

THE COURT OF THE PRINCIPAL CIVIL JUDGE & J.M.F.C.,

AT: KUNDAPURA

PRESENT: SHRI. PRAVEEN NAYAK, L.L.M.,

Prl. Civil Judge & JMFC.

Kundapura

ORIGINAL SUIT No.316/2017

DATED: THIS 19th DAY OF February, 2019

BETWEEN:

Sri Mahabala Achary, 43 years,
S/o Thammayya Achary,
Kalmande, Beloor Village,
Kundapura Taluk.

.....Applicant/ Plaintiff

(By Shri H.P.H., Advocate)

AND:

1. Mrs. Srimathi Acharthi, 57 years,
2. Mrs. Sharada Acharthi, 70 years,
3. Mr. Nagendra Achari, 65 years,
4. Mrs. Prabhavathi Acharthi, 60 years,

All are children of Late Manjunatha Achari,
Resident of Kalmande of Beloor Village,

Post: Devasthabettu, Kundapura ...Opponents/Defendants

(By Shri. M.J.S., Advocate)

ORDERS ON I.A.No.VII:

The instant application has been filed by the counsel for plaintiff seeking ad-interim injunction by restraining the defendant No.2, her men, agents, servants or any person claiming through her from alienate or creating any charge or encumbrance over the suit 'A' schedule property till disposal of suit.

2. In the affidavit the plaintiff has stated that originally survey No.294/2 measuring one acre belong to one Gouri Acharthi. She has acquired the ownership of the said land through the dharkast order No.143/1935 passed by the Tahsildar, Kundapura. After the death of Gouri Acharthi her son by name Kalinga Achari has sold and convey the said property to one Bhaskar Hegde through registered sale deed dated 21-10-1971. In turn, the said Bhaskara Hegde sold an extent of 22 cents in the said property in favour of the plaintiff through registered sale deed dated 15-11-1971. The said Bhaskara Hegde also sold another portion of 44 cents in favour of the father of the defendant No.2 i.e., Manjunath Achari as per the registered sale deed dated 15-11-1971. However, the said Manjunath Achari has not acquired any right, title or interest over any other portion in the suit property. The defendants are the legal heirs of Manjunath Achari. When matter stood thus, the defendant No.1 has filed

O.S.No.360/2012 for the relief of partition by contending that she and the defendants in the said suit are the absolute owners of entire one acre of land in Sy.No.294/2. The defendants have managed to obtain a collusive decree of partition in the said suit. Later, FDP No.13/2013 has been filed in continuance of preliminary decree and the same is pending for consideration. The defendant No.1, 3 and 4 have now executed a registered illegal document styled as release deed dated 10-10-2018 by releasing their 3/4th share in Sy.No.294/2 in favour of the defendant No.2. The defendant No.2 is now trying to alienate the suit property in favour of third persons. If the defendant No.2 succeeded in disposing off the suit property, the same will defeat the right of the plaintiff over the suit property. Hence, the application.

3. The defendant No.2 has filed objection to the present application by denying the contentions of the plaintiffs. It is stated that the Sy.No.294/2 measuring one acre was not originally belonging to one Gouri Acharthi as alleged by the plaintiffs. The suit is not maintainable under law. The plaintiffs have no right to challenge the preliminary decree passed by this Court in OS No.360/2012 and the suit is liable to be dismissed in limine. The defendant No.2 is true and lawful owner of the 'A' schedule property, which is part and parcel of one acre of land in the said Survey number. The alleged suit 'A' schedule property is not separated from the

said one acre of land and the same is unidentifiable. The Sy.No.294/2 of Beloor Village was measuring one acre and the same was belonged to one Pani Acharthi and her sister Padda Acharthi. They have acquired the land on the basis of moolgeni right. The said Padda Acharthi died intestate by leaving behind her sister Pani Acharthi as her only legal heir. The said Pani Acharthi became absolute owner of the said property. Pani Acharthi also died intestate by leaving behind her only son Manjunath Achari as class-I legal heir. Manjunath Achari died intestate by leaving behind the defendant No.1 to 4 as his legal heirs and the said defendants have acquired absolute joint right, title and interest over the said land. The names of Pani Acharthi and Padda Acharthi are appearing in record of rights. Later, the defendants got entered their names in the record of rights and improved the Sy.No.294/2. The suit of the defendants in OS No.360/2012 was decreed for the relief of partition and separate possession and as per the FDP No.13/2013 the defendants got divided the suit properties. The defendant No.2 was allotted the entire Sy.No.294/2 and now he is in exclusive possession and enjoyment of the same. The plaintiff has no right to dispute the preliminary decree in OS No.360/2012 as they are completely strangers. The plaintiffs, other predecessors in title were never in possession of the suit property. The suit 'A' schedule property is an imaginary and non-existed property.

The plaintiffs have no prima facie case and balance of convenience in their favour. If the temporary injunction is not passed, the plaintiffs will not suffer any hardship. Hence prayed to allow the application.

4. Heard both sides. Perused the averments of the application and objections and also the documents produced by both sides.

5. At this stage, the following Points would arise for my consideration:-

1) Whether the applicant proves that he has got prima facie case and balance of convenience tilts in his favour to pass an ad-interim order on I.A.No.VII?

2) Whether the applicant proves that he will suffer irreparable loss and hardship, if Temporary Injunction order has not been passed in I.A.No.VII?

3) What order?

6. My answer to the above Points are as under:-

Point No.1: In the Affirmative,

Point No.2: In the Affirmative,

Point No.3: As per final order,

for the following:-

REASONS

7. Point No.1: That, in order to prove the prima facie case, the Plaintiff has to prove the prima facie right over the suit property and not the title over the suit property. The Plaintiff has to establish his prima facie right of the nature as claimed in the main relief over the suit property and has to establish his balance of convenience by proving the comparative mischief which will be sustained by him, if the Temporary Injunction has not been granted.

8. The plaintiff has produced the certified copy of the release deed executed by one Srimathi Acharthi and others in favour of Sharada Acharthi dated 10-10-2018. The RTC in respect of Sy. No.294/2 is produced to show that the same was standing in the name of Pani Acharthi in the year 2012-13 and now it is standing in the name of the defendant No.2. The plaintiff has also produced the endorsement issued by the Tahsildar dated 26-04-2017 seeking further information as to dharkast order No.143/1935. The registered sale deed dated 21-10-1971 executed in favour of Bhaskar Hegde is also produced. The registered four sale deeds dated 15-11-1991 executed by said Bhaskar Hegde in favour of different persons are produced. The memorandum of appeal preferred before the Assistant Commissioner, Kundapura is produced. The

objection filed by the defendant No.1 in the said proceedings has been produced. The order passed by the Assistant Commissioner dated 22-08-2016 is produced by the plaintiff. The certified copy of plaint in OS No.360/2012 is produced to show that the defendants have got filed the same for the relief of partition. The written statement in the said suit filed by the defendant is also produced. The certified copy of judgement in OS No.360/2012 is produced to show that the defendants got divided the property among them. Another RTC is produced to show that the same was changed in the name of the defendants in the year 2017-18. The deposition of PW1 in OS No.360/2012 is produced to show that the plaintiffs in the said suit have lead exparte evidence and got decreed the suit.

9. On the other hand the defendants No.1, 2 and 4 have produced the hand written RTC pertaining to Sy.No.294/2 measuring one acre, which is standing in the name of Pani Acharthi and Padda Acharthi. The RTC for the year 2012-13 is also standing in the name of Pani Acharthi and Padda Acharthi. The recent RTC for the year 2015-16 shows that the defendants have got entered their names as per the partition entered into among them in the year 2013. The copy of the petition in miscellaneous case No.5/2013 filed by the defendant No.3 against the defendants No.1, 2 and 4 and the order sheet of the said proceedings have been produced. The

order dated 25-07-2016 passed by this Court by dismissing the said miscellaneous petition is also produced.

10. It is the specific case of the plaintiff that the defendants have got decreed OS No.360/2012 by colluding with each other and the final decree proceedings is pending before this Court in continuance of the preliminary decree passed in the said original suit. It is further contended that the plaintiff is the absolute owner in lawful possession of the suit property and the same is also included in the partition suit filed by the defendants. On the other hand the defendants have clearly denied the case of the plaintiff as to the ownership over the suit property.

11. On perusal of the rival contention it is crystal clear that the plaintiff and the defendants are claiming their title over the suit property based on the different previous title deeds. It is the case of the plaintiff that he has acquired the suit property from one Bhaskar Hegde and the defendants have also acquired 44 cents in the same survey number through a registered sale deed from the said Bhaskar Hegde only. On perusal of the documents it is true that the plaintiff has failed to produce the dharkast order No. 143/1935 passed by the Tahsildar, Kundapura to show that suit property was originally acquired by Gouri Acharthi. However, the plaintiff has produced the endorsement given by the Tahsildar seeking

further details of the order in order to trace the file. It is not disputed by the defendants that they are the children of late Manjunath Achari. The plaintiff has produced the certified copies of four registered sale deeds to show that he has purchased 22 cents of land, one Rama Achari has purchased 22 cents of land, one Raghuram Achar has purchased 12 cents of land and the father of the defendant No.1 to 4 has purchased the remaining 44 cents of land in Sy.No.294/2 situated Beloor Village, Kundapura Taluk. The plaintiff has also produced another sale deed dated 21-10-1971 to show that the vendor of all these persons, one Bhaskar Hegde, has purchased one acre of land in Sy.No.294/2 from one Kalinga Achari. On careful perusal of these documents it is clear that as per the contentions of the plaintiff, the plaintiff and defendants are claiming their right through one Bhaskar Hegde. The plaintiff has produced the registered documents in support of the said contention.

12. The counsel for the defendants has argued that the plaintiff and the defendants are claiming their right through different persons and the right of the plaintiff cannot be decided in the present suit. It is further contended that the defendants are claiming their right over the suit property through their ancestor's i.e., Pani Acharthi and Padma Acharthi. In support of their contention the defendants have

relied upon record of rights pertaining to the Sy. No.294/2. The old record of rights are standing in the name of Pani Acharthi and Padda Acharthi. It is pertinent to note that the said entry continued till the defendants got entered their names based on the partition decree passed in OS No.360/2012. It is also pertinent to note that in the present suit the plaintiff is questioning the validity of the decree passed in OS No.360/2012. The plaintiff has produced the registered title deeds pertaining to Sy.No.294/2 and the defendants have produced the old revenue records pertaining to the same property.

13. The learned counsel for the defendants has produced a decision reported in 2018(4) KCCR 3269 S. C. Gangadharaiah V/s REMCO (BHEL), House Building Co-operative Society Limited, Bengaluru and others, wherein the Hon'ble High Court of Karnataka has held that "prima facie case means not only that the plaintiff must make out serious issues for trial, but also that the suit must appear to be not frivolous or vexatious. The suit should also appear to be maintainable in order that interim order in the nature of injunction could be granted pending disposal of the suit".

14. I have gone through the above decision with due respect. The Hon'ble High Court of Karnataka has also held in the above suit that when the documents on record are showing

the defendants possession as on the date of the suit, the granting of temporary injunction amounts to improper exercise of desecration. In the present suit the defendants have produced the record of rights pertaining to suit property standing in the name of them and in the name of Pani Acharthi and Padma Acharthi.

15. The learned counsel for the plaintiff has relied upon a decision reported in Civil appeal No. 1330/2019 between Smt. Bheemabhai Mahadevo Kambekar Vs. Arthur Import and Export company, wherein the Hon'ble Supreme Court of India has observed that the mutation of names in the revenue records does not create or extinguish the title over land. The Hon'ble Supreme Court has consistently held that the mutation of name in the revenue records has no presumptive value on the title. In this regard the Court has to rely upon the title deeds to see that who is the real owner of the property. It is to be noted that the present suit is not filed by the plaintiff for injunction simpliciter. The plaintiff has sought declaratory relief against the defendants. The Court has to look into the title deeds to see that who has established his prima facie ownership over the suit property.

16. The learned counsel for the defendants has produced a decision reported in ILR 2004 KAR 4068 Budavant Subraya Palekar V/s Babu Vajra Chandravarkar and others wherein

the Hon'ble High court of Karnataka has observed that "when the sale deed is of the year 1959 and no attempt is made by the defendants to get their names mutated in the revenue records till 1986, the same raises suspicious circumstances as to the conduct of the defendants. It is true that the title deed relied upon by the plaintiff are of the year 1971. It is also true that the name of the plaintiff is not appearing in the record of rights pertaining to the suit property. It is to be noted that the defendants have also got entered their names in the revenue records very recently based on the decree passed in OS No.360/2012. The defendants have not produced any material to show that they are the legal heirs of Pani Acharthi and Padda Acharthi. The plaintiff is claiming that the decree obtained in OS No.360/2012 is a collusive decree. Under such circumstances the defendants have also not explained that why they have slept over their rights for all these years by failing to get enter their names/the name of Manjunath Achari in the revenue records. The rule is clearly applicable to both parties equally. The defendants cannot blow hot and cold in the same breath.

17. It is not in dispute that the defendants have got divided the suit properties by filing OS No.360/2012 and the final decree proceedings is still pending. The plaintiff has contended that the father of the defendants has purchased only 44 cents

of land and inspite of that the defendants have got decreed OS No.360/2012 by suppressing the material facts. In this regard the counsel for the defendants has produced a decision reported in 2017(2) KCCR 1374 the Bangaluru Development Authority V/s Bhagvandas Patel, wherein the Hon'ble High Court of Karnataka held that "the plaintiff must succeed on his own strength and cannot rely on the weakness of the defendant to demonstrate his case".

18. I have gone through above decision with due respect. It is the case of the plaintiff that the defendants have got decreed OS No.360/2012 by colluding with each other and thereby played fraud upon the plaintiff. The learned counsel for the plaintiff has relied upon a decision reported in (1994) 1 SCC1 between S.P.Chengalvaraya Naidu by Lrs. V/s Jagantha by Lrs and others, wherein the Hon'ble Supreme Court of India has held that the decree obtained by playing fraud is nullity. It is to be noted that the plaintiff and the defendants are claiming title over the suit property through different persons. It is also the case of the plaintiff that he and the defendants have purchased portions of Survey No.294/2 from the same person. He has also produced registered sale deeds standing in the name of him and the father of the defendants. If the defendants have acquired one acre of land in Sy.No.294/2 including the suit property by way of succession from Pani

Acharthi and Padda Acharthi, what was the necessity for the father of the defendants to enter into alleged sale deed dated 15-11-1971 in respect of 44 cents of land in Sy.No.294/2. In ordered to decide the alleged fraud committed by the defendants it requires a detailed trial. When, the plaintiff has made out a case which requires trial, it amounts to proof of prima facie case in favour of the plaintiff.

19. It is true that the plaintiff has not produced the alleged dharkast order before the Court. The endorsement issued by the Tahsildar goes to show that there is possibility of existence of such dharkast order as the Tahsildar has sought for further details as to the said order. It is not stated by the Tahsildar that the said file or the dharkast order is not available. The subsequent sale deeds of the year 1971 have been already produced by the plaintiff. The release deed dated 10-10-2018 shows that the defendant No.2 has got released the shares of defendant No.1, 3 and 4 in her favour. The plaintiff has contended that the defendant No.2 is trying to alienate the suit property to defraud the plaintiff. Under such circumstances, when there is a case which requires trial and also when there is an instrument which empowers the defendant No.2 to sell the suit property permanently to third persons, there are prima facie materials to show that there is every likely-hood of alienation of property. Accordingly, the plaintiff has made out

prima facie case and balance of convenience tilts in his favour. Hence, I answer Point No.1 in the Affirmative.

20. Point No.2:- While considering the irreparable injury that would be suffered by the parties, the Court has to see that the quantum of injury that would be suffered by the parties, if an order of Temporary Injunction has been passed and not passed. The Court has to weigh the quantum of injury to be suffered by the parties in this regard.

21. The plaintiff has proved his prima facie case and balance of convenience tilts in his favour. The release deed produced by the plaintiff shows that the defendant No.1, 3 and 4 have already released their shares in Sy.No.294/2 in favour of the defendant No.2. If the defendant No.2 succeeds in alienating the suit property, the plaintiff will permanently lose his right over the same and it will lead to multiplicity of proceedings. If the temporary injunction is not passed in favour of the plaintiff he will suffer irreparable harm and injury. If the temporary injunction has been passed by restrained the defendant No.2 from alienating or creating charge over the suit property, it will protect the suit property in the present form and avoid multiplicity of proceedings. Under such circumstances, the plaintiff has made out grounds to grant temporary injunction in his favour. Hence, I answer Point No.2 in the Affirmative.

22. Point No.3:- In view of above discussions, I proceed to pass the following:

: O R D E R :

I.A.No. VII filed by the plaintiff under Order XXXIX Rule 1 and 2 R/w Sec.151 of Code of Civil Procedure is hereby allowed.

The defendant No.2, her men, agents or anybody claiming under her are hereby restrained from alienating or creating charge or encumbrance over suit 'A' schedule property till disposal of suit.

No order as to cost.

(Dictated to the stenographer, transcribed and typed by her, corrected by me and then pronounced in the open Court, this 19th day of February, 2019)

(PRAVEEN NAYAK)
Prl. Civil Judge & JMFC.,
Kundapura.

kdp/-