

KAUP020011632022



**IN THE COURT OF ADDL. SENIOR CIVIL JUDGE AT
UDUPI**

Present: **Sri. P.R. Yogesh**, B.Com., LL.B.,
Addl. Senior Civil Judge, Udupi

Dated, this the 11th day of August, 2023

O.S.No.59/2022

Between:

Mukunda Kamath and others ... Plaintiffs

And

Baby Nayak and others Defendants

In I.A.No.II and XXII

Between:

1. Mukunda Kamath,
2. Saraswathi,
3. Umesh Nayak,
4. Usha Nayak,
5. Ramachandra Vagle,
6. Kuppanna Vagle,
7. Gopalakrishna Vagle,
8. Mahendra Vagle,

9. Mahesh Vagle ... Applicants / Plaintiffs

And

1. Baby Nayak,
2. Devappa Kamath,
3. Upendra Kamath,
4. Savitha Borker,
5. Ramakrishna Kamath,
6. Asha,
7. Manjunatha,
8. Raghunatha,
9. Padmavathi,
10. Raviraj Vagle Opponents/ defendants

(P - Rep. by Sri. N.K.A. Adv.)

(D1, 4, 5, 7 to 10 – Exparte)

(D2, 3 - Rep. by Sri. V.S. Adv.)

Order on I.A.No.II and XXII

The plaintiffs / applicants filed the I.A.No.II under Order XXXIX Rule 1 and 2 and Sec.151 of C.P.C. and requested to grant an order of temporary injunction against the defendant No.1 to 4 and the persons who are acting on their behalf to restrain them from selling the properties described in 'A' schedule.

2. The plaintiffs / applicants filed the I.A.No.XXII under Order XXXIX Rule 1 and 2 and Sec.94(e) and 151 of C.P.C. and requested to grant an order of temporary injunction against the defendant No.1 to 4 and the persons who are acting on their behalf to restrain them from putting new construction in the properties described in the 'A' schedule.

3. The defendant No.1 to 4 filed the memo and requested to adopt their written statement as objection to the I.A.No.II.

4. The defendant No.1 to 4 filed the objection to the I.A.No.XXII.

5. Heard, the arguments submitted by the respected counsel for plaintiffs and defendant No.1 to 4.

6. Perused the papers. Following points are taken to adjudicate the applications.

1. Whether the plaintiffs have made out a prima facie case?
2. In whose favour the balance of inconvenience will be lies?
3. To whom irreparable loss will be caused?

4. What order?

7. Findings on the above points are as follows:

Point No.1: In the affirmative;
Point No.2: In favour of the plaintiffs;
Point No.3: To the plaintiffs;
Point No.4: As per final order
for the following:

REASONS

Point No.1 :

8. The plaintiff No.1 / applicant No.1 filed the affidavit in support of I.A.No.II and XXII. The plaintiff No.1 stated similar set of facts in the affidavits of I.A.No.II and XXII. The plaintiff No.1 stated that, properties described in 'A' schedule are tenanted properties of Late Rama Kamath. After his death, father of plaintiff No.1 Subbanna Kamath and father of defendant No.1 to 4 Devanna Kamath were managing and cultivating the properties described in 'A' schedule on behalf of the joint family. After coming into force of Karnataka Land Reforms Act, father of defendant No.1 to 4 Devanna Kamath filed the declaration in Form No.7 seeking an order of occupancy right on behalf of the joint family. During the pendency of petition before

the Land Tribunal, Devanna Kamath lost his breath. After enquiry Land Tribunal granted the right of occupancy in the name of Kamalamma, W/o. Devanna Kamath on behalf of the joint family and also issued Form No.10 in the name of Kamalamma on behalf of the joint family. Rama Kamath died intestate leaving behind his children namely Subbanna Kamath, Vasu Kamath, Parvathi, Akkamma, Devanna Kamath as his legal heirs. Subbanna Kamath died intestate by leaving Shivaraya Kamath, Achutha Kamath as his legal heirs. Shivaraya Kamath died by leaving the plaintiff No.3 and 4 and defendant No.6 as his legal heirs. Achutha Kamath died issueless. Vasu Kamath died intestate by leaving the defendant No.7 to 9 as his legal heirs. Parvathi died issueless. Akkamma died intestate by leaving plaintiff No.5 to 7 and Raghu Vagle. Raghu Vagle died intestate by leaving plaintiff No.8, 9 and defendant No.10. Devanna Kamath died intestate by leaving defendant No.1 to 4. The plaintiffs and defendants are joint and constructive possession of the properties described in 'A' schedule. The defendant No.1 to 4 fraudulently entered into a registered deed of partition in respect of item No.5 to 13 and mutated their names in the records of rights.

The defendant No.1 to 4 are going adversely to the interest of other family members. The defendant No.1 to 4 threatened that they will alienate the properties. The documents of the properties are in their names. The defendant No.1 to 4 are also made an effort to put up construction in the properties described in 'A' schedule. He and other plaintiffs requested the defendant No.1 to 4 for their legitimate shares and also they requested not to put up new construction in the properties described in 'A' schedule. The defendant No.1 to 4 refused to divide the properties and also they refused the prayer of them. He and other plaintiffs are having legitimate share in the properties in question. He and other plaintiffs are having a prima facie case.

9. In the written statement and objection of I.A.No.XXII the defendant No.1 to 4 took the similar contention. The defendant No.1 to 4 contended that, the applications filed by the plaintiffs are not maintainable either in law or on facts. The defendant No.1 to 4 denied the statements of plaintiffs. The defendant No.1 to 4 contended that plaintiffs suppressed the material facts. The properties described as item No.1 to 4 were the lease hold properties of the joint family of plaintiffs and them.

The properties described as item No.1 to 4 were enjoyed under chalageni right of one Rama Kamath. After his death, his lease was continued by his legal heirs by executing the geni chit in the name of his son Subbanna Kamath. The properties described as item No.1 to 4 are only the chalageni holding of the joint family of plaintiffs and defendants. Those properties were divided into 4 shares as claimed by the plaintiffs. The defendant No.1 to 4 further contended that about 30 years ago oral partition was taken place in respect of the properties described as item No.1 to 4. The land in Sy.No.121/2 an extent of 2 acres was allotted to the share of their father namely Devanna Kamath. The remaining properties were divided amongst Subbanna Kamath, Vasu Kamath and Akkamma. As per the oral partition, 4 sharers are in separate possession of their respective shares. The defendant No.1 to 4 further contended that the properties described as item No.5 to 13 were the individual chalageni properties of their father Devanna Kamath. Devanna Kamath obtained the properties described as item No.5 to 13 under chalageni from the landlord Subbaraya Bhat in his individual capacity. After the death of Devanna Kamath they have been enjoying the properties

described as item No.5 to 13 which were exclusively held by their father Devanna Kamath. Except them, no other persons are having right, title and interest over those properties. In the month of March 2022 they entered into the partition deed and divided the properties described as item No.5 to 13. They did not include the land in Sy.No.121/2 an extent of 2 acres which was allotted to Devanna Kamath under the oral partition. The defendant No.1 to 4 further contended that Devanna Kamath submitted Form No.7 dated 20.08.1974 by claiming occupancy right of the properties described in the plaint. Devanna Kamath was an illiterate person. Some other person impleaded all the family members in Form No.7 which was submitted by Devanna Kamath. Even Devanna Kamath was cultivating the properties described as item No.5 to 13 on his individual capacity. The plaintiffs are claiming share over the properties described as item No.5 to 13 by misusing the names included in Form No.7 and in the order of Land Tribunal. On 22.11.2020 the plaintiffs came along with the grama panchayath member namely Sadananda Prabhu and one ex-grama panchayath member namely Rathnakar and approached them about part in 65

cents of land bearing Sy.No.121/2 which was allotted to their father under oral partition. They refused the representation of plaintiffs. In that wreck vengeance the plaintiffs instituted the suit. The plaintiffs are in exclusive possession and enjoyment of the properties described as item No.2 to 4 which contains 4 residential RCC house. The suit of the plaintiffs is hopelessly barred by limitation. There is no cause of action to institute the suit. The plaintiffs do not have any prima facie case. On these grounds, the defendant No.1 to 4 requested to reject the application.

10. The plaintiffs submitted the Form No.7, the order passed by the Land Tribunal, Form No.10, record of rights, chalageni chit, office copy of the letter written to PDO of Kodibettu Gramapanchayath and letter issued by the PDO of Kodibettu Gramapanchayath. The defendant No.1 to 4 did not submit any document.

11. The contention of the plaintiffs is, properties described in the plaint were managing and cultivated by one Late Rama Kamath. After his death father of plaintiff No.1 namely Subbanna Kamath and father of defendant No.1 to 4 namely Devanna Kamath were

managing and cultivating the properties described in the plaint on behalf of the joint family. Devanna Kamath submitted declaration in Form No.7 before the Land Tribunal, Udupi seeking right of occupancy on behalf of the joint family. During the enquiry before the Land Tribunal Devanna Kamath died. After enquiry the Land Tribunal confirmed the right of occupancy in the name of wife of Devanna Kamath namely Kamalamma on behalf of the joint family as per order dated 22.11.1978 and also issued Form No.10 in the name of Kamalamma on behalf of the joint family.

12. The contention of the defendant No.1 to 4 is, the properties described as item No.1 to 4 were chalageni properties. Those properties were divided as 4 shares among the plaintiffs and defendants under oral partition. 4 sharers were / are in possession and enjoyment of their respective shares in view of the the oral partition. In that oral partition, land in Sy.No.121/2 an extent of 2 acres was allotted to the share of their father namely Devanna Kamath. The further contention of the defendant No.1 to 4 is, the properties described as item No.5 to 13 were cultivated by their father Devanna Kamath on his individual

capacity. Devanna Kamath cultivated the properties described as item No.5 to 13 under the landlord namely Subbaraya Bhat. The defendant No.1 to 4 further contended that, their father was an illiterate person. Some other person made a declaration in Form No.7 by including all the family members, which was submitted by Devanna Kamath. Devanna Kamath died during the pendency of the enquiry which was pending before the Land Tribunal. After conducting an enquiry the Land Tribunal granted the right of occupancy in the name of wife of Devanna Kamath namely Kamalamma. The allegations of rival parties are apparently shown that, the plaintiffs are claiming the right over the properties in question by alleging that Devanna Kamath submitted Form No.7 on behalf of the joint family by claiming the right of occupancy. During the pendency of the enquiry which was pending before the Tribunal Devanna Kamath died. For that, the properties were granted in the name of Kamalamma on behalf of the joint family. The defendant No.1 to 4 are claiming the right over the properties by alleging that properties described as item No.5 to 13 were cultivating by Devanna Kamath on his individual capacity. The properties were granted on

his individual capacity only. The Form No.7, the order of Land Tribunal, Form No.10, Chalageni chit, geni chit in which it revealed that the names of family members of Rama Kamath. It also revealed that the properties were granted in the name of Kamalamma on behalf of the joint family. Such being the case, the properties were granted in the name of Kamalamma on individual capacity or on behalf of the joint family is a triable issue. To know the real fact full dressed trial is necessary.

13. The further contention of the plaintiffs is, the defendant No.1 to 4 divided the properties in question under deed of partition in respect of item No.6 to 13. The defendant No.1 to 4 did not deny the same. The record of rights submitted by the plaintiffs in which it appears that, the names of defendant No.1 to 4 are entered on the basis of partition.

14. The further contention of the defendant No.1 to 4 is the properties described as item No.1 to 4 were acquired under chalageni chit and that properties were only the joint family properties. Those properties were divided as 4 shares under the oral partition. The 4 sharers are in possession of their respective shares

and enjoying the same. In that oral partition, land in Sy.No.121/2 an extent of 2 acres was allotted to their father namely Devanna Kamath. The defendant No.1 to 4 did not submit any document at this moment to show that properties described as item No.1 to 4 were divided under oral partition and oral partition was acted upon and 4 sharers are enjoying their respective shares to know the real facts full dressed trial is necessary.

15. The further contention of the plaintiffs is, defendant No.1 to 4 made an effort to alienate the properties in question by using the revenue records which are in their names. The record of rights are apparently shown that the properties in question are in the names of defendant No.1 to 4. The defendant No.1 to 4 did not say anything about the allegations of plaintiffs are concerned. Such being the case, at this moment, no ground is available to throw out the allegations of plaintiffs. The further contention of the plaintiffs is the defendants are trying to put up new construction in the properties in question. The defendant No.1 to 4 are not having an exclusive right over the properties in question. The defendant No.1 to

4 denied the same. The letter issued by the PDO of Kodibettu Gramapanchayath dated 07.11.2022, the office copy of the letter of the respected counsel dated 14.11.2022 addressed to the PDO of Kodibettu Gramapanchayath are apparently revealed that, PDO of Kodibettu Gramapanchayath sent a letter to the plaintiff No.1 by stating that, if he failed to intimate about the pendency of the suit, they will issue NOC to the defendant No.3 by name of Upendra Kamath for construction of house. The letter issued by the PDO of Kodibettu Gramapanchayath is apparently shown that, the defendant No.1 to 4 are made an effort to put up construction in the properties in question. This suit is filed by the plaintiffs seeking direction to the defendants to divide the properties in question by metes and bounds. Before determining the rights of plaintiffs and defendants, if the defendants will do the alleged act, it may effect to the right of the plaintiffs. For all these reasons, in the opinion of court, the plaintiffs have made out a prima facie case. As such, answered ***point No.1 in the affirmative.***

Point No.2 and 3:

16. These points are interconnected with each other in order to avoid repetition of facts, taken these points at one hand.

The contention of the plaintiffs is, the properties in question are undivided properties of defendants and them. No partition was taken among them. The defendant No.1 to 4 entered the partition among them in respect of plaintiffs described as item No.5 to 13. They are threatening that, they will alienate the properties, the documents are in their names. On the other hand, the contention of the defendant No.1 to 4 is, the properties described as item No.1 to 4 were chalageni properties. Those properties were divided as 4 shares by way of oral partition. 4 sharers are enjoying their respective shares. The properties described as item No.5 to 13 are individual properties of their father Devanna Kamath. He submitted the Form No.7 to the Land Tribunal for granting the right of occupancy. He was illiterate, the strangers wrote the names of family members in the declaration form which was submitted by Devanna Kamath. In view of that, names of family members are entered in the declaration and grant certificate. The plaintiffs and

other family members do not have any right in the properties described as item No.5 to 13. Undoubtedly the suit is filed by the plaintiffs seeking direction to the defendants to divide the properties by metes and bounds. The documents submitted by the plaintiffs are apparently shown the names of defendant No.1 to 4. The documents submitted by the plaintiffs are also disclosed that, some efforts made by the defendant No.1 to 4 to get permission from the Panchayath to construct new building. Such being the case, before determining the rights of plaintiffs and defendants, before division of the properties among the plaintiffs and defendants, it is not possible to decide in which portion allotted to the shares of plaintiffs and defendants. It may difficult to the plaintiffs to get properties from the clutches of purchasers in case they will succeeded in the suit. The plaintiffs may invest more money and time to get the properties from the hands of purchasers. The plaintiffs may take action against the purchasers to get the properties of their declared shares. If the defendant No.1 to 4 may construct the building in the undivisional portion, the plaintiffs may take action against the constructed property to take possession. The constructed portion

may be leave to the defendant No.1 to 4 only at the time of division of the properties. For these reasons, in the opinion of court if interim order is not granted plaintiffs will be put to more loss and inconvenience. On the other hand, after decide the rights of plaintiffs and defendants, defendants may alienate the properties. The disputed properties in question are landed properties. The value of the landed properties will be hike day by day. The value of the landed properties will not be reduced day by day. The defendant No.1 to 4 may construct the building in future also. The defendant No.1 to 4 did not say that, they are not having any roof for reside. For these reasons, in the opinion of court, if order is granted, no loss and inconvenience will be caused to the defendant No.1 to 4. For these reasons, in the opinion of court comparative loss and inconvenience one more to the plaintiffs. As such, answered ***point No.2 and 3 in favour of the plaintiffs.***

Point No.4:

17. In view of the above discussion, pass the following:

ORDER

I.A.No.II and XXII filed under Order XXXIX Rule 1 and 2 of C.P.C. are hereby allowed.

Consequently hereby restrained the defendant No.1 to 4 and the persons who are acted on their behalf from alienating the suit properties till disposal of the suit by granting an order of temporary injunction in favour of the plaintiffs.

Consequently hereby restrained the defendant No.1 to 4 and the persons who are acted on their behalf from constructing the new structure in the suit properties till disposal of the suit by granting an order of temporary injunction in favour of the plaintiffs.

(Dictated to Stenographer, typed by her, corrected by me and then pronounced in open court on this the 11th day of August, 2023)

(P. R. Yogesh)

Addl. Senior Civil Judge and ACJM,
Udupi.