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IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 19TH DAY OF JANUARY, 2024

BEFORE

THE HON'BLE MR JUSTICE H.P.SANDESH

MISCELLANEOUS FIRST APPEAL NO.6094 OF 2023 (CPC)

BETWEEN:

SMT. JAGADISHWARI
D/O LATE K. HARISH KUMAR
W/O SRI. DEVARAJ
AGED ABOUT 53 YEARS,
RES.AT NO.70/2, MANJUNATHA NILAYA,
1ST MAIN ROAD, 2ND CROSS,
R.T.NAGAR, BENGALURU-560 032.

...APPELLANT

(BY SRI. VEVEK SUBBA REDDY SENIOR COUNSEL FOR
SMT. VARALAKSHMI P, ADVOCATE)

AND:

1. SMT. M.REVATHI
D/O LATE MUNIVEERAPPA,
W/O LATE M.K. NEELAKANTA,
AGED ABOUT 54 YEARS,
2. SMT. VYSHALI,
D/O LATE M.K. NEELAKANTA,
AGED ABOUT 35 YEARS,
3. SRI. VISHAL
S/O LATE M.K. NEELAKANTA,
AGED ABOUT 33 YEARS
4. SMT. N.KUSHALAKUMARI,
D/O LATE M.K. NEELAKANTA,
AGED ABOUT 30 YEARS
THE RESPONDENTS 1-4 ARE RESIDING AT

Digitally signed
by SHARANYA T
Location: HIGH
COURT OF
KARNATAKA



NO.67, ST.JOHN'S ROAD,
BANGALORE-560 042.

5. M/S CSS CONSTRUCTIONS & DEVELOPERS
REGISTERED PARTNERSHIP FIRM
REPRESENTED BY ITS PARTNER
SR CHANDRA NAGARJUN,
HAVING ITS OFFICE AT:
NO.80, EE-1, 'EDIS ELITE'
OPP INDIA OVERSEAS BANK,
ST.JOHN'S ROAD,
BENGALURU-560 042.
6. SRI. EDDIMUKKALA CHANDRA NAGARJUN,
S/O EDDIMUKKALA SUDHAKARA RAO,
AGED ABOUT 36 YEARS,
7. SRI. EDDIMUKKALA SUDHAKARA RAO,
AGED ABOUT 63 YEARS,
S/O EDDIMUKKALA VIJAYA
BOTH ARE RESIDING AT
NO.80, EE-1, 'EDIS ELITE'
OPP INDIA OVERSEAS BANK,
ST.JOHN'S ROAD,
BENGALURU-560 042.

...RESPONDENTS

(BY SRI. DHYAN CHINNAPPA, SENIOR COUNSEL FOR
SRI. YASEEN BABU, ADVOCATE FOR R5 TO R6;
SRI. C.S.PRASANNA KUMAR, SENIOR COUNSEL FOR
SRI. ALLAH BAKASH.M, ADVOCATE FOR R1 TO R4;
SMT. DHEEMANTHIKA, ADVOCATE FOR R7)

THIS MFA IS FILED UNDER ORDER 43 RULE 1(r) OF CPC,
AGAINST THE ORDER DATED 25.07.2023 PASSED ON I.A.
NOs.1,2 AND 3/2023 IN O.S.NO. 25599/2023 ON THE FILE OF
THE IV ADDITIONAL CITY CIVIL AND SESSIONS JUDGE, MAYO
HALL, BENGALURU (CCH-21), DISMISSING THE I.A. NOs.1 TO
3 FILED UNDER ORDER 39 RULE 1 AND 2 READ WITH
SECTION 151 OF CPC.

THIS APPEAL, COMING ON FOR ORDERS, THIS DAY, THE
COURT DELIVERED THE FOLLOWING:

**JUDGMENT**

Heard the learned counsel for the appellant and also learned counsel appearing for the respondents.

2. This Miscellaneous First Appeal is filed under Order 43 Rule 1(r) r/w Section 151 of CPC praying this Court to set aside the order of the Trial Court in rejecting I.A.No.1 filed under Order 39 Rule 1 and 2 r/w Section 151 of CPC seeking for the relief of temporary injunction defendant Nos.5 to 7 from interfering with her peaceful possession and enjoyment of the suit schedule property, I.A.No.2 seeking to restrain the defendants from alienating or creating any third party interest, charge or encumbrance over the suit schedule property, till the disposal of the suit and I.A.No.3 seeking to restraining the defendants from putting up of any constructions over the suit schedule property till the disposal of the suit.

3. The factual matrix of the case of the plaintiff before the Trial Court is that one Sri Krishnappa, who is the propositor of the family and his wife namely Smt.Rajalakshmi had two sons and six daughters. The plaintiff is the daughter of one Sri K.Harish Kumar and granddaughter of said Krishnappa. After the death of said K.Harish Kumar, his wife got



disconnected the relationship and the plaintiff was under the care of her maternal uncle. It is also the case of the plaintiff that there was a partition between Krishnappa and his brothers after the death of their father late Maheshwarappa @ Maheshriah in the year 1950 and the suit schedule property was allotted to the plaintiff's grand father namely Krishnappa. The plaintiff was born on 18.10.1969 and her mother namely Smt.Sushila @ Sushilamma remarried. Therefore, the plaintiff is the only legal heir to succeed and represent the share of her father. Hence, the suit is filed for the relief of partition in O.S.No.4455/2019 and the same is pending for consideration. It is also alleged in the plaint that defendant Nos.1 to 4 without having any absolute ownership over the suit schedule property entered into the Joint Development Agreement (JDA) on 07.07.2021 with defendant Nos.5 to 7 whereas, defendant Nos.5 to 7 taking undue advantage of said JDA have demolished the old building situated in suit schedule property on 20.11.2022 and now they are trying to put up illegal construction over the suit schedule property. Hence, they filed a suit for the relief of permanent injunction and also *inter alia* sought for the relief of restraining defendant Nos.5 to 7 by way of temporary injunction by putting up construction since they



were making an attempt to interfere with the peaceful possession and enjoyment of the suit schedule property and illegal interference has to be restrained and also making an attempt to alienate the suit schedule property and hence, sought the relief by filing separate applications i.e., I.A.Nos.1 to 3.

4. In pursuance of the suit summons, the defendants have entered appearance, filed written statements and objections to the aforesaid I.As.

5. The main contention urged before the Trial Court in the written statement is that already the plaintiff has filed a comprehensive suit in O.S.No.4455/2019 seeking the relief of partition and separate possession and the relief of permanent injunction is also sought in the said suit. It is contended that hence, the plaintiff cannot maintain a parallel proceedings in the competent Court with respect of very same suit schedule property with the same relief. Hence, a suit of the plaintiff is barred under Order 2 Rule 2 of CPC. The suit filed by the plaintiff for the relief of permanent injunction itself is not maintainable and there is no fresh cause of action to file a suit



for simpliciter. Hence, the plaint is liable to be rejected by invoking Order 7 Rule 11 of CPC.

6. It is also contended that when the suit itself is not maintainable, question of granting temporary injunction does not arise. It is also contended that plaintiff knowing the fact that already suit is filed and also similar applications are filed in the said suit, she cannot seek similar relief in the present suit and the plaintiff has not approached the Court with clean hand and hence, not entitled for the relief of temporary injunction and the applications are liable to be dismissed with exemplary cost.

7. It is contended that defendant Nos.1 to 4 being the owners of the suit schedule property entered into registered JDA dated 07.07.2021 with defendant Nos.5 to 7 and defendant Nos. 5 and 6 have already paid an amount of Rs.2 crores 5 lakhs to defendant Nos.1 to 4 under the said JDA and the defendants have already invested huge amount for development of the property. Such being the circumstances, if temporary injunction is granted, they would be put to great hardship and irreparable loss.



8. The Trial Court, having considered the pleadings of the parties, formulated the points whether the plaintiff has made out any *prima facie* case, balance of convenience and whether the plaintiff would be put to great hardship and irreparable injury. The Trial Court has come to the conclusion that the plaintiff has not made out any *prima facie* case and answered point No.1 as negative and answered other two points for consideration that it does not survive for consideration since the plaintiff has not made out a *prima facie* case.

9. When the applications are dismissed, the present appeal i.e., MFA No.6094/2023 is filed challenging the order of rejection of I.A.Nos.1 to 3.

10. The main contention of the learned counsel appearing for the appellant is that there is no dispute with regard to the fact that Krishnappa is the propositor of the family. The counsel also submits that Harish Kumar, who is the father of the plaintiff, is one of the son of late Krishnappa and Krishnappa and Rajalakshmi having another son by name Neelakanta and having six daughters. The counsel would vehemently contend that a suit in O.S.No.6592/2007 was filed



suppressing the facts and the plaintiff was not arrayed as party to the said proceedings and the same is decreed on 19.08.2011 wherein, the aunts of the plaintiff suppressed the presence of the plaintiff and obtained decree in their favour. Later proceedings in FDP No.202/2011 was also filed and the same was withdrawn when the application is filed by the appellant in the said FDP proceedings. Hence, the plaintiff filed a suit in O.S.No.4455/2019 for partition and separate possession. During the pendency of the said suit, defendant Nos.1 to 4 have entered into a JDA on 07.07.2021 and the same is registered in the office of the Sub-Registrar, Banasawadi and the same was without the knowledge of the plaintiff and the same came to the knowledge of the plaintiff on 20.11.2022 when the common relative informed about the same. The counsel also vehemently contend that when they have entered into a JDA during the pendency of the suit, fresh cause of action arose to the plaintiff to approach the Court since the JDA holder demolished the building and started construction and at that juncture, a separate suit for permanent injunction was filed. The counsel would submit that there is no bar to file any separate injunction suit and only the Court has to look into the exigency in filing the suit and separate suit for permanent



injunction is maintainable. The counsel would submit that the Trial Court has committed an error in rejecting the said applications by coming to the conclusion that when the suit was already filed for the relief of comprehensive suit for partition and separate possession ought to have filed an applications in the very same suit and the plaintiff has not approached the Court with clean hands and also an observation is made that the plaintiff is now seeking temporary injunction restraining the defendants from alienating the suit schedule property and also restraining them from putting up construction and when the suit is filed for bare injunction i.e., suit simpliciter for permanent injunction, it has very limited scope to grant temporary injunction. The very approach of the Trial Court is erroneous and specifically pleaded in the plaint with regard to the pendency of the other suit in O.S.No.4455/2019 and the plaintiff has not suppressed any fact before the Trial Court while seeking the relief of temporary injunction and if the plaintiff has suppressed the fact of filing of other suit in O.S.No.4455/2019, then the finding of the Trial Court would have been right in rejecting the same and the very approach of the Trial Court is erroneous. Hence, it requires interference of this Court.



11. *Per contra*, learned counsel appearing for respondent Nos.1 to 4, in his arguments, vehemently contend that when identical applications are filed in O.S.No.4455/2019, the plaintiff ought to have sought the relief in the very same suit and the Court has to look into the conduct of the plaintiff. The counsel also brought to the notice of this Court that even though similar applications are filed in the said suit, but not pursued the applications. The counsel also vehemently contend that the very plaintiff/appellant executed the sale deed on 13.01.2006 for an amount of Rs.10 lakhs and wherein they have referred to the document of palupatti dated 10.01 1994 and disclosed the source of the property how the plaintiff has got the property and when already plaintiff herself declared that she got the property vide palupatti dated 10.01.1994, she cannot file a suit for partition as well as suit for injunction. The counsel also vehemently contend that based on the palupatti dated 10.01.1994, a mutation register was also came into existence and based on that document only khata was got it transferred before selling the property on 13.01.2006. When the plaintiff herself has declared that she has got the property by way of partition, now cannot file a suit for partition and also suit for permanent injunction. The counsel also vehemently



contend that the suit is filed for the relief of permanent injunction and *inter alia* sought the reliefs and when the plaintiff has not made out any *prima facie* case, the Trial Court rightly come to the conclusion that the suit itself is not maintainable and answered point No.1 as negative by coming to the conclusion that the plaintiff has not made out any *prima facie* case. The counsel also vehemently contend that when a suit itself is not maintainable, the question of granting any interim injunction does not arise. The counsel also vehemently contend that it is nothing but forum shopping and the Court has to look into the conduct of the plaintiff and the plaintiff has suppressed the fact of earlier partition and based on the earlier partition, the plaintiff took her share and went out from the joint family and the Court has to look into the conduct of the plaintiff.

12. The counsel in support of his arguments relied upon the judgment of the Hon'ble Apex Court in the case of ***Ramjas Foundation and another vs. Union of India and Ors*** reported in ***2010 AIR SCW 7091*** and brought to notice of this Court the principle laid down in the judgment in paragraph No.14 wherein, the Apex Court has observed the principle that



a person who does not come to the Court with clean hands is not entitled to be heard on the merits of his grievance and, in any case, such person is not entitled to any relief is applicable not only to the petitions filed under Articles 32, 226 and 136 of the Constitution but also to the cases instituted in others courts and judicial forums. The object underlying the principle is that every Court is not only entitled, but is duty bound to protect itself from unscrupulous litigants who do not have any respect for truth and who try to pollute the stream of justice by resorting to falsehood or by making misstatement or by suppressing facts which have bearing on adjudication of the issue(s) arising in the case.

13. The counsel also relied upon the judgment of the Hon'ble Apex Court in the case of ***Vijay Kumar Gai & Ors. vs. The State of West Bengal & Ors.*** reported in ***2022 LiveLaw (SC) 305*** and brought to the notice of this Court paragraph No.9 wherein, the Apex Court referring the judgments discussed with regard to the practice of forum shopping or choice of forum by the litigants. He further brought to the notice of this Court that after the discussion of several judgments, the Apex Court comes to the conclusion that the



decision referred to clearly lay down the principle that the Court is required to adopt a functional test vis-à-vis the litigation and the litigant. What has to be seen is whether there is any functional similarity in the proceedings between one court and another or whether there is some sort of subterfuge on the part of a litigant. It is this functional test that will determine whether a litigant is indulging in forum shopping or not.

14. The counsel also relied upon the judgment of this Court in the case of ***M/s. Patel Enterprises vs. M.P.Ahuja*** reported in ***ILR 1992 KAR 3772*** and brought to the notice of this Court paragraph No.14 wherein, this Court also discussed with regard to the fact that the Trial Court has made certain observations doubting the genuineness of one of the documents filed by the third defendant by references to the date mentioned therein. This again is a matter of evidence which will have to be considered afresh by the trial Court. Any expression of opinion by us may prejudice the rights of the parties on that aspect. This certainly would include the nature of the suit filed and its maintainability. If, on the face of it, the suit is not maintainable, question of issuing any temporary injunction would not arise.



15. The counsel also relied upon the judgment of this Court in the case of ***Smt. Lalithakshi Annadanagouda vs. Sadashivappa Basappa Patil and another*** reported in ***AIR 1984 KAR 74*** and brought to the notice of this Court paragraph No.8 with regard to the scope of Appellate Court - when the authority of the Appellate Court while dealing with a discretionary order passed by the trial Court, the Court has to take into note of whether that exercise is based on its discretion and if trial Court has acted unreasonably or capriciously or has ignored relevant fact and has adopted an unjudicious approach, then it would certainly be open to the appellate Court and in many cases it may be its duty to interfere with the trial Court's exercise of jurisdiction. He also brought to the notice of this paragraph No.15 wherein, this Court observed that the First Appellate Court had no jurisdiction to interfere with the discretionary order passed by the trial Court, simply because, it was reasonably possible to take another view on the facts of the case. The first appellate Court has substituted its own discretion substituting the judicial discretion exercised by the trial Court. It could not do so, it had to stay its hands and confirm the order passed by the trial



Court in the circumstances. The first appellate Court has made it clear that two interpretations are possible and that being so, it is not proper to allow the defendant to construct a latrine with septic tank. That observation is clearly illegal. It has exceeded its jurisdiction in so observing. Its order cannot be sustained.

16. The counsel appearing for respondent Nos.5 and 6, in his arguments, vehemently contend that when the comprehensive suit already pending before the Court which was filed in the year 2019 ought to have approached the very same Court instead of filing a separate suit seeking for the relief of permanent injunction and *inter alia* sought for the relief of temporary injunction. He also vehemently contend that no recurring cause of action and only recurring cause of action arises, if earlier suit is filed for the relief of permanent injunction. The counsel also vehemently contend that the main relief cannot be granted and the same was taken note of the Trial Court and the Trial Court has rightly rejected the applications. He also vehemently contend that while exercising the discretionary relief, the Court has to take note of the conduct of the plaintiff also and its equitable relief. He also



brought to the notice of this Court the sale made on 13.01.2016 and he also reiterates the submission made by the counsel appearing for respondent Nos.1 to 4 with regard to the transaction by referring the earlier sale made by the plaintiff.

17. In reply to the arguments of the counsel appearing for respondent Nos.1 to 4 and the counsel appearing for respondent Nos.5 to 6, the counsel for the plaintiff/appellant would submit that the suit is filed after respondent Nos.1 to 4 entering into the JDA. Earlier, the suit was filed for the relief of partition and separate possession and during the pendency of the said suit, though they appeared before the Trial Court in earlier suit filed by the plaintiff entered into a JDA with defendant Nos.5 to 7 and the Court has to take note of the conduct of the respondents also. When suit is pending and they appeared and filed the written statement and subsequently on 07.07.2021, they entered into a JDA and based on the JDA, they came near the suit schedule property and demolished the old building and when fresh cause of action arose, a separate suit is filed for the relief of bare injunction. The counsel also submits that in the earlier suit also, the joint development agreement holder is not a party. Under the circumstances, the



plaintiff without having any alternative has approached the Court. The counsel also brought to the notice of this Court that immediately after entering into the JDA, the very party to the said JDA i.e., defendant No.1 filed a suit in O.S.No.6452/2021 and filed an application restraining this appellant in interfering with peaceful possession arraying this plaintiff as defendant No.3 to interfere with the peaceful possession and enjoyment of the suit schedule property, till the disposal of the suit. The counsel brought to the notice of this Court that the said I.A. was rejected on 09.03.2022. The counsel would vehemently contend that even after dismissal of the said application, respondent Nos.5 to 7 came near the suit schedule property and made an attempt. When the suit is filed for the relief of permanent injunction, the Court has to take note of the conduct of the parties and after entering into the Joint Development Agreement, the very executant of Joint Development Agreement holder filed a suit for the relief of permanent injunction and when the application is rejected and thereafter, started the work, the Court has to take note of the conduct of the respondents. Hence, the very approach of the Trial Court is erroneous.



18. The counsel for the appellant has also filed an application-I.A.No.1/2024 for production of additional documents before this Court and those documents are of the earlier partition between the members of the joint family of Krishnappa and also produced the copy of RTC extracts, the copy of General Power of Attorney executed by the wife of Krishnappa i.e., Smt.Rajalakshmi i.e., the registered document dated 23.08.1983 and also an agreement of sale dated 20.06.1983 prior to the execution of power of attorney and also produced copy of the order passed by the Trial Court in O.S.No.6452/2021.

19. The counsel would submit that the respondents have relied upon the earlier document of the sale deed executed by the plaintiff and in order to clarify the same, these documents are produced i.e., the power of attorney and also the sale deed. Hence, the said application is also reliable to be allowed.

20. *Per contra*, the counsel appearing for the respondents would contend that no dispute with regard to the earlier partition in the year 1950 between Krishnappa and other



family members and also now only they have produced the document of power of attorney which is placed before the Court and also the sale agreement and those documents have not been placed before the Trial Court and for the first time, they have placed before this Court. Therefore, the question of allowing the application filed under Order 41 Rule 27 of CPC does not arise.

21. Having heard the learned counsel for the appellant and also learned counsel for the respondents and also considering the grounds which have been urged in the appeal as well as the documents which have been placed before this Court and also the principles laid down in the judgments referred supra, the points that arise for consideration of this Court are:

1. *Whether the appellant has made out a ground to allow the application filed Order 41 Rule 27 of CPC?*
2. *Whether the Trial Court has committed an error in dismissing the applications-I.A.Nos.1 to 3 filed by the plaintiff in coming to the conclusion that the plaintiff has not made out a prima facie case to grant temporary injunction as sought?*



3. *Whether the order of the Trial Court requires interference of this Court?*

4. *What order?*

22. Having heard the learned counsel for the appellant and also learned counsel for the respondents, this Court would like to consider point No.1 for consideration.

23. It is settled law that if any application is filed under Order 41 Rule 27 of CPC even in Miscellaneous First Appeal also, the Court can entertain the documents. The documents which have been relied upon are with regard to the earlier partition of the year 1950 amongst the members of joint family of Krishnappa. The respondents are also not disputing that Krishnappa was the propositor of the joint family. The respondents are also not disputing that the property came to the Krishnappa in the said partition and the RTC extracts are also in respect to the very same property which are the subject matter of the suit.

24. The counsel for the appellant submits that the power of attorney was placed before the Trial Court and also before this Court. But learned counsel for the respondents



submits that the power of attorney and the sale agreement was not produced before the Trial Court and these documents are only with regard to show the conduct of the parties since the respondents also took the contention that already appellant took her share and she went out from the joint family and she is not the joint family member and these are the documents requires to be considered by the Trial Court while taking into note of the conduct of the parties and to decide the issue involved in between the parties and now the Court has to only consider whether there is any *prima facie* case or not.

25. Having considering the said fact into consideration that there is a dispute with regard to the very production of the document and whether the power of attorney was executed by Rajalakshmi in favour of the maternal uncle of the plaintiff and also sale agreement, the same would be considered by the Trial Court on merit subject to its admissibility and having considered the same and when the documents are pertaining to the very same suit schedule property and issue is also with regard to the claiming the relief of partition in another suit and also seeking the relief of permanent injunction, the same could be considered before the Trial Court and at this juncture, there



is no need of allowing the application filed under Order 41 Rule 27 of CPC and the appellant is at liberty to file such an application before the Trial Court for consideration of those documents while deciding the matter on merit. Accordingly, point No.1 is answered.

26. Now point Nos.2 and 3: The main contention of the plaintiff before the Trial Court is that she is the daughter of one Harish Kumar who is the son of Krishnappa. The respondents are also not disputing the fact that the plaintiff is the daughter of Harish Kumar. It is also not disputed that the originally property belongs to Krishnappa, who is the propositor of the family. It is also not in dispute that the sisters of said Harish Kumar have also filed O.S.No.6592/2007 wherein, one of the sisters is arrayed as defendant No.1, one M.K.Neelakanta, who is the brother of Harish Kumar, is arrayed as defendant No.2 and the wife of M.K.Neelakanta is arrayed as defendant No.3 and also no dispute that there is already a decree in O.S.No.6592/2007. It is also not in dispute that against the said judgment and decree, FDP No.202/2011 is filed before the Trial Court. It is also not in dispute that the very plaintiff has also filed an application before the FDP Court seeking



permission to implead her as party to the proceedings and a memo was filed on 03.01.2020 by the petitioners seeking permission to withdraw the FDP proceedings and the Trial Court also permitted to withdraw the said FDP vide order dated 03.01.2020. It is also not in dispute that earlier, the plaintiff filed the suit for the relief of partition and separate possession in O.S.No.4455/2019 wherein, she has sought the relief to declaration that the judgment and decree obtained in O.S.No.6592/2007 is not binding on her and without arraying her as party to the proceedings, a decree has been drawn.

27. Having considered the material on record also, it is clear that the plaintiff is not party in O.S.No.6592/2007. It is also important to note that when the plaintiff has been omitted in the said suit, the Court has to examine whether any averments with regard to giving of share in favour of the plaintiff and she took away her share. But both the counsel appearing for the respondents would contend that in the very sale deed of the plaintiff executed on 13.01.2006, a reference was made that she got the property by way of partition. It is important to note that the document of power of attorney was executed in the year 1983 and the said power of attorney was



executed by the wife of Sri Krishnappa i.e., the grand mother of the plaintiff and also an agreement of sale which is placed before this Court is prior to execution of the power of attorney. Having taken note of power of attorney is registered document and subsequently a sale was made, no reference was made with regard to the said power of attorney executed by the grand mother in favour of the plaintiff.

28. It is also the contention of the learned counsel for the appellant that a mistake was crept in mentioning the partition in the palupatti document and no such document is in existence. The plaintiff and the defendants have not produced the same before the Court. No doubt, there was a reference of partition dated 10.01.1994 and no such document is before the Court. It is also important to note that when there is no dispute with regard to the relationship between the parties and in terms of the registered power of attorney, a reference was made by the grand mother that the power of attorney was executed in favour of the maternal uncle to take care of the property and she is unable to take care of the said property and no right is given to sell, create any mortgage.



29. The counsel relied upon the agreement of sale executed by the very same power of attorney holder in favour of the power of attorney holder and the same is dated 20.06.1983 prior to execution of the power of attorney wherein, a reference was made with regard to this plaintiff to take care of her. The same is also subjected to the proof before the Trial Court.

30. It is also important to note that the respondents contend that already the plaintiff took her share and the same is under partition and given share to her and in order to substantiate the same, I have already pointed out that the document which has been referred dated 10.01.1994 has not been placed before the Court. Whether the same is giving of share in favour of the plaintiff, there is no material before the Court.

31. The Trial Court, while rejecting the applications, also made a reference that already suit is filed for the relief of partition and separate possession in the year 2019 and comprehensive relief is sought. No dispute with regard to the fact that the suit is filed for the relief of partition and separate possession. It is also important to note that the cause of action



mentioned in the plaint in paragraph No.16 categorically stated that cause of action arose when the defendants entered into a joint development agreement dated 07.07.2021 and on 20.11.2022, when the defendants have demolished the building and on 06.04.2023, when the defendants are trying to put up the constructions on the suit schedule property and subsequently till now the cause of action is different from earlier suit which was filed in the year 2019 and there was no such cause of action in the year 2019.

32. No doubt, the counsel appearing for the respondents would vehemently contend that when similar applications are pending before the Trial Court instead of approaching the very Court filed a present suit and sought the interim reliefs. No doubt such applications are not considered on merits and also the reliefs which have been sought only against the original defendants in the said suit. In view of the subsequent changed circumstances of the defendants entering into the Joint development Agreement with defendant Nos.5 to 7, a fresh cause of action arose for the plaintiff to file a suit in order to prevent the interference of putting up of construction in the suit schedule property. It is also important to note that



when the earlier suit is filed against respondent No.1 seeking the relief of partition and the same has been pending, the Court has to take note of the conduct of both the parties and no doubt, the plaintiff has not sought the relief in the very same suit. I have already pointed out that fresh cause of action arose and in the said suit, defendant Nos.5 to 7 are not parties and when defendant Nos.5 to 7 based on the said JDA came near the land, fresh cause of action arose and the suit is filed. If defendant Nos.5 to 7 are also parties to the said suit, then the arguments of the respondents that in the said suit itself, the plaintiff ought to have sought the relief could be accepted, however, defendant Nos.5 to 7 are not parties to the said suit.

33. It is also important to note that immediately after entering into the JDA, respondent No.1 files a suit before the Trial Court in O.S.No.6452/2021 and in the said suit, interim relief is also sought for preventing the appellant who is arrayed as defendant No.3 to restrain her from interfering with the possession. The Trial Court rejected the application on merits. The Court also taken note of the very conduct.

34. The learned counsel for the respondents would vehemently contend that the Court has to take note of



exercising of power by the Appellate Court and it is also not in dispute that while exercising the power by the Appellate Court, the Court has to take note of whether the Trial Court has passed an unreasonable and capricious order and then exercise its power.

35. No doubt, the counsel for the appellant also relied upon the judgment of the Apex Court in the case of **Vijay Kumar Gai's** case referred supra and brought to the notice of this Court with regard to forum shopping is concerned. No doubt the Apex Court held that the parties cannot approach the Court for forum shopping. There is no dispute with regard to the principles is concerned as mentioned in paragraph No.9 and also discussion made by the Apex Court wherein, it is extracted its judgment in the case of **Union of India & Ors. Vs. Cipla Ltd. & Anr.** reported in **(2017) 5 SCC 262** and laid down the factors in paragraph No.148:- A classic example of forum shopping is when litigant approaches one Court for relief but does not get the desired relief and then approaches another Court for the same relief. The said principle is not applicable to the facts of the case on hand with regard to the forum shopping is concerned. I have already made it clear that it is a fresh



cause of action arose while filing a fresh suit and in the said suit, defendant Nos.5 to 7 are not parties and also earlier application was not considered on merits and the relief sought in the earlier application is not against defendant Nos.5 to 7 who entered into the JDA subsequently with respondent Nos.1 to 4 during the pendency of the said suit. Hence, the question of forum shopping does not arise.

36. If the party does not get any relief and approaches other Court, then it would be a forum shopping. But no such circumstances in the case on hand. Hence, I do not find any force in the contention of the counsel for the respondents that it is a case of forum shopping. No doubt, the principle laid down in the judgments referred supra is very clear and the conduct is also looked into in the case on hand also. I have already pointed out with regard to the conduct is concerned and no doubt the plaintiff has approached the Trial Court in a separate suit and circumstances has been explained in paragraph 16 wherein, it is pleaded with regard to the same and the Court also took note of the fact in filing the subsequent suit. The plaintiff has not suppressed the fact of earlier suit and specifically mentioned in paragraph Nos.8 and 9 of the plaint.



In paragraph No.8 categorically stated that they have challenged the judgment and decree passed in O.S.No.6592/2007 and also in paragraph No.9 specifically pleaded that O.S.No.4455/2019 is filed for the relief of partition and the plaintiff has not suppressed the fact in the subsequent suit and the same has been narrated in paragraph Nos.8 and 9. If the plaintiff has suppressed the said fact and filing of the suit, then there is a force in the contention of the counsel for respondent Nos.1 to 7. At the same time, the Court has to take note of the fact that earlier there was a suit for the relief of partition among themselves of the family member excluding the plaintiff and the plaintiff has not been arrayed as party in the said suit and the same is challenged in the subsequent comprehensive suit filed for the relief of partition and separate possession.

37. This Court has explained the circumstances on which the present suit is filed and not suppressed any fact of earlier suit and also the Court has taken note of conduct of respondent Nos.1 to 4, who entered into JDA in 2021 and the same is also during the pendency of the comprehensive suit and when they started construction in 2022, based on the fresh



cause of action, a separate suit is filed. The Trial Court has committed an error in coming to the conclusion that already comprehensive suit is filed and ought to have filed very same applications before the said Court. The fact that defendant Nos.5 to 7 are not the parties in the said suit and when the interference was made and started putting up the construction at that juncture a separate suit was filed and nothing is discussed with regard to the fact that defendant Nos.5 to 7 are not parties in the said suit and making an applications for impleading and seeking relief, it takes time and immediately relief cannot be granted in the said suit when they started and acted upon based on the JDA. The said circumstances has not been taken note of by the Trial Court while rejecting the applications, merely because another suit is pending before the Court, the relief which the plaintiff has sought in order to prevent changing the nature of the property, a suit is filed and sought the relief of temporary injunction and very purpose would be defeated when such an attempt is made by the plaintiff in the said suit. The said facts have not been considered by the Trial Court and hence, the order of the Trial Court is nothing but capricious and unreasonable and the Appellate Court can also exercise its discretion.



38. This Court also in the judgment of ***Gowrishankara Swamigalu vs. State of Karnataka and another*** reported in ***(2008) 14 SCC 411*** in paragraph Nos.11, 12 and 26 discussed with regard to the scope of Appellate Court and the Appellate Court when failed unreasonableness and capricious order of the Trial Court, the Court can exercise its discretion in an appeal to set it right the prejudice which caused to the plaintiff.

39. No doubt, the counsel for the respondents relies upon the document of sale deed executed by the plaintiff dated 13.06.2006 and no doubt there is an express statement made by the plaintiff that there was a partition and I have already pointed out that no such document is placed either by the plaintiff or the defendants and whether it is a partition, metes and bonds and the same has to be considered by the Trial Court after the trial only. Hence, I do not find any force in the contention of the counsel for the respondents that the Trial Court has rightly comes to the conclusion that there is *prima facie* case. The *prima facie* means whether the plaintiff has got right or not. In the case on hand, no dispute with regard to the relationship between the parties and no dispute with regard to filing of suit for earlier partition and excluding the plaintiff, a



decree was obtained. The Court has taken note of the fact that when an application is filed by the plaintiff in the FDP proceedings and the said proceedings was withdrawn by the respondent Nos.1 to 4 and other parties in the said proceedings and also said fact is not considered by the Trial Court and the conduct of the defendants also very important and in order to defeat the right of the plaintiff, an attempt is made earlier by withdrawing the FDP proceedings before taking decision with regard to the claim made by the plaintiff. These factors have not been considered by the Trial Court while considering point No.1 i.e., whether the plaintiff has made out a *prima facie* case.

40. It is not in dispute that the plaintiff is the daughter of Harish Kumar who is the son of Krishnappa and no dispute with regard to the relationship between the parties and hence, the rights of the parties, particularly right of the plaintiff has to be determined in a suit for comprehensive and suit for partition and separate possession and also the plaintiff explained the circumstances on which she filed suit for permanent injunction and sought interim relief of temporary injunction and the same has not been considered by the Trial Court while passing an order and the reasons assigned by the Trial Court is also



capricious and unreasonable and hence, this Court exercised the powers of Appellate court to set it right the same. Hence, I answer points Nos.2 and 3 in affirmative.

41. In view of the discussion made above, I pass the following:

ORDER

- i) The appeal is ***allowed***.
- ii) The impugned order dated 25.07.2023 passed on I.A.Nos.1 to 3 in O.S.No.25599/2023 by the Trial Court is set aside. Consequently, the relief is granted in favour of the plaintiff as sought in I.A.Nos.1 to 3.

In view of disposal of the appeal, pending interlocutory applications do not survive for consideration and the same stand disposed.

**Sd/-
JUDGE**

VM
List No.: 1 Sl No.: 28