

KAUK620026182023



IN THE COURT OF PRINCIPAL CIVIL JUDGE & JMFC ,
AT: HONNAVAR

Present: Chandrashekhar E Banakar, B.A.LL.B.LL.M,
Principal Civil Judge and JMFC, Honnavar

Dated this the 2nd day of April, 2024

O.S. No. 137/2023

Plaintiff:

Kumari Varijakshi D/o Manjunath Naik,
Age: 50 years, Occ: Agriculture &
Household , R/o. Honnavar, Paiki
Rayalakeri, Madivalahalla, Tq: Honnavar,
U.K.,

//Vs//

Defendants:

- 01. Smt. Janaki W/o Manjunath Naik,**
Age: 90 years, Occ: Agriculture
& Household, R/o. Honnavar Paiki
Rayalakeri, Madivalahalla,
Tq: Honnavar, U.K.,
- 02. Sri. Gajanana Manjunath Naik,**
Age: 70 years, Occ: Agriculture,
R/o. R/o. Honnavar Paiki
Rayalakeri, Madivalahalla,
Tq: Honnavar, U.K.,
- 03. Sri. Balakrishna Manjunath Naik ,**
Age: 65 years, Occ: Agriculture,
R/o. Sirsi Taluka Paiki Hanumanti,
Tq: Sirsi, U.K.,
- 04. Prakash Manjunath Naik,**
Age: 60 years, Occ: Agriculture,
R/o. Honnavar Paiki
Rayalakeri, Madivalahalla,
Tq: Honnavar, U.K.,

- 05. Smt. Rohini W/o Manjunath Naik**
Age: 55 years, Occ: Agriculture & Household, R/o. Manchikeri, Paiki Gondsamane, Tq: Yallapura, U.K.,
- 06. Smt. Shaila W/o Manoja Naik**
Age: 45 years, Occ: Agriculture & Household, R/o. Kumta, Paiki Mooruru Katri, Tq: Kumta, U.K.,

Parties to I.A. No. I:

Applicant/plaintiff:

Kumari Varijakshi D/o Manjunath Naik,
Age: 50 years, Occ: Agriculture & Household, R/o. Honnavar, Paiki Rayalakeri, Madivalahalla, Tq: Honnavar, U.K.,

(By Advocates. Sri. MIH).

//Vs//

Opponents/defendants:

- 01. Smt. Janaki W/o Manjunath Naik,**
Age: 90 years, Occ: Agriculture & Household, R/o. Honnavar Paiki Rayalakeri, Madivalahalla, Tq: Honnavar, U.K.,
- 02. Sri. Gajanana Manjunath Naik,**
Age: 70 years, Occ: Agriculture, R/o. R/o. Honnavar Paiki Rayalakeri, Madivalahalla, Tq: Honnavar, U.K.,
- 03. Sri. Balakrishna Manjunath Naik ,**
Age: 65 years, Occ: Agriculture, R/o. Sirsi Taluka Paiki Hanumanti, Tq: Sirsi, U.K.,
- 04. Prakash Manjunath Naik,**
Age: 60 years, Occ: Agriculture, R/o. R/o. Honnavar Paiki Rayalakeri, Madivalahalla, Tq: Honnavar, U.K.,

- 05. Smt. Rohini W/o Manjunath Naik**
Age: 55 years, Occ: Agriculture & Household, R/o. Manchikeri, Paiki Gondsamane, Tq: Yallapura, U.K.,
- 06. Smt. Shaila W/o Manoja Naik**
Age: 45 years, Occ: Agriculture & Household, R/o. Kumta, Paiki Mooruru Katri, Tq: Kumta, U.K.,
(By D-1 Ex parte D-2 to 6 NMN Adv)

ORDER ON I.A. NO. I

The plaintiff/applicant has filed I.A. No. I under Order 39 Rule 1 and 2 read with section 151 of CPC praying this Court to issue an order of temporary injunction against the defendants from continuing with the construction of new building and also from constructing any building over the suit schedule properties till the disposal of this suit.

2. The application is supported with the affidavit of the plaintiff, wherein she deposed that she has filed this suit seeking for the relief of partition and she has 1/7th share in the suit schedule properties. With her consent, the defendants have started to construct new building over the suit schedule properties. When she tried to stop the defendants from constructing the said building, the defendants threatened to her life and then she went to the police station and filed her first information and police have issue an endorsement stating that the dispute is of Civil nature. Hence, having no other option, she filed this suit along with this application.

3. On the other hand, even though the defendant Nos. 2 to 6 have appeared before the Court through their advocate, but they have failed to file their written statement and objection to the present application.

4. I have heard the arguments of learned advocate for the plaintiff. The learned advocate for the defendant Nos. 2 to 6 remained absent.

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

1. Whether the plaintiff has made out a prima facie case for the grant of temporary injunction against the opponents/ defendants?

2. Whether the plaintiff proves that the balance of convenience lies in his favour?

3. Whether the plaintiff proves that she 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. I have already discussed the rival contentions raised in this case. Therefore, I directly move to discuss about the documents produced in this case.

9. In order to prove his case, the plaintiff has produced the RTC pertaining to the item No.1 of the suit schedule properties,

wherein the name of the plaintiff and defendants are shown as actual possessors of the said land. She has also produced the mutation entry in relation with the said RTC. She has also produced another RTC pertaining to the item No.2 of the suit schedule properties, wherein the names of defendants are shown as actual possessors of the said land. She has also produced the mutation entry. Further she produced another RTC pertaining to the item No.3 of the suit schedule properties, wherein the names of defendants are shown as actual possessors of the said land.

10. On meticulous perusal of the application and documents, this Court of is of the opinion that the plaintiff is also daughter of late Manjunath and defendant No.1 as that of the defendant Nos. 2 to 6. At this point of time, the plaintiff and defendant Nos. 2 to 6 are the children of late Manjunath is proved.

11. Now the question is whether one share holder can be restrained from constructing any building over the schedule property without the consent of other share holder. In this regard, it is proper to cite the following judgment. In N.S.Bangera vs Rama Bangera, reported in ILR 1989 KAR 1382, wherein the Hon'ble High Court of Karnataka has held as follows,

"7. Even a co-owner cannot appropriate a portion of the joint family for himself and construct a building thereon for his own use and occupation at his own cost without their permission. During admission the following substantial question of law has been set down for determination:—

"Whether the Court below was right in holding that the plaintiff is disentitled to the relief of mandatory injunction sought for in the suit?"

"8. The appellants' Counsel has taken me through the reasoning of the first Appellate Court in extenso and pointed out that the Court was

wrong in holding that he had to prove substantial injury caused to the appellants. At para-18 of its Judgment the first Appellate Court observed at the concluding portion that it was incumbent on the part of the appellants to plead as to how the act said to have been committed by respondent-1 had adversely affected their rights as co-owners and how it has caused a substantial injury. They ought to have pleaded that if respondent-1 is permitted to construct a building in the manner he has done, that is going to affect the effective enjoyment of the suit schedule properties jointly or is going to adversely affect the partition of the suit schedule properties that may be claimed in future. Nothing of that sort has been done by the appellants, respondent-1 being a co-owner and Ejman of the family and when he thinks that the present residential house does not fulfil his needs he is entitled to put up an additional structure though at his own cost and though without the consent of the other co-owners. He can be restrained by putting up such structure and therefore appropriate a portion of the land for himself to the exclusion of others only if it is proved that such exclusion and ouster of the other coparceners and such exclusion of the possession has or is going to adversely affect the interests of the other co-owners. Such a sweeping remark by the first Appellate Court is wholly uncalled for inasmuch as it went to the extent of recognising such a right in a co-owner to put up an additional structure even at his own cost and without the consent of other co-owners. Therefore, this reasoning of the first Appellate Court cannot be sustained. It may be said at once that no co-owner has got such an unqualified right to put up any structure even at his own cost on any portion of the property owned by the co-owners as no one can predicate which specific portion he is entitled to. This reasoning is opposed even to the

observations made in the decisions of various High Courts referred to by the Appellate Court.

9. At para-14 of the Judgment the first Appellate Court has referred to a decision of the Lahore High Court in the case of Ahmed Gul v. Rahim Khan [AIR 1926 Lahore 52.] in which it was held that a mere circumstance of a building having been on a common land without the consent of the co-sharers and despite their protest is not sufficient in itself to entitle the co-sharers to claim the demolition of the building unless it is shown that the erection of the building has actually caused material and substantial injury which could not be remedied. It was also held that it was not shown that such a con-in joint land. In the case of Shankar Lal v. Pati Ram [AIR 1937 All 293.] it was observed that if one co-owner constructs in joint land buildings of permanent character or of such a character to give exclusive possession to one co-owner to the ouster of other co-owners such an exclusive possession is not justified and can be objected to and the building so constructed could be ordered to be demolished. However if the buildings constructed are of temporary nature no relief of demolition could be granted. In the case of Krishna Kumar v. Padum Singh [AIR 1950 Patna 511.] , it was held that the plaintiff who complained that a building of permanent nature has been put up in a joint property by his co-owner cannot obtain decree for demolition unless he establishes that he has sustained some substantial injury in the act of the co-owner and that he had taken steps in time to prevent erection of the building. In the case of Darshan Lal v. Harkesh, [AIR 1951 Allahabad 338.] it was held that one co-sharer cannot build upon a joint land without the consent and concurrence of the other co-sharers. The consent or concurrence of other co-sharers can be express or implied. If the joint owners have allowed the construction of the building without challenge for a long time,

consent is implied. This Court in the case of **Ganapatsa v. Tuljanasa**, [1972 (2) Mys. L.J. 126.] while considering an application under Order 39 Rules 1 and 2 CPC, observed that there is no such broad proposition that one co-sharer is entitled to injunction restraining the other co-owner from exceeding his rights absolutely and without reference to the amount of damage to be sustained by one side or the other complaining or withholding the injunction. This decision however, has no direct bearing on the facts of the instant case. What emerges from these decisions is that the co-owner has no such right as came to be recognised by the first Appellate Court to construct over a common property as extracted from the observations above. What is consistently laid down is that if there is no consent either express or implied one co-owner cannot erect any building of a permanent nature on any portion of the common property. At the same time the proof of substantial injury which could not be remedied is also necessary in the matter of granting or refusing mandatory injunction.

10. Counsel for respondent-1 urged that in addition to being a co-owner the first defendant is the Manager or Ejman of the joint family. If it is so he cannot assume for himself any higher rights with regard to dealing with the property enjoyed by the entire family and it cannot be recognised that he has not a right to put up any such constructions on his own. The limitation on all the co-owners in the matter of dealing a property of this nature are the same whether he is a Ejman or a junior member in the family."

12. On perusal of the above judgment, it is clear that in the absence of consent, no co-owner, even if Ejaman of family can erect permanent structure on any portion of common property. Further held that no co-owner has got such an unqualified right to put up any structure even at his own cost on any portion of the property

owned by the co-owners as no one can predicate which specific portion he is entitled to. What is consistently laid down is that if there is no consent either express or implied one co-owner cannot erect any building of a permanent nature on any portion of the common property.

13. For all these above reasons, this Court is of the opinion that at this point of time, the plaintiff has proved that she is also having right over the suit schedule properties. Therefore, at this point of time, prima facie it is clear that the plaintiff is in the actual possession of the suit schedule properties.

14. So on perusal of the records, it appears that there is a triable question in this suit. In this case, the plaintiff has made out grounds for trial, thereby she has made out prima facie case. Further if this Court refuses to grant the relief sought in this application, obviously it is the plaintiff, who will suffer irreparable injury. Because, if the defendants construct building over the suit schedule properties, then it will cause irreparable injury to the plaintiff. Further, on comparing the inconvenience, it is the plaintiff who will suffer greater inconvenience on refusal of the relief sought in the application. On the other hand, no injustice will cause to the defendants. Hence, I answered point Nos. 1 to 3 in the affirmative.

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

ORDER

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

The defendants are restrained from continuing any construction over the suit schedule properties and also restrained

from constructing any building over the suit schedule properties 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 2nd day of April, 2024).

**Pri. Civil Judge & J.M.F.C.
Honnavar.**