

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.

Applicant : **I.A.No.VIII**
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.VIII UNDER SECTION 151, ORDER I
RULE 10(2) CPC FILED BY PLAINTIFF

This order arising out of an application filed by plaintiff with a prayer to implead opponent as defendant No.4 who is

proper and necessary party for effective and complete adjudication upon the dispute involved in the case in the ends of justice.

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 the 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 have 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 counter statement that the application is false, frivolous, vexatious and not maintainable either in law or on

merits. There are no grounds to allow the application. The application is not in conformity with the civil rules of practice and the provision of law quoted is not applicable. Only to defeat his right as they are not having any right over item No.3 of the schedule property, wherein it has been purchased by him in his individual capacity out of his self acquired income with an intention to house his wife and her aged mother, who are residing in a small apartment in Mangalore. It was not purchased out of undivided family nucleus or funds and is not the joint family property nor his intention to purchase the property for the benefit of joint family. After purchase, khatha standing in his name and he being the absolute owner executed a registered settlement deed dated 28-11-2016 in favour of his wife, accordingly, she became the absolute owner, khatha mutated in her name and she is in possession and enjoyment of the said property, but plaintiff without challenging the recitals of sale deed and cancellation of decree to set aside the settlement deed executed by him is not maintainable. Hence, prayed for dismissal of the application as opponent is not a proper and necessary party for adjudicating the matter in controversy involved in the suit.

4. **Heard** on both side.

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

1. Whether the presence of opponent is just and necessary for proper adjudication of the matter without whose presence an effective decree can not be passed as she is necessary party to the suit?

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: It is not in dispute that the suit filed for partition. According to plaintiff, suit schedule properties are joint family properties. But according to defendant No.1, the suit schedule properties are self acquired properties as his father is not having nor acquired any property as he is working at bank and after retirement he received meager amount and spent for clearance of loan and though he acquired properties under partition deed, but the said

properties alienated in order to discharge the debts as well as to meet the marriage expenses of his 2nd daughter, accordingly, nothing is left in the joint family.

8. On the other hand, he being the responsible son of a parents doing land dealing brokerage business, vehicle dealings, medical records drafting jobs, construction, trading and investments made in shares and savings made in bank deposits. By doing all these business earned money and improved the family by purchasing the properties. Though item No.1 and 2 of “A” schedule properties purchased in the name of plaintiff and defendant No.1 nominally, but the consideration paid by him, so also item No.3 which is his self acquired property. Accordingly he being the absolute owner executed the settlement deed in favour of his wife and now she is in possession and enjoyment of item No.3 property as absolute owner.

9. The plaintiff categorically denied the release deed and according to him, the power of attorney based on which defendant No.1 got executed for his convenience the release

deeds, wherein the power of attorney itself was cancelled by issuing a notice.

10. Though plaintiff and defendants raised their contention, but by considering the nature of the suit as the suit is one for partition, it is not only the bounden duty on the parties to include all the properties in a suit for partition for adjudication, but it is also mandate on the part of the Court to direct the parties to include all the properties for proper adjudication and there should not be a scope for technical ground that the suit is not maintainable for non-joinder or mis-joinder of necessary properties and if at all the parties denied, but considering the nature of suit, whether the suit schedule properties are self acquired properties or joint family properties nor acquired out of joint family funds or self earned money which have to be determined only during full fledged trial. Moreover, though the proposed opponent is not a necessary party, but according to plaintiff, item No.3 of the suit schedule properties is also a joint family property purchased out of joint family nucleus, but according to defendant No.1, it is his self acquired property.

11. In the existence of property wherein defendant No.1 not disputing the settlement deed executed in favour of the opponent, wherein he specifically contended that she is the absolute owner in possession and enjoyment of said property, such being the thing, in the existence of specific averments and admission made by plaintiff and defendant No.1 in respect of acquisition of property though is a subject during trial according, the presence of opponent is necessary though she is not a necessary party, but in the existence of property shown in "A" schedule and in whose absence though decree can be passed, but when defendant No.1 himself contending that the right, title and interest has been transferred by virtue of settlement deed in favour of opponent who is also having interest in the said property. Such being the thing, the presence of the opponent is necessary for effective and complete adjudication of the dispute involved between the parties. The crux of the matter is whether the suit schedule properties are self acquired or joint family properties, such being the thing, the objections raised by the defendant No.1 not sustainable. Moreover, the provision of Order I Rule 10(2) CPC which reads thus:

“Court may strike out or add parties.—The Court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the Court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the suit, be added.”

12. By reading the provision which clearly implicates that a necessary party is one in whose absence the Court cannot pass an effective decree at all. Proper party is one in whose presence before Court is necessary to ensure that all matters in dispute are effectually or completely determined. The reason necessary to make a person party to action is that she should be bound by ensuring result and the question should be settled in the suit. Therefore, it must be one, which cannot be effectively settled unless is a party. Where for whose benefit the acquisition/transferring the property is proposed cannot be said to have a direct legal interest in the proceedings, wherein the defendant No.1 himself transferred the property

upon which the proposed opponent is having legal interest, accordingly though she is not a necessary party, but in the existence of settlement deed, if the opponent appeared as proper party no injustice caused to the defendants. Accordingly, ***I answer point No.1 in the affirmative.***

13. 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.VIII under section 151 and Order I Rule 10(2) C.P.C., is here by 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.