

KAUK620009042022



IN THE COURT OF PRINCIPAL CIVIL JUDGE & JMFC

AT: HONNAVAR

**Present: Sri. Chandrashekhar Banakar.,
B.A., LL.B., LL.M.,
Pri.CJ & JMFC.,Honnavar**

Dated this the 10th day of August, 2022

O.S. No. 29/2022

Plaintiffs:

01. Mahammed Pavad Hasan Abu

Mohammed Shirur,

Aged about 34 years,

Occupation: Business,

02. Mahammed Javad Hasan Abu

Mohammed Shirur,

Aged about 32 years,

Occupation: Private work,

Both are residing at.

R/o. Shirur House, Doctor Street,

Mavalli, Murdeshwar, Tq: Bhatkal.

//Vs//

Defendants:

01. Magadum Baba Khaji,

Aged about 83 years,

Occupation Agriculturist,
R/o. Moolegadde, Mahime,
Post: Upponi, Tq: Honnavar.

02. Samasunnisa Mahamud Sab Khaji,

Aged about 60 years, Household,
R/o Mahime, Post: Upponi,
Tq: Honnavar.

03. Shabeer Baba Sab Khaji,

Aged about 72 years,
Occupation: Agriculturist,
R/o.Moolegadde, Mahime,
Post: Upponi, Tq: Honnavar.

04. Abu Ahammed Babasab Khaji,

Aged about 71 years,
Occupation: Agriculturist,
R/o. Moolegadde, Mahime,
Post: Upponi, Tq: Honnavar.

05. Abdul Hameed Babasab Khaji,

Aged about 60 years,
Occupation: Agriculturist,
R/o.Moolegadde, Mahime,
Post: Upponi, Tq: Honnavar.

06. Bibi Hurumat Khaja Siddibap,

Aged about 62 years, Household,
R/o.Muslimkeri, Upponi,
Post: Upponi, Tq: Honnavar.

07. Aliakbar Babasab Khaji,

Aged about 56 years,
Occupation: Agriculturist,
R/o.Moolegadde, Mahime,
Post: Upponi, Tq: Honnavar.

08. Bibi Shareefa Mahammed Gouse Valki,

Aged about 43 years, Household,
R/o.Arfa Manjil, Upparkeri,
Tq: Kumta.

09. Mahammed Muktiyar Amir Sab,

Aged about 43 years,
Occupation: Business,
R/o.Near Majid, Samshi,
Post: Kudrigi, Tq: Honnavar.

Parties to I.A. No. IV:

Applicants/plaintiffs:

**01. Mahammed Pavad Hasan Abu
Mohammed Shirur & another**

(By Advocate Sri.MSB)

//Vs//

Opponents/defendants:

01. Magadum Baba Khaji & others

(D-1, 3 to 7 by Advocate Sri.RVN)

(D-2 and 8 by Advocate Sri.MDR)

(D-9 by Advocate Sri.GVS)

ORDER ON I.A. NO. IV

The plaintiffs/applicants have filed I.A. No. IV under Order 39 Rule 1 and 2 of CPC praying this Court to issue an order of temporary injunction restraining the defendants No. 9 from doing any survey of the item No. 10 of the suit schedule property and also sought for temporary injunction restraining the defendant No.9 from alienating and creating encumbrance over the item No. 10 of the suit schedule property till the disposal of this suit.

2. The application is supported with the affidavit of the plaintiff No. 1, wherein he has deposed that the suit schedule properties are his ancestral properties and the plaintiffs and defendants have equal rights over the suit schedule properties. After the death of his mother by name Rehamthunissa, these plaintiffs and defendants got right over the suit schedule properties as legal heirs. But, the name of the defendant No. 8 alone was entered in the revenue records. But, the defendant Nos. 1 to 8 in collusion with each other have entered into an oral partition on 25/09/2018. On 15/12/2021, the defendant No. 8 had sold the item No. 10 of the suit schedule properties in favour of defendant No.9 without knowledge of these plaintiffs. Therefore, the said oral partition as well as the said registered sale deed are not binding on these plaintiffs. Hence, this suit and application.

3. On the other hand, the defendant No. 9 has filed his objection to the present application, wherein he has deposed that it is false to say that this defendant is trying to alienate the item No. 10 of the suit schedule property and it is also false to say that this defendant is trying to create encumbrance over the said property. Already pot hissa was taken place and this defendant is not made any attempt to get the pot hissa. This defendant undertakes not to sell the item No. 10 of the suit schedule property till the disposal of this suit. Hence, he prayed to dismiss the application.

4. I have heard the arguments of learned advocate for the plaintiffs and learned advocate for defendant No.9.

5. The points which are arise for my consideration are:

1. Whether the plaintiffs in I.A. No. IV made out a prima facie case for the grant of temporary injunction against the opponent/defendant No.9?
2. Whether the plaintiffs in I.A. No.IV prove that the balance of convenience lies in their favour?
3. Whether the plaintiffs in I.A. No.IV prove that they will be put to great loss and hardship if T.I. is not granted?

4. What order?

6. By considering the materials on record, my answers to the above points are as follows:

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

7. **Point Nos. 1 to 3:-** These point required are interconnected with each other, to avoid repetition of facts, these points are answered in common.

8. In order to prove his case, the plaintiffs have produced 22 RTCs. On perusal of these RTCs, it appears that those are relating to the suit schedule properties. On perusal of these RTCs, the names of defendant Nos. 1 to 8 were mutated in the RTCs as per partition dated 31/12/2018 and the name of defendant No. 9 was entered as per sale deed dated 17/01/2022. They have also produced the mutation entries under which the names of the defendants were entered in the RTCs. They have also produced the copy of unregistered partition deed dated 25/09/2018 and on perusal of this document, it appears that the defendant Nos. 1 to 8 have have entered into the said deed and divided the suit schedule properties in between them. The plaintiffs are not made as party to the said document. They have also produced the copy of the sale deed dated 15/12/2021 and on perusal of this

document, it appears that the defendant No. 8 sold the item No. 10 of the suit schedule properties in favour of defendant No. 9 for the sale consideration of Rs. 2,90,000/-. They have also produced the connected mutation entry. They have also produced the copy of the notice issued by plaintiff No. 1 in favour of ADLR, Honnavar and on perusal of this document, it appears that the plaintiff No. 1 had requested the ADLR, Honnavar not to conduct survey and poddi. They have also produced the copy of letter issued by them in favour of Tahasildar, Honnavar. They have also produced the photos in which the officials have conducted the survey work with the assistance of police.

9. In support of his contentions, the learned advocate for the defendant No. 9 has contended that still the plaintiffs have not proved their right over the item No. 10 of the suit schedule property and the defendant No. 9 is the bonafide purchaser of the said property and while purchasing the said property, the defendant No. 9 made proper enquiry and on satisfaction, he had purchased the said property. Moreover, the name of the defendant No. 8 was shown in the RTC pertaining to the item No. 10 of the suit schedule property. Therefore he sought for dismissal of the application. However, at the time of argument, he has filed the undertaking stating that till the pendency of this suit, the defendant No. 9 will not alienate the item No. 10

of this suit. With this background, let me discuss about the merits of the case.

10. On perusal the above discussed material, it appears that the name of the defendant No. 8 was entered in the RTC pertaining to the item No. 10 of the suit schedule property by virtue of partition dated 31/12/2018. Based on the said RTC, the defendant No. 9 had purchased the item No. 10 of the suit schedule property by the defendant No. 8 for the sale consideration. These facts are not denied by both the parties. So, the crux of the dispute is the alleged partition dated 31/12/2018. Now, whether the said partition is registered one or not is not disclosed by the defendants. However, the plaintiffs have contended that the said partition is oral one. In Roshan Singh vs Zile Singh, reported in (2018)14 SCC 814, the Hon'ble Supreme Court of India has held as follows,

"9. It is well settled that while an instrument of partition which operates or is intended to operate as a declared volition constituting or severing ownership and causes a change of legal relation to the property divided amongst the parties to it, requires registration under Section 17(1)(b) of the Act, a writing which merely recites that there has in time past been a partition, is not a declaration of will, but a mere statement of fact, and it does not require registration. The essence of the matter is whether the deed is a part of the partition transaction or contains

merely an incidental recital of a previously completed transaction. The use of the past tense does not necessarily indicate that it is merely a recital of a past transaction. It is equally well settled that a mere list of properties allotted at a partition is not an instrument of partition and does not require registration. Section 17(1)(b) lays down that a document for which registration is compulsory should, by its own force, operate or purport to operate to create or declare some right in immovable property. Therefore, a mere recital of what has already taken place cannot be held to declare any right and there would be no necessity of registering such a document. Two propositions must therefore flow : (1) A partition may be effected orally; but if it is subsequently reduced into a form of a document and that document purports by itself to effect a division and embodies all the terms of bargain, it will be necessary to register it. If it be not registered, Section 49 of the Act will prevent its being admitted in evidence. Secondary evidence of the factum of partition will not be admissible by reason of Section 91 of the Evidence Act, 1872. (2) Partition lists which are mere records of a previously completed partition between the parties, will be admitted in evidence even though they are unregistered, to prove the fact of partition.

11. Therefore, the oral partition entered in between the defendant Nos. 1 to 8 is not accepted as proper partition. Based on the oral partition, the name of the

defendant No. 8 was entered in the RTC pertaining to the item No. 10. Based on the said RTC, the defendant No. 9 had purchased the said property. Therefore, the core of the dispute is the alleged oral partition. But in law oral partition has no value. Therefore, there is something which requires a full fledged trial in order to decide the case. Therefore, the plaintiffs have made out prima facie case in order to get the relief of temporary injunction.

12. If this Court reject the present application, comparative inconvenience will cause to the plaintiffs. Because, the plaintiffs have proved their prima facie case and if this Court not restrain the defendant No. 9 from selling the suit schedule property or created encumbrance over the suit schedule property, it will cause inconvenience to the plaintiffs. If this Court not granted the relief of temporary injunction as sought for, obviously it will cause irreparable injury to the plaintiffs. Hence for these reasons, I have answered the point Nos. 1 to 3 in the affirmative.

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

ORDER

The I.A. IV filed by the plaintiffs under Order XXXIX Rule 1 and 2 of CPC is hereby allowed.

The defendant No. 9 is restrained from surveying the item No. 10 of the

suit schedule property and also restrained from alienating and from created any encumbrance over the item No. 10 of the suit schedule property till the disposal of this suit.

No order as to costs.

(Typed by me in my laptop, corrected and signed by me and then pronounced in the open Court on this 10th day of August, 2022)