

KAUP020004552020



**IN THE COURT OF THE PRINCIPAL SENIOR CIVIL JUDGE
AND CJM., AT UDUPI.**

Dated : This the 24th day of September 2021

Present: Smt. Shakunthala S.,
B.A. L.L.B.
Prl. Senior Civil Judge & CJM.,
Udupi.

O.S.No.34/2020

Plaintiff : A. Sudhir Kodgi.
V/s
Defendants : A. Rajendra Kodgi and others.

I.A.No.VII

Applicant : A. Sudhir Kodgi,
Aged about 44 years,
S/o Late A. Chandrashekar Kodgi,
R/at "Guru Kripa",
Hayagreeva Nagar, Indrali,
Post: Kunjibettu,
Udupi Taluk – 576102. - Plaintiff.

V/s

- Opponents** :
1. Dr. Reshma K.
Aged about 36 years,
W/o Mr. A. Rajendra Kodgi,
R/at No.204, 2nd Floor,
“Inland Ebony”, Kadri,
Mangalore. – Opponent.
 2. A. Rajendra Kodgi,
Aged about 49 years,
S/o Late A. Chandrashekar Kodgi,
R/at Apartment Flat No.602,
“Kodgi Sai Sadan”,
Post Kunjibettu, Indrali,
Udupi Taluk – 576102.
 3. Nandagopal Kodgi,
Aged about 47 years,
S/o late A. Chandrashekar Kodgi,
R/at “Guru Kripa”,
Hayagreeva Nagar, Indrali,
Post Kunjibettu,
Udupi Taluk – 576102.
- Defendants No.1 & 2.

ORDERS ON I.A.NO.VII UNDER SECTION 151 AND ORDER**VI RULE 17 OF CPC FILED BY PLAINTIFF**

This order arising out of an application filed by the plaintiff with a prayer to amend the plaint after para No.19 by

adding para No.19 A, B, C, in respect of cancellation of general power of attorney dated 07-07-2010, 16-01-2009, 19-03-2012, 07-06-2014 and 25-06-2013 executed by them in favour of defendant No.1 by issuing legal notice dated 04-03-2017 by RPAD and also in respect of release deed dated 07-03-2017 as stated in the application.

2. In support of the application, sworn to an affidavit that the schedule properties are their joint family properties and the suit filed for partition. On going through the written statement filed by defendant No.1 and the documents produced came to know in order to defeat his right over item No.1 to 4 and 6, the defendant No.1 managed to execute the settlement deed and release deed for his convenience. After cancellation of power of attorney dated 19-03-2012 executed by him and defendant No.2. Defendant No.1 managed to execute the release deed dated 07-03-2017 in his favour in respect of item No.1 and 2 of "A" schedule properties without any authority and on the same day after cancellation of power of attorney executed by him, he managed to execute the settlement deed in respect of item No.4 of the "A" schedule

property and after cancellation of power of attorney also managed to get release deed dated 08-03-2017 in respect of item No.6 of the "A" schedule property and release deed dated 07-03-2017, 08-03-2017 which are void and illegal documents illegally executed by defendant No.1 in his name in order to grab item No.1, 2, 4 and 6 of "A" schedule properties. Moreover, he has no authority to execute the said documents as the general power of attorney prior to the execution of release deed and the power of attorney attested before notary which has no connection. Therefore, the said documents executed in respect of the suit schedule properties for which defendant No.1 has no right. Even though item No.3 of the "A" schedule property purchased on behalf of family, but transferred the property in the name of his wife for which also he is not having absolute right, title and interest to transfer the property to the name of his wife which is a dummy transfer does not convey any legal, absolute right, title and interest over the said property and his wife will not acquire any right through settlement deed which is not binding on him. Hence, prayed to allow the application.

3. The said application has been resisted by defendant No.1 by filing objection that the application is not maintainable, frivolous, vexatious. The amendment sought for is unwarranted not at all necessary for adjudication of the matter and which will introduce a new case and to improve his case by getting hints from the defence of written statement and which is beyond the scope of provision of Order VI Rule 17 of CPC and all other averments have been emphatically denied and the amendment is barred by law of limitation, there is delay, laches, acquiescence and plaintiff barred from seeking the amendment without seeking the relief of declaration and cancellation of documents, as such cannot be allowed. Plaintiff obtained an ex parte temporary injunction order. Now seeking amendment which cannot be taken into consideration, without disposing the temporary injunction applications, if the said applications deferred, he will suffer irreparable hardship and injury. Hence, prayed for dismissal of the application with exemplary cost.

4. Heard on both side.

5. The points that arise for my determination are as follows:

1. Whether the amendment sought is just and necessary for determination of the matter for proper adjudication?
2. What order?

6. My findings on the above points are as under:

Point No.1: In the affirmative.

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

REASONS

7. Point No.1:- The present suit filed for the relief of partition, wherein it is the specific contention of plaintiff that suit schedule properties are the joint family properties and having purchased out of the joint family nucleus funds, accordingly they are entitled for share, wherein defendant No.1, elder member of the family, accordingly is managing the entire family properties. In view of the same himself and defendant No.2 have got executed general power of attorney in his favour, but the defendant No.1 misappropriated the joint family properties and mismanaging the same, accordingly they demanded for partition, wherein they have cancelled the power

of attorney executed in favour of defendant No.1 by issuing a legal notice which was served as returned for the reason unclaimed. But based on the alleged general power of attorney, defendant No.1 is creating the documents which are not binding.

8. Even though defendant No.1 resisted the case contending that the application is time barred and it will introduce a new case, but in the written statement he is not disputing that item No.1 to 3 of “A” schedule properties have been purchased jointly in the name of himself, plaintiff and defendant No.2. But according to defendant No.1, plaintiff and defendant No.2 have executed general power of attorney and release deed by releasing their right over the properties in his favour and the names of plaintiff and defendant No.2 mentioned in the sale deed nominally and they also having knowledge, but the entire sale consideration paid by him, accordingly they are not entitled for share.

9. On perusal of the documents, wherein the release deed executed by defendant No.1 as general power of attorney

holder of plaintiff and defendant No.1 wherein the plaintiff and defendant No.2 have issued notice by cancelling the general power of attorney, but according to defendant No.1, it has not been served. Whether the general power of attorney cancelled or not which will be determined only during full fledged trial. Moreover, at this stage the Court has to determine, whether the amendment sought is just and necessary for proper adjudication. The plaintiff is seeking permission to add para No.19 (a to c) which are nothing but ancillary to the plaint and which will not introduce any new case or it will change the nature of the suit nor the cause of action.

10. Even though proviso to provision Order VI Rule 17 CPC bars to entertain the application that too filed belatedly after commencement of the evidence, but admittedly in the present case evidence not yet commenced. Moreover, when the amendment sought by the plaintiff is nothing but in the nature of an explanation i.e. an ancillary to the plaint averments, wherein defendant No.1 has already raised specific defence for which the amendment sought is an explanation. If the application is allowed no injustice caused to defendant No.1.

On the other hand, the object of the provision of Order VI Rule 17 CPC is to minimize the litigation. Accordingly, though objections raised the delay itself is not a ground to reject the application and it is a settled law that in respect of amendment application is concerned there should not be a pedantic approach and the amendment sought, it will not change neither the cause of action nor the nature or introduce new case. Such being the thing, in the existence of defence already raised by defendant No.1, if the application is allowed no injustice caused to defendant No.1. On the other hand, if it is not allowed, plaintiff will be put to irreparable loss and damage. Accordingly, the amendment sought is just and necessary to adjudicate the matter. Hence, ***I answer point No.1 in the affirmative.***

11. Point No.2:- For the above reasons, I proceed to pass the following:

ORDER

The application filed by the plaintiff i.e. I.A.No.VII under section 151 and Order VI Rule 17 C.P.C., is hereby allowed.

Cost will follow the result of the suit.

(Dictated to the Stenographer, computerized by him, corrected, signed and then pronounced by me in the open court on this the 24th day of September 2021).

(Smt. Shakunthala S.)
Prl. Sr. Civil Judge and CJM.,
Udupi.