction not to alienate, transfer or create any charge or putting up any structure over the suit schedule properties until disposal of the suit and IA No.V is filed against defendant No.4 to 11 seeking Temporary Injunction not to alienate, transfer or create any charge or putting up any structure over the suit schedule properties until disposal of the suit. The trial court has failed to note that initially the Temporary Injunction was granted and there is no change of circumstances, under such circumstances the trial court ought to have confirmed the Temporary Injunction granted on IA No.III and V. The trial court has failed to note that there is prima facie case,

balance of convenience and irreparable injury in favor of the appellants. The trial court has failed to apply the law applicable to the facts of the case and miss-applied the law to the fact of the case. The trial court has failed to consider the materials on record in proper and perceptive manner. Hence submitted to allow the appeal.

11. Heard arguments of learned counsel for the appellants and learned counsel for the respondents.

12. Perused the material evidence and the trial court records in detail.

13. Now the points that arise for my consideration are that:-

POINTS

01. Whether the findings arrived at by the learned trial judge needs interference?

02. What Order?

14. My findings on the above points are as follows:

Point No.1 : In the affirmative,

Point No.2 : As per the final order
for the following:

REASONS

15. Point No.1: The plaintiffs have filed the suit for partition and for injunction contending that suit schedule properties are their joint family properties and they are in joint possession and enjoyment of the suit schedule properties, hence they are entitle for 1/3rd share in the suit schedule properties and the defendants now making attempts to alter the nature of the suit properties by constructing building. Hence till the suit schedule properties are divided by metes and bounds, they have to be restrained.

16. As observed supra, the defendants No.1 to 6 in the written statement have admitted the nature of the suit schedule properties as the joint family properties, but taken the contention about the oral partition held between their ancestors and allotment of half share in Item No.1 and 2 of the 'B' schedule properties to the share of the defendant No.1 to 6 and remaining half share to the share of plaintiffs and submitted that they have already constructed house, Naga Bana, cow shed and shop. They have also submitted that in the event of partition the portion of the properties which are in their possession have to be allotted to their share in the ends of equity.

17. If the documents produced by the plaintiffs is perused, the RTC extract pertaining to the suit schedule

properties are still standing in the joint names of plaintiffs and defendants. Even though the defendants No.1 and 6 have contended about the oral partition but the khata in respect of the suit schedule properties have not been changed in the name of defendant No.1 to 6 in respect of portion of the Item No.1 and 2 of the 'B' schedule property which stated to have been allotted to their share under the alleged partition. It is true that defendant No.1 and 6 have produced the photographs with C.D. By producing the aforesaid documents the defendant No.1 and 6 have tried to prove that they are in possession of the portion of Item No.1 and 2 of the 'B' schedule property.

18. If the order passed by the trial court is perused, it goes to show that during the pendency of the said two applications, the learned counsel for plaintiffs made submission before the trial court that they will restrict their relief under IA No.III and V to the extent of restraining the defendants from constructing structure in the suit schedule properties pending disposal of the suit. It is true that under IA No.III and V apart from seeking restraint order to restrain the defendants from putting up any construction in the suit schedule properties have also sought for the relief of injunction restraining the defendants from alienating, transferring or creating any charge over the suit schedule properties. When the properties are standing in the joint

names of the plaintiffs and defendants the question of alienating, transferring or creating charge over the suit schedule properties does not arise because it is not possible to do the aforesaid acts when the properties are in the joint names of the plaintiffs and defendants.

19. So far as the relief claimed by the plaintiffs under the IA No.III and V restricting to restraint order from putting up construction in the suit schedule properties is concerned, the trial court in its order having observed that the suit schedule properties are the joint family properties and that the defense taken by the defendant No.1 and 6 as to the oral partition can be decided on merit, erroneously come to the conclusion that the plaintiffs have not stated in specific terms the exact portion of the land in which the defendants are trying to put up construction. On that sole ground the trial court has answered the Point No.1 to 3 holding that the plaintiffs have not made out prima-facie case and that balance of convenience is not tilts in favour of the plaintiffs and that plaintiffs will not put to any irreparable injury and hardship if the Temporary Injunction order is not granted in their favour.

20. At the cost of repetition, the parties have admitted that suit schedule properties are their joint family properties. Though the defendant No.1 and 6 have contended about the

oral partition but they have not at this stage proved the oral partition. Further the defendant No.1 and 6 have clearly stated that in the event of partition the portion of the properties which are in their possession and enjoyment have to be allotted to their share under equity.

21. In a ruling reported in **AIR 2003 SC 2427 T. Lakshmipathi V/s P. Nithyanda Redy** the Hon'ble Apex Court held that 'A co-owner who is in possession of the property with other co-owner can protect his possession against the other co-owner.

22. In **AIR 1985 Madras 283 Rukmini and Ors Vs. Thirmalai Chettiar** the Division Bench of Madras High Court held that 'A co-sharer cannot be allowed to cause injustice to the other co-sharer by putting substantial construction during the pendency of the suit for partition.

23. It is further well settled that every co-owner is as good as full owner in respect of every inch of the property. It is also well settled that a co-owner though in possession of joint property he has no right to change the user of that property without the consent of other co-owner.

24. Hence considering the facts and circumstances of the case it can be said that plaintiffs have made out prima facie case. Even balance of convenience also tilts in favor of

the plaintiffs. When plaintiffs stated to be the co-owner of the suit schedule properties they have every right to enjoy every inch of the land in its original position without causing waste and damage to the said property by anybody including the other co-owner. Under the given circumstances if temporary injunction is not granted and thereby defendants are permitted to put up any construction in the suit schedule properties, under such circumstances it is the plaintiffs who are going to suffer substantial injury and hardship. Hence this court is of the view that the trial court has erred in rejecting the IA No.III and V. Hence interference of this court is warranted. Accordingly Point No.1 is answered in the Affirmative.

25. **Point No.2:** In view of findings given on Point No.1, this court proceeds to pass the following -

ORDER

Appeal challenging the order passed on IA No.III and V in OS No.28/2023 dated 03-11-2023 by the learned Additional Civil Judge and JMFC. Bhatkal is hereby allowed.

Consequently, the order passed by the trial court on IA No.III and V under Order XXXIX Rule 1 and 2 of C.P.C. is set-aside.

The defendants and all persons claiming through or under them are restrained from putting up any construction in the suit schedule properties pending disposal of the suit.

Office to return the entire records of OS No.28/2023 to the trial court along with the copy of the order of this appeal.

(Dictated to the stenographer directly on the computer, typed by her, corrected, then signed and pronounced in the open court on this 01st day of August, 2026)

Sd/-
(ROOPASHRI)
**SENIOR CIVIL JUDGE & JMFC.,
BHATKAL**