



IN THE COURT OF CIVIL JUDGE AND JMFC, KITTUR.

PRESENT : Smt. Farha Begum Sayed,
B.A, LL.B,
Civil Judge & JMFC, Kittur.

Dated on this 10th day of January 2024.

OS. No.21/2021.

- 1) Shivangouda S/o Kubendrappa Goudar,
Age:67 Years, Occ: Agriculture,
R/o:Pinjar Oni, M.K. Hubli,
Tq: Kittur, Dist: Belagavi.

Plaintiff..

(By Sri. I. M. Hunashikatti, Advocate)

V/s.

- 1) Iranna S/o Malleshappa Jolad,
Age:70 Years, Occ: Agriculture,
R/o: Neginahal, M.K. Hubli,
Tq: Kittur, Dist: Belagavi.

And others

Defendants..

(By Sri. A.B. Kittur, Advocate)

**COMMON ORDER ON I.A. III AND IV, FILED BY THE
PLAINTIFF UNDER ORDER XVIII RULE 18 OF CPC AND
UNDER ORDER XXXIX RULES 1 AND 2 R/W SECTION
151 OF CPC.**

The IA No.III is filed Under Order XVIII Rule 18 of CPC seeking to conduct local inspection of the suit property in the interest of justice and equity.

Further, IA No.IV is filed Under Order XXXIX Rules 1 & 2 of CPC, seeking for temporary injunction restraining the defendants from alienating the suit schedule property till the disposal of this suit.

2. To the application U/o.XVIII Rule 18 of CPC the plaintiff has sworn the affidavit by stating that the plaintiff has filed this suit seeking the relief of declaration and permanent injunction against the defendants and that the originally suit property was the ancestral property of the plaintiff's father. That the father of the plaintiff has sold the same to the father of defendants No.1 and 2 on 21.01.1959. That the remaining property of plaintiff is also situating abutting the said property. That the father of plaintiff plaintiff and plaintiff were using the suit pathway for their ingress and egress along with bullock-cart, tractors and coolies without any interference by the defendants. The plaintiff was in use of the suit way since 70 long years, but now the defendants are obstructing the right of easement of the plaintiff over the suit way. As such, in order to ascertain the real controversy between the plaintiff & defendants, it is necessary for this Court to conduct a local inspection. Hence, prayed to allow the application in the interest of justice and equity.

3. To the application U/o.39 Rules 1 and 2 of CPC, the plaintiff has sworn the affidavit and averred that, after vacating the temporary injunction on 01.04.2021 in this case on IA No.I, the defendants colluding with the ADLR Bailhongal have illegally got created the mutation entry by making Phodi with

respect to suit property in order to sell the suit property. If the defendants are succeeded in their illegally activities, it will cause the hardship to the plaintiff as well as to the subsequent purchasers also. Further, the number of litigation will certainly increase and it will cause mental and economical hardship to the plaintiff. Therefore, the plaintiff has got prima facie case and the balance of convenience also lies in favour the plaintiff. If the temporary injunction is not granted, the plaintiff will be put into irreparable loss and hardship. Hence, prayed to allow the application in the interest of justice and equity.

4. The defendants have filed the detailed separate objections to the IA No.III and IV.

In the objection to the IA No.III it is contended by the defendants that, the contents of the affidavit filed in support of IA by the plaintiffs are all false frivolous and vexatious and hence same is deserves to be rejected. It is specifically contended that Order XVIII Rule 18 is not enabling to file any such application, it is the discretionary power of the Court. That the plaintiff in the month of June 2021 had intentionally dug the mud wall abutting the main road in order to create so called way. The present application is not maintainable in the eye of law. The plaintiff cannot insist this Hon'ble Court to conduct such inspection by way of filing such interim application. Therefore, prayed to dismiss the IA.

In the objection to the IA No.IV it is contended by the defendants that, the contents of the affidavit filed in support of

IA by the plaintiffs are all false frivolous and vexatious and hence same is deserves to be rejected. Further it is contended that after vacating the temporary injunction the plaintiff did not file any appeal. There is no suit way as contended by the plaintiff in his pleadings. The defendants have got obtained 11-E sketch for their land by making phodi procedure, but they did not intending to sell the said property. Further, there is no prima facie case is made out by the plaintiff and the balance of convenience is also does not lies in his favour, as such the plaintiff is not entitled for the temporary injunction as prayed. Hence, prayed to dismiss the IA No.IV with heavy cost.

5. Heard both the sides and perused all the available materials on record.

6. To decide this IA, the following points arise for the consideration of this Court :

POINTS

1. Whether the applications filed by the plaintiff deserves to be allowed?
2. Whether the plaintiff has made out a prima facie case?
3. Whether the balance of convenience lies in his favour?
4. Whether the plaintiff suffer from irreparable damage if TI is not granted?

7. Having done so, the answers to the aforesaid points are as hereunder:-

Point No.1 : In the negative.
Point No.2 : In the negative.
Point No.3 : In the negative.
Point No.4 : In the negative.

8. Points No.1 to 4:- Since, these points are inter connected to each other, in-order to avoid repetition of facts & findings, all these points are taken up together from common discussion at one stretch.

9. It is the case of the plaintiff that, he is the absolute owner of the property bearing RS No.400/1 measuring 01 acres 21 guntas and the defendant are his neighbors. The plaintiff and his ancestors are in possession of the aforesaid property from more than 50 years and are using the suit way for ingress and egress through bullock carts and tractors for the purpose of transporting food materials grown on their land. However, the defendants have started obstructing the plaintiff to use the suit way, as such he is unable to transport the food grains which have been grown from past 1 year. Hence, the plaintiff has constrained to filed this suit. Now the plaintiff contends that the defendants are trying to alienate the suit schedule property to cause loss to the plaintiff.

10. The defendants in their objections have totally denied the case of the plaintiff. It is pleaded in the objections that, the suit way which the plaintiff is alleging is not at all in existence, as such there is no question of the plaintiff and his ancestors

using the same. Further, it is the defence of the defendants that, the defendants wanted to create a map of their 1 acre land in RS. No.400/1 as such they have approached the Survey Authorities for phodi proceedings i.e. to create 11-E map regarding 1 acre of land which will enable the defendants to obtain loan for the purpose of improving the said land. The plaintiff being his neighbor though has every right to approach the Survey Authorities for the purpose of conduct of phodi proceedings, he has filed objections to the application filed by the defendants by falsely stating that, the defendants are trying to alienate 1 acre of land. Since, his ill will is not fulfilled, he has filed this false suit and obtained the order of temporary exparte injunction by suppressing the material facts and submitted the same to the survey authorities to stop the phodi proceedings. Further, it is contended by the defendants that, absolutely there is no right to way, the very main intention of the plaintiff is to stop the phodi proceedings undertaken by the survey authorities. The plaintiff has intentionally concealed the fact that there is a public road touches Sy. No.400 running from M. K. Hubli-Bailhongal road to Hunashikatti village. Further, he has concealed the fact that, there is a foot way running from the very land of the plaintiff towards the eastern side in between Sy. No.401 and 402. The plaintiff is in use and occupation of that public road running towards Hunashikatti village situated on the northern side of RS. No.400 and also using foot way runs from his land as stated above. Along with this pleadings, the defendants have also filed objections that the application of plaintiffs U/Order XVIII Rule 18 is

misconceived and not maintainable. That the inspection of property as provided under said provision is on the discussion of the Court and not for the party to file application for the same. That defendants are not intending to sell the their property. That the defendants being the owners have absolute rights to alienate the same irrespective of right of way as falsely contended by the plaintiff. With other contentions defendants prays to dismiss the applications in the interest of justice and equity.

11. The plaintiff has submitted that, he is unable to transport the food grains which have been grown by him as the defendants are obstructing the plaintiff from using the way which is situating in the land of defendants.

12. However, the defendants have denied the existence of the suit way itself. In the earlier order of this Court it has been observed that there is no recitals with regard to the easmentory right/right of way in the sale deed. The defendants have furnished the village map, in which the suit property situated. From the record, it prima facie appears that, there is a public road which touches Sy. No.400 running from M. K. Hubli-Bailhongal road. Further, to the eastern side of the plaintiff's property it appears that there is a foot way, the plaintiff can use the same. It was vehemently argued by the learned counsel for the plaintiff that, though there exists a place but the same is covered by water as such the plaintiff is unable to use the same. It is well settled law that, when the alternative access is available for the plaintiff, there is no

question of claiming easementary right. In other words, whenever the easement is claimed, the claimant must satisfy that absolutely there are no alternative ways for him to reach his land except the one which has been claimed. In the present case on hand, this Court is not convinced that, absolutely there are no other ways for the plaintiff to reach his land. With these observations the IA No.I filed Under Order XXXIX Rule 1 and 2 against the defendants to restrain them from obstructing the plaintiff from using the way situating in the land of defendants had been dismissed.

13. Now the plaintiff has come up with another application Under XXXIX Rule 1 and 2 to restrain the defendants from alienating their property in any manner. When plaintiff has not made out prima facie case and when there is also another way to reach his land then plaintiff cannot pressurize the other party to act on his behalf or in his favour by using the process of Court. The plaintiff has no interest or rights in the land of defendants. The defendants can alienate their property in any manner they wish, irrespective of right of way if any by the plaintiff. The defendants will only alienate the land which will not effect the existence of land or the way as contended by the plaintiff and it will situate at the same place as only the owners in the papers will be changed and not the land. It is for the plaintiff to establish his right under easement of necessity and also the prescription as contended by plaintiff. There is absolutely no prima facie case made out by the plaintiff in seeking the injunction against the defendants from alienating

their property. Further., if said application is allowed, no hardship and inconvenience will cause to the defendants and not to the plaintiff. Therefore, the application of the plaintiff to restrain the defendants from alienating their property is devoid of merits and cannot be allowed.

14. Further, it is upon the plaintiff to first establish his right of way in accordance to law of easement, for which the plaintiff has to lead the cogent evidence and defendants have the opportunity to lead rebuttal evidence. After the evidence is concluded, if there is ambiguity or if it appears absolutely necessary to the Court to appoint the Court commissioner or to inspect by itself the properties then the application filed under order XVIII Rule 18 has to be considered. Such application at this stage of the case cannot be considered. The plaintiff is at liberty to file the similar application after the conclusion of trial if necessary. Therefore, the applications filed by the plaintiff liable to be dismissed. As such **all these points are answered in the negative.**

ORDER

The IA No.III under XVIII Rule 18 and IA No.IV U/O. XXXIX Rule 1 & 2 of CPC filed by the plaintiff are hereby dismissed with cost of Rs.3,000/-.

(Dictated to the Stenographer, on online computer. The same is corrected, signed and then pronounced by me in open Court on this 10th day of January 2024)

(Smt. Farha Begum Sayed)
**Civil Judge & JMFC.,
Kittur.**