

KABG040006332022



**IN THE COURT OF THE IV ADDL. CIVIL JUDGE & JMFC,
BELAGAVI**

Present: SHRI. BASAVARAJA THULASAPPA NAYAKA,
B.A.L LL.M.,
IV Addl. Civil Judge & JMFC,
Belagavi.

Dated : This the day of 23rd May- 2023

O.S. NO.353/2022

Plaintiff/s : Shri. Jayawant S/o. Vasudev Nevageri.

(By Shri. P.S. Agasagi, Advocate)

-Vs.-

Defendant/s: Shri. Anand S/o. Mallappa Kolakar and another.

(By Shri. B.A. Gangai, Advocate)

I.A. No.II

Applicants/Plaintiff : Shri. Jayawant S/o. Vasudev Nevageri.

-Vs.-

Opponents/Defendants: Shri. Anand S/o. Mallappa Kolakar and
another.

ORDERS ON IA. No.II FILED U/O. 39 RULE 1 AND 2 R/W SEC. 151 OF CPC :

I.A. No. II is filed by the plaintiff with a prayer to grant an ad-
interim temporary injunction to restrain the defendant Nos. 1 and 2, their

men and anybody acting on their behalf from carrying out any work over the suit property till disposal of the suit.

2. I.A. No.II is accompanied with an affidavit sworn by the plaintiff, wherein it is stated that the gavatana property bearing parade No.10 was belonging to Hulaji family which is situated within the limits of Ganeshpur village and same was in possession of Hulaji family and rest of the gavatana property was owned and possessed by other villagers. The parade No.10 was totally measuring 6 guntas and suit property was divided among three family members of Hulaji family in the family partition and the suit property was allotted to Nago @ Nagoji Hulaji and the said person has sold his property in favour of plaintiff through registered sale deed dated 30.12.2002. The plaintiff is in possession and enjoyment of the suit property. He has constructed the RCC building measuring 1440 Sq.fts in the suit property and left remaining property as open. The defendants having no right, title and interest over the suit property tried to encroach upon the southern side of the suit property in the first week of March-2022. So, he had requested the defendants not to encroach upon the suit property, but the defendants threatened him. Further contend that the defendant No.1 without having any right, title and interest over the suit property had executed a sale deed in favour of defendant No.2. On the basis of the said sale deed, the defendant No.2 tried to encroach the plaintiff's property.

Further contend that the alleged parade No.54 as claimed by the defendant No.1 is not situated abutting to the suit property and the defendant No.1 by mangling the survey authorities had got surveyed the property and shown that the said parade is situated therein. Further contend that based on the alleged created document, the defendants with an intention to gulp his property trying to fix the boundaries by encroaching the suit property and tried to construct the compound wall and carry out the work upon the suit property. Further contend that the defendant No.1 being the influential person had managed the Gram panchayat and created bogus entry in respect of the gavatana property which is not belonging to defendant No.1 and on the basis of the entry, the defendant No.1 is claiming the portion of the southern side property which is belonging to him. He has prima-facie case and the balance of convenience lies in his favour. If the temporary injunction is not granted, he will be put into great loss which cannot be compensated in terms of money. If the unauthorized and illegal acts of defendants are not stopped, then they may gulp his property. If his property is not protected, then the defendants may carry out the construction work over the suit property and in that even he will be put into great loss. Hence, prayed to allow the I.A. No.II.

3. The defendants have filed objections to the I.A. No.II, wherein they have denied the contents of the application as false and

contended that a similar application was already rejected by this Court on 29.11.2022. Further it is contended that the plaintiff has neither made out any prima facie case nor the balance of convenience leans in his favour. No any irreparable hardship, hence plaintiff is not entitled for any equitable relief. Further it is contended that the plaintiff has not specifically pleaded as to what was the extent of alleged encroachment over the suit property. They have not made any attempt to encroach over the suit property at any time and they have not undertaken any construction. The plaintiff claims to be in possession of the suit property on the basis of sale deed, but the plaintiff has not produced any document to show that he is in possession of the suit property. Further it is contended that the present second application is hit by the principle of res-judicata, because considering the fact that the present application for temporary injunction filed by the plaintiff were on the same grounds which are disclosed in the present application. Further the defendant is the absolute owner and in peaceful possession and enjoyment of the property bearing parade No.54 measuring 21 guntas and the same was situated abutting to the southern side of the suit property. The name of the defendant No.1 authorisedly mutated in the revenue records by the revenue authorities and the said property comes within the gavatana area. The defendant No.2 had applied to the panchayat authorities for mutating his name in respect of parade No.54 in the records of Gram

panchayat. The panchayat authority after visiting the spot, conducted the survey, prepared the computer extract in respect of parade No.54 and mutated the name of the defendant No.1. Further contend that parade No.54 was originally owned by one Yallaiyya @ Yallappa S/o. Shattaiyya @ Shattyappa Kolkar who bequeathed the said parade No.54 under the Will in favour of Mallappa Durgappa Kolkar in a sound disposing state of mind. The name of Mallappa Durgappa Kolkar was mutated in M.R bearing H23/2016-2017 dated 30.11.2016. Thereafter Mallappa Durgappa Kolkar has bequeathed his all right, title and interest in parade No.54 in favour of his son defendant No.1 through registered relinquishment deed. Further contend that the plaintiff in collusion with other neighbors have filed 9 to 10 false suits against the very defendants in respect of parade No.54 just to harass and grab the said property. The plaintiff has not made out any prima-facie case and balance of convenience does not lean in his favour. Further it is contended that there are no any believable documents or evidence to prove that the defendants are encroaching over the suit property. Hence, prayed to reject the application.

4. Heard arguments and perused the records.

5. On perusal of the pleadings, documents and application, the points that arise for my determination are;

1. Whether the plaintiff has made out prima facie case for grant of temporary injunction?
2. Whether the plaintiff proves balance of convenience lies more in her favor?
3. Whether the plaintiff proves irreparable loss will be caused more to her, if temporary injunction is not granted?
4. What order ?

6. My answer on above points is as follows;

Point No.1 : In the Affirmative
 Point No.2 : In the Affirmative
 Point No.3 : In the Affirmative
 Point No.4 : As per final order
 for the following;

REASONS

7. **Point No.1 to 3** :-These points are taken up together for discussion to avoid the repetition as they require same set of pleadings and documents. The present application is filed by the plaintiff with a prayer to restrain the defendants from carrying out any work in the suit property.

8. The plaintiff contend that the gavatana property bearing parade No.10 was belonging to Hulaji family which is situated within the limits of Ganeshpur village and same was in possession of Hulaji family and rest of the gavatana property was owned and possessed by other

villagers. The parade No.10 was totally measuring 6 guntas and suit property was divided among three family members of Hulaji family in the family partition and the suit property was allotted to Nago @ Nagoji Hulaji and the said person has sold his property in favour of plaintiff through registered sale deed dated 30.12.2002. The plaintiff is in possession and enjoyment of the suit property. He has constructed the RCC building measuring 1440 Sq.fts in the suit property and left property measuring 736 Sq ft as open. The defendants having no right, title and interest over the suit property tried to encroach upon the southern side of the suit property in the first week of March-2022. So, he had requested the defendants not to encroach upon the suit property, but the defendants threatened him. Further contend that the defendant No.1 without having any right, title and interest over the suit property had executed a sale deed in favour of defendant No.2. On the basis of the said sale deed, the defendant No.2 tried to encroach the plaintiff's property. Further contend that the alleged parade No.54 as claimed by the defendant No.1 is not situated abutting to the suit property and the defendant No.1 by mangling the survey authorities had got surveyed the property and shown that the said parade is situated therein. Further contend that based on the alleged created document, the defendants with an intention to gulp his property trying to fix the boundaries by encroaching the suit property and tried to construct the

compound wall and carry out the work upon the suit property. Further contend that he has prima-facie case and the balance of convenience lies in his favour. If the temporary injunction is not granted, he will be put to irreparable injury and loss.

9. On the other hand, the defendants denied the contents of the application. Further contend that earlier plaintiff had filed similar application Under Order 39 rule 1 and 2. Said application was rejected. Now, the present application is not maintainable. Further denied that the parade No. 10 was belonging to Hulaji family and parade No.10 was totally measuring 6 guntas and the suit property was allotted to Nago @ Nagoji Hulaji. Further denied the sale of the suit property by Nago @ Nagoji Hulaji in favour of the plaintiff through registered sale deed. Further denied the construction of the building measuring 1440 Sq.fts in the suit property and leaving the remaining property as open. Further denied that the defendant No.1 without having right, title and interest over the suit property has executed the sale deed in favour of the defendant No.2. Further denied that the defendants managing the Gram Panchayat had created the documents. The defendants contend that the defendant who is the owner and in exclusive possession and enjoyment of the property bearing parade No.54 measuring 21 guntas. The same was situated abutting to the southern side of the suit property. The name of the defendant No.1 authorisedly mutated in the

revenue records by the revenue authorities and the said property comes within the gavatana area. The defendant No.2 had applied to the panchayat authorities for mutating his name in respect of parade No.54 in the records of Gram panchayat. The panchayat authority after visiting the spot, conducted the survey, prepared the computer extract in respect of parade No.54 and mutated the name of the defendant No.1. Further contend that parade No.54 was originally owned by one Yallaiyya @ Yallappa S/o. Shattaiyya @ Shattyappa Kolkar who bequeathed the said parade No.54 under the Will in favour of Mallappa Durgappa Kolkar in a sound disposing state of mind. The name of Mallappa Durgappa Kolkar was mutated in M.R bearing H23/2016-2017 dated 30.11.2016. Thereafter Mallappa Durgappa Kolkar has bequeathed his all right, title and interest in parade No.54 in parade No.54 in favour of his son defendant No.1 through registered relinquishment deed. Further contend that the plaintiff in collusion with other neighbors have filed 9 to 10 false suits against the very defendants in respect of parade No.54 just to harass and grab the said property.

10. The plaintiff's counsel in support of his contention relied on the registered sale deed, unregistered partition deed, mutation entry and record of rights ,photos etc.

11. The plaintiff's counsel relied on the copy of the sale deed of the year 1932 to show that the property measuring 6 guntas was sold to Gundu Devappa Hulaji in the year 1932. Further relied on the unregistered partition deed to show that the suit schedule property was fallen to the share of Nago Gundu Hulaji. Further relied on the sale deed of the year 2002 to show that Nago Gundu Hulaji has sold the suit property in favour of the plaintiff. Further the plaintiff relied on the mutation bearing No.397 to show that one Kachu Ningappa Tudayekar was the owner of the parade No.10 measuring 6 guntas. The said person has sold the said property to Gundu Devappa Hulaji. The plaintiff's counsel relying on the translated copy of the mutation Hakku patra and contended that in respect of the parade No.54, the number is 441, wherein the name of one Yallaiyya @ Yallappa S/o. Shattaiyya @ Shattyappa Kolkar is shown, but there is no mention of measurement in respect of parade No.54. Further relied on R of R of the year 1964-65 and contend that in the said document in respect of parade No.54, there is no mention of measurement. Further relied on R of R of the year 1984 and contend that for the first time the measurement pertaining to parade No.54 is mentioned as 21 guntas. It creates doubt with respect to the property bearing parade No.54. Further argued that unregistered partition deed clearly shows that the suit property was allotted to vendor Nago @ Nagoji Hulaji and plaintiff has purchased the suit property.

Further argued that the panchayath would give the VPC number when there is a house.

The plaintiff rely on the following decision:-

1. AIR 1964 Supreme Court 993

Arjun Sing Vs Mohindra Kumar and Others

12. The defendants' counsel argued that the prayer of the plaintiff is vague as the plaintiff has sought for an order to restrain the defendants from carrying out any work in the suit property. Further argued that the plaintiff in order to prove his case has to show prima-facie case pertaining to the suit property.. The plaintiff cannot say with respect to the parade No.54 which is the property of the defendant. The present application is not maintainable as similar application filed by the plaintiff was rejected earlier. In this regard, the defendant relied on the averments of the made in para No.3 of the affidavit and contend that even in the earlier application filed by the plaintiff, wherein the plaintiff stated that the defendant tried to encroach upon the suit property i.e southern side of the suit property in the first week of March-2022. Even in the present application also contains the same averments that the defendant tried to encroach from the southern side of the suit property in the first week of March-2022. Further argued that the plaintiff relied on the documents issued by the panchayat, wherein parade No.350 is mentioned. In the said document, no measurement is mentioned.

Further argued that the plaintiff has not placed any document to show that when the property purchased by the plaintiff under the sale deed was given VPC No.350A. The plaintiff has not placed the resolution of the panchayat to show that VPC number was given to the suit property. The plaintiff's counsel relied on the RTC and argued that though the plaintiff claims that the suit property was allotted to the plaintiff's vendor in the partition, but on perusal of the RTC, the parade No.10 measuring 6 guntas still stands in the joint name. Further relying on the unregistered partition deed filed by the plaintiff and contend that in the said partition, there is no mention of VPC No.350A. Further relied on the boundaries mentioned in the partition deed and contend that towards the southern side shown as open land. Whereas in the present suit, towards southern side shown as road. The plaintiff has not placed any document to show towards the southern side of the suit property, the road is formed subsequently. Further argued that the plaintiffs claim that the defendants are trying to encroach the suit property from southern side. But, towards the southern side, as per the plaintiff there is a road. Such being the case, the contention of the plaintiffs that the defendants are trying to encroach the suit property from southern side cannot be believed. Further argued that, there is no mutation as per the unregistered partition deed. The parade number 10 still stands in the joint name. Further argued that the sale agreement produced by the

plaintiff cannot be believed as the said sale agreement does not bear the signature of vendor and purchaser, but only bears the signatures of the witnesses. Further argued that in the sale agreement, the sale consideration amount is mentioned as Rs.2,00,000/-. Whereas the sale deed relied by the plaintiff, the sale consideration is mentioned as Rs.1,00,000/- only. Further argued that though the plaintiff contend that he has constructed RCC building in the suit property to the extent of 1440 sq.fts, but to show that he has constructed RCC building measuring 1440 Sq feet and left open 736 Sq feet open land no material placed before the Court. According to the plaintiff, the suit property was allotted to the defendant Nago @ Nagoji Hulaji under the partition deed and the said property is part of parade no.6 . If that is so, atleast on one side there must be the remaining property of the parade No.10. Further argued that the plaintiff has not stated new facts to file the present application. Therefore, the present application is not maintainable. Further argued that, the hakku patrike relied on by the plaintiff is translated copy. The plaintiff has not placed before the court the original hakku patirka. Therefore, the said document cannot be relied. Further argued that the plaintiff admitted the ownership of the defendant in respect of parade no.54 ,which is clearly evident from the averments of the plaintiff in the affidavit wherein it is stated that parade No.54 claimed by the defendant is not situated abutting to their

property. The plaintiff with an intention to harass the defendants has filed the present suit and other villagers also filed the suits. Further the defendant relied on copy of the order passed by Assistant commissioner, RTC, office copy of I.A. filed in 353/22 and online order copy of O.S.No.418/2022 etc.

The defendant relied on following decisions:-

1.AIR 1976 Jammu and Kashmir 72

Abdul Ghani Daga Vs Mahant Ram Sarana & Others.

2. AIR 1988 Rajasthan 61

Madan Lal Khuteta Vs Badri Narayan

3. ILR 2002 KAR 2675

Abdul Sattar and Others Vs Gurulingayya and Another

4. AIR 2020 Supreme Court 307

Ambalal Sarabhai Enterprise Ltd Vs KS Infraspac LLP Ltd

5. 2012(5)SCC 370

Maria Margarida Sequeria Fernandes and Others Vs Erasmo Jack de Sequeria (dead) through Lrs.

13. The plaintiff counsel in reply arguments argued that the principles of res-judicata is not applicable to the present application. The plaintiff has filed the present application on new facts. The contents of the application has to be read as whole. The defendant cannot rely on any one averments of the application and contend

that the present application is similar to the earlier application. The plaintiff's counsel argued that in the present application, on perusal of the entire averments of the present application, it is clear that the plaintiff has pleaded new facts for filing the present application. In this regard, relied on the averments of the affidavit of I.A. No.II and contend that the present application is filed by the plaintiff when the defendants are tried to construct compound wall and carried out the work upon the suit property. Further argued that the plaintiff in the plaint has clearly stated that the defendants are trying to encroach the public road and other properties. So this clearly shows that the contention of the defendant that there is no question of encroachment of the suit property cannot be acceptable. Further argued that at the time of the allotment of suit property in favour of Nago @ Nagoji Hulaji towards the southern side there may be open land. But, now towards the southern side of the suit property, there is a road. Further argued that the plaintiff has acquired the suit property through the registered sale deed from Nago @ Nagoji Hulaji and relied on the sale deed of the year 1932 and 2002. Mere joint name of Nago @ Nagoji Hulaji- does not mean that plaintiff is not owner and possession of the suit property. Further argued that, the defendants in their objection states that their property situated abutting to the southern side of the suit schedule property. Further

argued that, the defendants has got surveyed without issuing the notice to the adjoining owners.

14. It is pertinent to note that, there is no dispute as to the decision relied on by the plaintiff and the defendant counsel. It is settle law that the principles resjudicata is not applicable to the interlocutory application. The parties can file similar application seeking the same relief based on the new facts and circumstances. In the present case, the defendant counsel relying on the averments that in the I.A.No.I and I.A, No.III contains the same averments that, the defendant tried to encroach the suit property in the first week of March 2022 , therefore, the present I.A.i.e I.A.No.III is hit by the principles of resjuidcata as no new facts pleaded, On the other hand, the plaintiff counsel contend that, the application has to be read as a whole. Further relied on the averments in the affidavit that, he has pleaded that now the defendant with an intention to encroach the suit property trying to construct compound wall and carry out the work upon his property. It is pertinent to note that, the plaintiff in the earlier application i.e I.A.No.I also contended that, the defendant is trying to put lay out by encroaching the suit property. Admittedly, the said IA was dismissed by this court by holding that the plaintiff has not made out prima facie case that the defendant is trying to encroach the suit property. Admittedly, the plaintiff has not preferred any appeal challenging the order of dismissal

passed on I.A.No.I by this court. Now, he has come up with the present application alleging that, the defendant is trying to construct the compound wall and carry out the work upon his property. As rightly contended by the plaintiff counsel the averments of the affidavit has to be read as whole. On perusal of the entire averments of the affidavit , it is clear that, the plaintiff alleging that now the defendant is trying to carry out work in his property. Hence, the contention of the defendant that the plaintiff has filed similar application reiterating the same facts holds no water.

15. It is pertinent to note that, the plaintiff rely on the sale deed dated 14-11-1932 and the RTC to show that the suit property i.e. parade no.10 was purchased by Hulaji family and the suit property stands in the name of the Hulaji family. Further rely on Hakku patrike, which is a translated copy but the original is not produced .Relying on the said translated copy entry no.397 contend that the para no.10 was standing in the name of one Kachu Ningappa Tudeyekar. The said person has sold the parade no.10 measuring 6 guntas to Hulaji family i.e Gundu Devappa Hulaji. It is pertinent to note that on perusal of the sale deed and the RTC it is clear that the suit property i.e parade no.10 was standing in the name of Hulaji family. Further the plaintiff rely on the sale deed dated 30-12-2002 to show that he has purchased property measuring east west 16 feet and north south 136 feet out of

the parade no.10 property. Further rely on the unregistered partition deed to show that the suit property was fallen to the share of the Nago @ Nagoji , his vendor. It is pertinent to note that on perusal of the RTC it appears that the parade no.10 stands in the joint name of the Hulaji family. But it is clearly evident from the sale deed of the year 2002 that, the plaintiff has purchased the suit property from one of the owner of the parade no.10. At this stage, this prima facie shows the possession of the plaintiff over the suit schedule property. It is pertinent to note that the defendant in the objection states that, his property i.e parade No.54 abutting to southern side of the suit property. Now, the question is whether the defendant is trying to construct compound wall and carry out the work on the suit property. The plaintiff contend that, the parade no.54 is not situated abutting to his property and contend that the defendants based on the bogus document claiming right over the suit property. Further rely on the mutation translated copy and the RTC contend that in respect of the parade no.54 no measurement is mentioned. It is pertinent to note that, the plaintiff has not placed before the court the original mutation such being the case, the translated copy cannot be relied. On perusal of the RTC of the year 1964 , it appears that in respect of the parade No.54 no measurement is mentioned. Whereas, on perusal of the RTC of the year 1984 in respect of the parade no.54 the measurement of 21 guntas is mentioned. The

defendant rely on the order of Assistant commissioner to show that the appeal filed by the plaintiff against the mutation of the name of the defendant no.1 was rejected. The plaintiff claims that he has preferred appeal against the said order. It is the contention of the defendant that though, the plaintiff claims that, he has constructed the house measuring 1440 sq feet and left open land measuring 736 Sq feet has not placed any material. The plaintiff placed before the court the certificate issued by the Benakalli panchayath, wherein description of the property is mentioned as Rcc but to show that he has constructed RCC building measuring 1440 Sq feet and left open land measuring 736 Sq feet has not placed any material before the court. The plaintiff counsel rely on the averments made in the affidavit and contend that, the defendant is trying to encroach the public road and further contend that, at the time of the sale deed towards the southern side there was sarkari patta and later on road is formed. On the other hand, the defendant contend that the plaintiff has not placed before the court any resolution to show that the property purchased by him was given VPC No.350A and further contend that, the plaintiff has not placed any material to show that towards the southern side of the suit property road is formed. It is pertinent to note that the defendant himself admits that , the suit property situated abutting to the parade no.54. Admittedly, the parade no.10 stands in the name of the Hulaji family. Though, the

defendant claims that, the parade no.10 stands in the name of Huljai family, it is clearly evident from the sale deed that the plaintiff has purchased property measuring 16x136 in parade no.10 from Nago Gundu Hulaji and his family. The plaintiff rely on the earlier photos produced by the defendant, in the photo produced by the defendant earlier there was only poll with barbed wire in all the four sides, now, in the present photo filed by plaintiff the poll with barbed wires are removed and the construction of the compound wall in one side is clearly seen. The defendant contend that, the after conducting the survey of parade no.54 , the survey authorities prepared the computerized extract. On the other hand, the plaintiff contend that, no notice was served upon them. It is pertinent to note that, the defendant himself admit that the suit property is abutting to his property but to show that the notice was served on the adjoining owners no material is placed before the court. The plaintiff at this stage placed before the court the materials to show that he has purchased property measuring 16 x136 in parade no.10. He claims to be in possession of the suit property. It is pertinent to note that whether the parade no.54 is situated abutting to the suit property or not is a matter of trial. On perusal of the earlier photos produced by the defendant and the present photo produced by the plaintiff it appears that, the defendant has removed the poll with barbed wires. The plaintiff allege that the defendant is trying to

carry out work in his property. The plaintiff in the affidavit claims that, the defendant is trying to make development work in the suit property. There is no pleading what type of development work in the suit property. If the defendant put up construction in the suit property it would cause hardship to the plaintiff. The balance of convenience lies in favor of the plaintiff. Hence, the plaintiff only entitle for an order restraining the defendant from putting construction in the suit property. Hence, I answer the point no.1 to 3 in the Affirmative.

16. **Point No.4:-** In view of above discussion, I proceed to pass the following;

ORDER

IA No. II filed by the plaintiff U/O. 39 Rule 1 and 2 R/w sec. 151 of CPC is hereby partly allowed.

The defendant is hereby restrained from putting up construction in the suit property till the disposal of the suit.

No order as to costs.

(Dictated to the Judgment Writer directly on computer, corrected and then pronounced by me in the open Court on 23rd day of May, 2023)

**(BASAVARAJA THULASAPPA NAYAKA)
IV Addl. Civil Judge & JMFC,
BELAGAVI.**

