

IN THE COURT OF THE SENIOR CIVIL JUDGE, YELLAPUR
SITTING AT MUNDGOD

DATED THIS 18TH DAY OF DECEMBER 2018

**PRESENT : SRI.VITHAL V. JOSHI, B.Com.,LL.B.,Spl.,
SENIOR CIVIL JUDGE., YELLAPUR.**

R.A.No.6/2010

Appellants:-

1. Anand Dattatreya Kurdekar,
Age: 50 years, Occ: Farmer,
R/o: Koppa (Indoor),
Tq: Mundgod (U.K.).
2. Narayan Dattatreya Kurdekar,
Age: 40 years, Occ:Farmer,
R/o: Koppa (Indoor),
Tq: Mundgod (U.K.).

[Since deceased L.Rs. were brought on record
Amended as per Orders on I.A.No.II.
dated:30-10-2010]

- 2(a). Smt. Nayana Kom Narayan Kurdekar,
Age: 29 years, Occ: Household,
R/o: Koppa, Indoor, Tq: Mundgod (U.K.).
- 2(b). Kumari Deepa D/o Narayan Kurdekar
Age: 13 years, Occ: Student,
R/o: Hubli in Hubli Taluka.
- 2(c). Kumar Naveen S/o Narayan Kurdekar
Age: 10 years, Occ: Student,
R/o: Hubli in Hubli Taluka.
- 2(d). Kumar Dattatreya S/o Narayan Kurdekar
Age: 8 years, Occ: Student,
R/o: Hubli in Hubli Taluka.

3. Ravi M/o Shekavva Kurdekar
Age: 35 years, Occ: Shetki,
R/o: Koppa (Indoor),
Tq: Mundgod (U.K.).
4. Manju M/o Shekavva Kurdekar,
Age: 37 years, Occ: Shetki,
R/o: Koppa (Indoor),
Tq: Mundgod (U.K.).

**(By Shri. V.P.Bhat and Shri. B.C.Patil,
Advocates)**

V/s-

Respondent:-

Annappa Basappa Kumbar,
Age: 75 years, Occ:Farmer,
R/o: Koppa (Indoor),
Tq: Mundgod (U.K.).

(By Shri. N.R.Bhat Kodlagadde, Advocate)

Appeal filed on : 19-02-2010

Appeal decided on : 18-12-2018

Total duration	:	<u>Years</u>	<u>Months</u>	<u>Day</u>
		08	09	29

J U D G E M E N T

This is a defendant's U/Sec.96 of Civil Procedure Code against the judgment and decree passed by Civil Judge, Mundgod in O.S.No.18/1999.

2. Plaintiffs and defendants are referred in the judgment for the sake of convenience as ranked in the trial court.

3. This is a defendant's appeal.

4. Brief facts leading to the case are as follows:-

Respondent herein was a plaintiff before the trial court filed suit for the relief to declare that he is acquired easementary right by way of prescription and permanent injunction restraining the defendants from interfering with plaintiff's peaceful user of the suit property. The suit property described in the plaint is approach road measuring 12 feet width 15 feet length abutting to Sy.No.10 towards Southern boundary of Indoor-Koppa and Bachanaki road, Mundgod Taluk, UttaraKannada District. It is stated that plaint sketch is produced along with the plaint and same may be considered as part and parcel of the plaint. The said disputed property is described as 'ABCD' in the hand sketch. Sy.No.19 measuring 7-13-0 of Indoor (Koppa gram) village of Mundgod Taluk is ancestral property of plaintiff. To have the approach to Sy.No.19 and ancestors of the plaintiff used to go through the road abutting to Southern boundary of Sy.No.10 and it was from time immemorial. Plaintiff and prior to plaintiff his ancestors were using this road to carry bullocks, bullock cart, tractors and to take crops grown in the land. As such plaintiff is in lawful possession and enjoyment of Sy.N.19 to go to Koppa-Bachanaki panchayath road, they use through disputed road abutting to Southern boundary of Sy.No.10.

Except this road plaintiff has no any approach road to approach Sy.No.19.

5. It was further contended by plaintiff that there is a partition in the family of plaintiff and land measuring 1-13-0 was fallen to the share of plaintiff and his sons. Even the plaintiff and the sons are using the approach road abutting Southern boundary of Sy.No.10 without anybodies interference. As such plaintiff is acquired easementary right. Defendants have no manner of right, title and interest to deny, the right of plaintiff to use the said road. It was further contended that defendant had no manner of right title or interest to interfere with plaintiffs user of the said road, but defendants are interfering with the plaintiffs user of the said road. They are preventing the plaintiffs to make use of the said road. If defendants cause interference in user of this road, plaintiff cannot cultivate Sy.No.19. Plaintiff requested the defendants on several occasions, but defendants are not take into consideration the said fact. Defendants are continued to interfere in plaintiffs user of the said road. Plaintiff has suffered injustice in the hands of defendants since long time and plaintiff has perfected the right of easement by way of prescription.

6. It is further contended that the defendants threatened the plaintiff that they want to close the said road by fencing it.

Defendants posed a threat to the plaintiff in second week of June and therefore cause of action accrued to the plaintiff to file this present suit. Therefore prays to decree the suit.

7. On service of summons all the defendants appeared through counsel and defendant No.2 filed the written statement. The pleadings of the plaintiffs are totally false and baseless. Plaintiff is to be put to strict proof of averments of Para No.1 of the plaint. Burden is on plaintiff to prove that, there exists a road in Southern side of Sy.No.10. In the plaint contents of plaint Para No.3 are false and denied. It is false to say ancestors of the plaintiff were making use of alleged road on Southern boundary of Sy.No.10, to carry bullocks, bullock cart, tractors etc., No road is existing in Sy.No.10. To approach Sy.No.9 and 19 there is a separate road. In Revenue records of Sy.No.10 existence the road is not shown. Therefore allegation made by the plaintiff that there exists a road towards Southern boundary of Sy.No.10 is false. The allegations made in Para No.4 of the plaint are denied. It is false to say that these defendants are interfering with plaintiff's user of the said road. Allegations made in Para No.5 are denied. It is false to say that these defendants posed a threat to fence the disputed road. On the contrary plaintiffs themselves are attempting to put the fencing. Allegation that cause of file this suit arose in second week of June is false and denied. This court has no jurisdiction to determine

and adjudicate the question of easement, revenue officials are having jurisdiction to try the said issue. Therefore this court has no jurisdiction to try the suit. Suit of the plaintiff cannot be decreed since there is no any right of description accrued in favour of plaintiff. There is a road in Sy.No.9 and not in Sy.No.19. Accordingly in map a road is shown. Therefore, suit of the plaintiff deserves to be dismissed. These defendants have raised DCH cotton, and had grown very good crop by applying pesticides, fertilizers etc., If cattle's entering field eats away the grown crop, they may die. That apart plaintiff under the guise of easementary right is intended to close canal No.7 of irrigation department to prevent flow of water and to see that water enter to the field of this defendant. Several farmers of the lands located ahead are raising objections. Police department also had taken action in this regard. Sy.No.10 is standing in the name of defendant No.2 and in order to harass his relatives filed this suit. To irrigate the land Sy.No.9, 10 and 19 Irrigation depart had constructed a pool and laid a pipeline. And this plaintiff is making use of this pathway on the pool to approach Sy.No.19. Therefore it was contended that plaintiff has filed a false and frivolous suit against defendants and prays to dismiss the suit with compensatory cost of Rs.5,000/-.

8. Defendants NO.1, 3 and 4 filed a memo adopting the written statement filed by defendant No.2.

9. On the basis of above pleadings of the parties, trial court framed following;

I S S U E S

1. Whether the plaintiff proves that he has go the right of way towards the Southern side of the Sy.No.10 in order to reach the land Sy.No.19 belonging to him?
2. Whether the plaintiff proves that the said right of way towards the Southern side of the land Sy.No. is existing since time immemorial and he has got the right of easement?
3. Whether the plaintiff further proves that the description have obstructed and prevented form proceeding on the path way which is towards southern side of the Sy.No.10 in order to reach the land Sy.No.19 for cultivation?
4. Whether there is a cause of action to file the suit?
5. Whether the court fee paid is insufficient?
6. What order or decree?

10. Plaintiff himself examined as PW1 and PW2 to 5 were examined. Ex.P1 to 35 were marked. On behalf of defendants, defendant No.2 was examined as DW1 and Ex.D1 to D14 were marked. Court Commissioner was examined as CW1, commissioner report and PT sheet marked Ex.C1.

11. After hearing the arguments of both the counsel trial court decreed the suit declaring that plaintiff has acquired easementary right of prescription and also issued a permanent injunction against the defendants not to interfere with

plaintiff's peaceful possession and enjoyment of suit property as plaintiff is having prescriptive right of road to approach Sy.No.19.

12. Unsuccessful defendants presented this appeal U/Section.96 R/w Order 41 Rule 1 and 2 CPC on following among other grounds.

1. The trial court not taken into consideration the documentary evidence produced before it and therefore judgment is not in accordance with law.
2. Trial court not raised proper issues and no enquiry was held on the issues framed therefore the judgment on said issues are illegal.
3. Trial court not considered the revenue documents produced by the defendants.
4. Trial court not taken into consideration the documents produced by Irrigation department, police department and as such judgment and decree suffers from illegality.
5. The appellants/defendants before the trial court and produced several citations in support of their case and said citations are not taken into consideration at the time of judgment.
6. Trial court without considering the ingredients of easementary right of prescription and when plaintiff failed to prove the easementary right of prescription rendered the judgment, is illegal and not in accordance with law.
7. Plaintiff has the pathway on the channel through Sy.No.9 to go to Sy.No.9 and in spite of this suit granting the relief in favour of plaintiff is illegal and liable to be set aside.

13. After admission of the appeal records of the trial court were called for.

14. Heard the arguments of learned for the appellants Shri. V.P.Bhat and Shri. N.R.Bhat Kodagadde Advocate for respondents.

15. Perused trial court records and relevant documents.

16. Following points that would arise for consideration.

Points

1. Whether the Trial court has committed an error in decreeing the suit of plaintiff without considering material documentary evidence available on record, solely on the ground of admission of DW1?
2. Whether the judgment and decree of the trial court required to be interfered with?
3. What order?

17. My finding on the above points as follows:-

Point Nos.1 and 2 : In the Affirmative.

Point No.3 : As per final order

for the following:

R E A S O N S

18. Point No. 1 :: Learned counsel for the appellant Shri. V.P.Bhat vehemently argued that the trial court committed an error in decreeing the suit of plaintiff without considering the pleadings, pleaded by plaintiff. He would

submit there is no clear pleading forthcoming in the plaint whether plaintiff is claiming a right of easement of necessity or right of easement by prescription. According to counsel for the for the appellant these two kinds of easements are distinct. If plaintiff is claiming right of easement by necessity then burden is upon the plaintiff to establish the fact, there is no any alternative approach road available for the plaintiff. If plaintiff is claiming right of easement by prescription then plaintiff is bound to establish the ingredients of Section 15 of Easement Act. Therefore trial court without going into this question and without proper pleading in the plaint decreed the suit and come to a wrong conclusion. Therefore he prays to allow the appeal and dismiss the suit.

19. On the contrary learned counsel for the appearing for plaintiff-Respondent Shri. N.R.Bhat Kodlagadde vehemently argued the defendant who filed the written statement denying right of plaintiff on suit property, in the cross-examination clearly admitted that there was a approach road since last 30 to 40 years towards Southern boundary of Sy.No.10 in between Sy.No.9 and 10 and vary contention of the defendant that, there is a no road towards Southern side of Sy.No.10 goes to show that there is interference in the plaintiffs user of the said property. Therefore he would submit that the trial court correctly applied the principle of law, assessed the evidence available on record in proper perspective and decreed

the suit and therefore no interference is called for in this appeal. Therefore he would submit to dismiss appeal with costs.

20. Having considered the rival contention of parties, on perusal of oral evidence and documentary evidence, now this court has to ascertain whether the judgment and decree of the trial court is in accordance with law, and based on legal evidence.

21. There is no dispute in between the parties about ownership of Sy.No.9, 10 and 19. On plain reading of the plaint it is not pleaded by the plaintiff that 'ABCD' road shown in the plaint sketch is part of Sy.No.10 or a part of Sy.No.9. The pleading of the plaintiff goes to show that this 'ABCD' road is abutting to Southern boundary of Sy.No.10. Therefore U/Section.15 of Easement Act plaintiff who claim right of Easement must establishes a dominant heritage and defendant being a servient heritage, burden is of plaintiff to establishes that he is having a dominion over the property of the defendant. In the instant case as already pointed out the suit road is not part of Sy.No.10 or 9, but on what basis plaintiff claims a declaratory relief against defendant, no material pleading is forth coming in the plaint. Counsel for the defendant vehemently argued that the DW1 was examined before the trial court clearly admitted the existence of road towards Southern boundary of Sy.No.10 and therefore plaintiff

proved the existence of suit road. It is relevant to point out during trial, a surveyor was appointed as a Court Commissioner to inspect the suit property and report. The Court Commissioner was also examined as CW1 and commission report was marked at Ex.C1. As per his evidence and commission report in between Sy.No.9 and 10 there exists Sy.No.3. And even in evidence of commissioner, CW1 in the cross-examination made by plaintiff themselves he made it clear that approach road to Sy.No.19 is in Sy.No.3 which is shown in 'dot dot' lines in map prepared by him Ex.C1. Even in Ex.C1 it is clearly mentioned that Sy.No.9, 10 and 19, boundaries are all fixed in P.T.Sheet and it was prepared. And he has shown the existing road from main road to Sy.No.19 is also shown. And this road is passes through Sy.No.3. Accordingly CW1 in his cross-examination also gave similar evidence. And this Sy.No.3 measures towards East corner width is 1 meter and towards West corner width is 3 meter and this measurement there a road. And CW1 clearly stated that this road is not passes through Sy.No.9 and 10. Thus from above materials on record it is clear that plaintiff is not claiming any right in Sy.No.9, or 10 or in Sy.No. 3 as per his pleading as well as in oral evidence. Even after appointment of Court Commissioner and his report plaintiff never made any attempt to amend the plaint disclosing existence of road in Sy. No.3, in between Sy.No.9 and 10 as evident from Ex.C1. Owner of Sy.No.3 will become servient owner within the

meaning of Section 4 of Easement Act. , he is not imp leded in the suit. Trial court not at all considered contents of Ex.C1 and oral evidence of CW1 in this aspect. Trial court simply relied on so called admission of DW1 in the cross-examination that there was a road towards Southern boundary of Sy.No.10 and therefore it decreed the suit. If one peruses plaint sketch wherein disputed road is shown as 'ABCD' and the map prepared by the Court Commissioner Ex.C1 the existence of the road in both these maps are contradictory each other. Trial court without considering this aspect which is material evidence available on record and decreed the suit. Ex.C1 the report of the Court Commissioner is the part of the record of the court U/O.26 Rule 10(2) of C.P.C. and this legal evidence is not at all considered by the trial court while declaring and granting declaratory relief. When the judgment is rendered by the trial court without considering material evidence available on record, in opinion of this court the judgment and decree of the trial court is unsustainable in the eye of law. As already pointed out it is not the case of plaintiff in the pleading as well as in his evidence that already there exist a road and defendant is interfering with plaintiffs peaceful enjoyment of said road, in that event the foundation laid by plaintiff would have been sufficient to grant the relief of declaration that he had right of easement from time immemorial and allegation of interference. But in the instant case though the plaintiff claim that alleged road is being used from time immemorial, that

location of road shown in the plaint is totally contrary to what was shown in Ex.C1. On perusal of the plaint prayer one can see, plaintiff claim relief on the ground that plaintiff has acquired prescriptive right of easement. In that event it is incumbent upon plaintiff to plead from what date to which date he was using the said suit property to establish the right of prescription to the detriment of other party. But in the instant case no such pleading is forthcoming in the plaint averment in the pleading plaintiff claim right of easement from time immemorial and in the prayer he claim easement of right by prescription. Therefore a principle law laid down by Hon'ble Supreme court reported in **2017 SAR Civil 1075** in case of **State of Uttarakhand and another V/s Mandir Sri. Laxman Sidh Maharaj** wherein Hon'ble Supreme Court held as follows:

“R—Pleadings—Courts cannot travel beyond the pleadings for granting any relief. And 4—Pleadings—Courts can grant only that relief which is claimed by the plaintiff in the plaint and such relief can be granted only on the pleadings but not beyond it—In other words courts cannot travel beyond the pleadings for granting any relief.”

22. Further more Hon'ble Supreme Court in case of **Justiniano Antao and others V/s Smt. Bernadette B. Pereira** held as follows:

“But in order to establish a right by way of prescription one has to show that the incumbent has been using the land as of right peacefully and openly and without any interruption for the last 20 years. There should be categorical pleadings

that since what date to which date one is using the access for the last 20 years. In order to establish the right of prescription to the detriment of the other party, one has to aver specific pleadings and categorical evidence.”

23. In view of the above said principles laid down the above decisions it is clear that suit of the plaintiff suffers from non-pleading of material pleadings in consonance with prayer made in the plaint. Therefore it is clear from the records of the trial court itself that decree of trial court is unsustainable and liable to be set aside. Accordingly Point raised in the appeal is answered in the **Affirmative**.

24. Point No.2 : While discussion the point NO.1 this court come to conclusion that there is a contradictory material placed on record by the plaintiff i.e., hand sketch speaks something and commission report Ex.C1 speaks something. As per the plaint averments and sketch plaintiff claim right of easement of way abutting to Southern boundary of Sy.No.10 where as evidence of CW1 and Ex.C1 show that said road is in existence in Sy.No.3 located in between Sy.No.9 and 10 and said runs abutting Northern boundary of Sy.No.9. Therefore the suit property described by the plaintiff in the plaint nothing but misdescription of the property even plaintiff after getting the commission report not chosen to amend the plaint and suit sketch. Further, more plaintiff no impleaded servient owner that is owner of Sy.No.3 located in between Sy.No.9 and 10 as per evidence of CW1 and Ex.C1, in this suit. Therefore,

suit of the plaintiff has to be dismissed solely on the grounds of mis description of the property and non-joinder of necessary party. Accordingly, interference is called for in the hands of this court. Accordingly Point No.2 is raised is answered in the Affirmative. For the forgoing reasons and discussion made above judgment and decree of the trial court required to be interfered with and it liable to be set aside and suit of the plaintiff deserves to be dismissed. Accordingly point No.2 is answered in the **Affirmative**. For the forgoing reasons and discussion made above, I proceed to pass the following;

O R D E R

Appeal is allowed.

**Judgment and decree of the trial
court is hereby set aside.**

**Suit of the plaintiff is hereby
dismissed with costs.**

Draw up decree accordingly.

**Office is directed to send back the
records of the trial court along with the
copy of this judgment.**

(Dictated to Stenographer, transcribed and typed by him, corrected and then pronounced by me in the open court on this 18th day of December 2018).

Sd/-

(V.V.Joshi)

Senior civil judge,yellapur.
Sitting at Mundgod