

IN THE COURT OF THE PRL. CIVIL JUDGE & JMFC.,
HARIHARA

Present: Smt.Bennikal Sumalatha. B.A, L.L.M.,
Prl. Civil Judge & JMFC,
Harihara.

DATED THIS 30th DAY OF NOVEMBER, 2019

O.S.No.156/2013

PLAINTIFF/S:- Smt.Basamma
W/o A.G.Dharmappa,
Aged about 42 years,
Agriculturist and household worker,
R/o Naditavare Village,
Harihara Taluk,
Davanagere District.

(By Sri.M.N., Advocate)

-Vs-

DEFENDANT/S:- Chandrashekharappa.Y.S
S/o Ningappa,
Aged about 55 years,
Agriculturist,
R/o Nanditavare Village,
Harihara Taluk,
Davanagere District.

(By Sri.N.H., Advocate)

DATE OF PRESENTATION
OF THE SUIT : 03.09.2013

NATURE OF THE SUIT : Permanent Injunction

EVIDENCE RECORDED ON : 10.11.2016

JUDGMENT PRONONUNCED ON : 30.11.2019

DURATION OF THE SUIT : Year/s Month/s Day/s
-06- -02- -27-

:: J U D G M E N T ::

This is a suit filed by the plaintiff seeking for the relief of permanent injunction against the defendant to restrain the defendant, his family members, brothers, agents or anybody acting on his behalf from disturbing with the peaceful possession and enjoyment of 'D' schedule road by the plaintiff and her family members and for other reliefs.

2. The brief facts of the plaint are that:

The plaintiff submits that, one Nandyappa and Channabasappa were brothers. Nandyappa married Hanumamma. They had two sons by name Mahadevappa and Basavanagowda. Mahadevappa and his wife Nandyamma had 3 children by name Shekharappa, Nirmalamma (dead) and Drakshayanamma. Mahadevappa and Nandyamma died long back. Basavanagowda S/o Nandyappa and his wife Gangamma have 2 daughters by name Basamma (plaintiff)

and Manjula. The plaintiff's parents died long back at Nanditavare Village.

Channabasappa and his wife had two daughters by name Nandyamma, Siddamma. Nandyamma and her husband Ningappa have 5 children by name Chandrashekarappa.Y.S (defendant), Gowramma, Nagamma, Eramma, Nagappa.Y.

The plaintiff further submits that, Nandyappa and Channabasappa got oral partition in their family properties. They owned a thrashing floor and residential house in Nanditavare Village i.e., 'A' schedule property and same was equally divided between Nandyappa and his brother Channabasappa long back, half portion towards northern side had fallen to the share of Channabasappa i.e., 'B' schedule property and southern side half portion khana had fallen to the share of Nandyappa i.e., 'C' schedule property. Both are enjoying their share independently.

After the partitioned in between Nandyappa and Channabasappa, they formed card road in Channabasappa's khana in order to reach 'C' schedule property belonging to

Nandyappa. The said cart road runs from 'Kere road' through 'B' schedule property, north to south until A.G.Basappa's house. During the life time of Nandyappa and Channabasappa, they had been using the said road i.e., 'D' schedule property. There is no other road to reach 'C' schedule property except 'D' schedule road. The father of the plaintiff, his brother had been enjoying the same without any interference. The father, mother and grand-father of the defendant had been enjoying the 'D' schedule road since long years.

The plaintiff further states that, on 29.01.1981, the father of the plaintiff and his elder brother Mahadevappa got divided family property through registered partition deed. As per the said partition deed in Khanesumari No.115 one Ankana Flat roofed and red tied house and khana East-West 81 feet and North-South 48 feet had fallen to the share of Mahadevappa towards northern side. In the same survey number, 4 Ankana flat roofed house and vacant site (khana) measuring East-West 81 feet, North-South 44 feet had fallen

to the share of Basavangowda towards southern side. In the partition deed the said path road is mentioned as 'Shekharappana mane mattu Mahadevappanavara Odaduva Bandi Dari.' Mahadevappa and Basavanagowda had been using the 'D' schedule property to reach their residential houses and rick-yard.

On 17.02.1994 the plaintiff's father had purchased one Ankana flat roofed house measuring 22 X 9 feet from Mahadevappa through a registered sale deed, hence, the same had been owned by father of the plaintiff, which is situated towards western side of khana. Mahadevappa had sold his thrashing floor to one Y.S.Basavaraj about 20 years ago through registered sale deed. Since, the plaintiff, defendant and Y.S.Basavaraj have been using 'D' schedule property peacefully. On 28.04.2001, the plaintiff and her sister Manjamma and their father got divided their family properties through registered partition deed. The house property and vacant site (khana) has fallen to the share of plaintiff. From the date of partition, the plaintiff has been in lawful

possession and enjoyment of her properties by using the 'D' schedule road.

About 50 to 60 years, the father of the plaintiff, plaintiff and her family members have been regularly using 'D' schedule property for stock, transfer haystack, manure soil etc in the 'E' schedule property peacefully without any interference. There is no alternative road to this plaintiff except the 'D' schedule land. Y.S.Basavaraj has filed suit for permanent injunction and for mandatory injunction against the plaintiff in O.S.No.18/2007 on the instigation of Y.S.Basavaraj, which is pending before the Court. On 18.07.2013, the defendant came near the 'D' schedule property and parked his tractor-trailer across the 'D' schedule road with intention to obstruct the plaintiff. Hence, the plaintiff is constrained to file this suit.

3. After institution of the suit, summons was issued to the defendant and defendant was served with summons and has appeared before the court through his counsel and has contested the matter by filing the written statement.

4. In the course of written statement filed by the defendant, he has denied all the plaint averments and insisted upon putting the plaintiff to strict proof of the same. Further submits that, one of the ancestors of Late Mahadevappa having 2 sons by name Nandyappa and Channabasappa, they have divided their movable and immovable properties long back and are in peaceful possession and enjoyment of the same separately. One Mahadevappa's first son Nandyappa had 2 sons namely one Mahadevappa and Basavanagowda, and on 29.01.1981 both have got registered partition of the movable and immovable properties and enjoying the same separately. One Mahadevappa in the said partition deed has got Khanesumari No.115 four Ankana Maligi house along with vacant site measuring 81 X 44 feet, during the time of partition , it was wrongly mentioned as on northern side Shekharappa's house and Mahadevappanavaru Odaduva Bandi Daari. The plaintiff is making use of the said wrong entry that has been created towards northern side there comes the card road which leads to kere.

Further states that, the defendant has went for the adoption to Channabasappa long back as he has not got the male children, hence, his daughter Nandyamma's son ie., the defendant has taken the adoption and he being the legal heirs of the deceased Channabasappa and after his death he is in peaceful possession and enjoyment of the same. Further states that, before the house of the plaintiff towards western side there comes village main road, which leads to the C and E schedule property of the plaintiff, further as well as from the said village main road towards northern side of the schedule property there comes kere road which leads from the houses of one Gutepps, Nagappa, and Murthappa and other properties from Eastern side there is a public road directly connecting the property of the plaintiff. There is no existence of 'D' schedule road as shown by he plaintiff and there is no existence of 'A' to 'E' schedule properties. As per 'E' schedule East and West: mentioned the road, North: defendant's house, South: Y.S.Basavarajappa's house. But as per the property documents towards northern side there comes the house of

defendant but not at all any road of the plaintiff as mentioned in his plaint.

It is further submitted by the defendant that, the brother of plaintiff's father Late Mahadevappa had sold the part of property to one Y.S.Basavaraj through a registered sale deed dated 17.02.1994 in its schedule clearly mentioned that towards 'E' schedule northern side: property of defendant existed. The defendant's house list shows the boundaries that towards East there exists the house of Guteppa, West: Main Road, North: Ring road (Kere road), South: Agasi Baiglu Basavanagowda. Hence, the plaintiff has created false boundary in her plaint. Hence, prays to dismiss the suit.

5. On the basis of the pleadings of the parties following issues are framed:

:- I S S U E S :-

- 1) Whether the plaintiff proves the existence of suit schedule 'D' road ?
- 2) Whether the plaintiff proves that she has been using the suit schedule 'D' road to approach her property ?

- 3) Whether the plaintiff proves the alleged interference of the defendant with her use and enjoyment of the suit schedule 'D' property ?
- 4) Whether the plaintiff is entitled for the relief of perpetual injunction ?
- 5) What Order or Decree?

Additional Issue :

1) Whether the suit is maintainable without seeking the relief of declaration ?

6. In order to prove the plaintiff's case, the plaintiff has examined herself as PW.1 and examined another witness by name Basavarajappa as PW.2 and got marked 35 documents as Ex.P.1 to P35 documents viz., Ex.P.1 – C/c of partition deed dated 29.01.1981, Ex.P.2- Tax paid receipt, Ex.P.3- House list register of 327/1 and 327/2 (new No.376, 377), Ex.P.4 & 5 – RTC extracts of Sy.No.85/1P2 and 85/2AP1, Record of Rights, Ex.P.6 to 16- 10 photographs, Ex.P.17- one C.D, Ex.P.18- copy of mutation register, Ex.P.19 to 21 -tax paid receipts, Ex.P.22- C/c of sale deed dated 17.02.1994, Ex.P.23- House list register New No.375 (Old No.326), Ex.P.24-

to 34- 11 photographs, Ex.P.35- photo studio receipt respectively.

Defendant examined himself as DW.1 and examined other 2 witnesses namely Shivakumar and Parameshwarappa and got marked 2 documents as Ex.D.1 and D.2 viz., Ex.D.1 – Tax paid receipt of Sy.No.111 and Ex.D.2- tax paid receipt of house property respectively.

7. Heard the arguments from both sides.

8. My findings to the above issues are as under:-

Additional Issue No.1- In the Negative

Issue No.1 - In the Affirmative

Issue No.2 - In the Affirmative

Issue No.3 - In the Affirmative

Issue No.4 - In the Affirmative

Issue No.5 - As per final order

:- R E A S O N S :-

9. **Issue No.1, 2 and 3:-** These issues are taken together for discussion as they are interlinked with each other and emanate from same set of facts so also they require common discussion.

The burden of proving these issues is cast upon the plaintiff and the plaintiff in order to prove the same has

examined herself as PW.1 and PW.2 as her supporting witness and got marked documents Ex.P.1 to P.35.

10. Here it is pertinent to note that there is variation with respect to rough sketch produced by the plaintiff and the sketch produced by the Court Commissioner. Anyhow, since the sketch appended to commissioner report is not disputed by both the parties, for the sake of convenience and case discussion, the commissioner report sketch shall be taken for reference. The disputed **road** 'D' schedule property is shown in the commissioner sketch and the existence of the same is also admitted by defendant during his cross-examination, even though denied during the course of his written statement. The question that is arising for the sake of consideration here is, whether the plaintiff has been using the said 'D' schedule road for the purpose of access to her **C/E** schedule property ? Hence, let us venture upon the material placed by the plaintiff both oral and documentary to prove that, she has been using 'D' schedule road to reach her **C/E** schedule property.

11. The plaintiff during the course of her chief-examination has reiterated the plaint averments. The plaintiff has mainly relied upon Ex.P.1 document, which is a partition deed entered into between Mahadevappa and Basavanagowda at an undisputed point of time. In have meticulously gone through the pleadings and documents produced by both parties and the commissioner report. Admittedly, the plaintiff and defendant are relatives and while the plaintiff represents the branch of Nandyappa, the defendant represents the branch of Channabasappa. It is also not dispute that said Nandyappa and Channabasappa and their successors have got divided their properties from time to time. While 'B' schedule property belongs to defendant, **E/C** schedule property belongs to the plaintiff. However, while the plaintiff claims that, there is 'D' schedule cart road through the property of defendant and that the plaintiff and her ancestors have been using the said 'D' schedule cart road for the transportation of haystack, firewood etc., through tractor-trailer and bullock cart etc., the defendant denies any legal

right and usage of the plaintiff over 'D' schedule cart road and specifically contends that, the plaintiff has alternative East-West passage, as well as the road leading from the main road towards the western side of the plaintiff's and defendant's houses, which would lead to '**C/E**' schedule property of the plaintiff. However, the C/c of the partition deed dated 29.01.1981 i.e., Ex.P.1 between Mahadevappa and Basavanagowda, the sons of Nandyappa, discloses that, there exists the cart road (disputed 'D' schedule road) towards the northern side of plaintiff's **C/E** schedule property. It is pertinent to note that, this registered partition deed is entered into between the sons of Nandyappa at an undisputed point of time and as such the chances of creation of the same to put forth claim for the cart road is remote. Even the Court commissioner has submitted report that, there is existence of 'D' schedule cart road through the property of defendant.

12. The defendant has contended that, there are alternative ways to reach **C/E** schedule property, but with regard to the same, the defendant has not produced any single

piece of evidence to show that, there exist alternative ways to reach '**C/E**' schedule property. It is the settled principle of law that, to claim right of way, the plaintiff must prove that, there was no other access to her property, except through the disputed way. While the defendant has not produced any evidence to substantiate his version of alternate passages, the plaintiff on the other hand has counter attacked the defendant's case by producing photographs Ex.P.7 to 16 and Ex.P.24 to 34, Ex.P.1 and has also elicited good number of admissions from the mouth of DW.1 and DW.2. The defendant has been unable to break the chain of consistency in the plaintiff's case and no admissions with regard to existence of alternate passage other than 'D' schedule cart road are elicited from her mouth.

13. During the course of cross-examination of DW.1 and DW.2, on confrontation to them Ex.P.25 photograph, they have admitted that, to the east of plaintiff's **C/E** schedule property there exists the houses of Gutteppa, Nagappa and Gangappa. It is also admitted by DW.1 that, except the way

leading to khana of defendant, the surroundings of khana running all along east to west is fenced. Hence, one can assume that, there is no way east to west to reach the khana/**C/E** schedule property of plaintiff, except the 'D' schedule cart road. On perusal of Ex.P.24 photograph also it is clear that, it is the main road towards the western side of the houses of plaintiff and defendant and as it is we can see that, there is no way leading from that main road to the **C/E** schedule property. As per commissioner's report there is a alternate passage as contended by the defendant, but that passage is only a 'Kaaludaari' (foot track, walk path) and cannot be used for transportation of bullock cart and tractor. The defendant has not even chosen to challenge the commissioner's report and under such circumstances there are no reasons to disbelieve the same. It is clearly reported in the commissioner report that, there is no other alternative way to the plaintiff to reach '**C/E**' schedule property other than the 'D' schedule cart road. Further it is also admitted by DW.1 and DW.2 that towards the south of '**C/E**' schedule property there exists the

house of A.G.Basappa and Y.S.Basavaraj houses. When such being the fact, it is clear from the above narrated facts and circumstances, there is no other alternative way to the plaintiffs to reach C/E schedule property except the 'D' schedule cart road.

14. The defendant has examined another witness DW.3 in support of his case, who has given admissions as good as DW.1 and DW.2 and also admits that, except 'D' schedule cart road there is no other alternative road to reach C/E schedule property.

15. Ex.P.3 and Ex.P.23 are the house list extracts of plaintiff and defendants respectively and it is suggested by defendant during cross-examination to PW.1 that, there is no mention of existence of 'D' schedule cart road in the said documents, which is admitted by PW.1, but that admission is of no aid to defendants because there is documentary evidence/Ex.P.1-C/c of partition deed dated 29.01.1981 and also sufficient oral evidence on record to show that, there is existence of 'D' schedule cart road. Except Ex.P.3 and 23 and

the photographs produced by plaintiff, the defendant has not disputed any other document.

16. The evidence of PW.2 has been of no avail to the plaintiff's case, since he has not deposed anything as such in support of plaintiff's case. The witnesses for defendant, DW.2 and DW.3 have caused more destruction to the defendant's case, rather than favouring the defendant's case. Ex.D.1/ tax paid receipt (Sy.No.111) and Ex.D.2/ tax paid receipt of house property, are of no aid to defendant's case.

17. The question of interference by the defendant with the use and enjoyment of the suit schedule 'D' property is not at all in dispute, since DW.1 has given clear admission on confrontation of Ex.P.11 photograph that, on 18.07.2013 he has caused interference by parking his tractor in a manner causing hindrance to the use of 'D' schedule cart road by plaintiff to reach **C/E** schedule property.

Resultantly for the discussion made supra, I answer issues No.1, 2 and 3 in '**Affirmative.**'

18. Additional issue No.1: As per the decision in **R.F.A.506/2010 between M/S Spring Borewells Co.Pvt Ltd., V/s Union of India, the Hon'ble High Court of Karnataka** has observed that,

“when the plaintiff claims easementary right over another’s property by way of prescriptive right and seeks protection of such right, it is a requirement that the relief of declaration should be prayed with pleadings to support such prayer and consequently seek protection by injunction.”

But in counter to this Authority, there is an Authority of our Hon'ble Apex Court in a decision laid down in **Ramakanya Bai and Anr., V/s Jagadish and Ors.**, wherein, it is observed in para No.10 of the Judgment that ***“When a person (dominant owner) has an easementary right, and the servient owner disturbs, obstructs or interferes with his easementary right, or denies his easementary right, the remedy of the dominant owner is to approach the civil court for the relief of declaration and/or injunction.”***

In the background of the decision of the Hon'ble Supreme Court quoted above, the former decision of Hon'ble High Court of Karnataka cannot be considered as a precedent and hence not applicable to the present case in hand.

19. The plaintiff has relied upon the following decisions in support of her case -

1) ***ILR 1996 KAR 465 in between Puttegowda @ Ajjegowda V/s Ramegowda***- wherein it is held that-

“That as regards the technical point raised by the Counsel for defendant-appellant to the effect that the plaintiff's suit for permanent injunction is not maintainable, in view of the fact that the plaintiff respondent has not formally claimed relief, namely, declaratory decree to the effect that plaintiff be declared to have acquired or to be possessed of easementary right of passage over the land in dispute, has got no substance for the reasons hereinafter.”

“In the case of Corporation of the City of Bangalore v. M. Papanna, the Hon'ble Supreme Court has been

pleased to lay down the law in this regard as per paras 2 and 4 of the Decision....”

“the suit for permanent injunction cannot be dismissed simply on the ground that relief for decree for declaration of title has not specifically been claimed or mentioned in plaint if the plaint shows that plaintiff's claim for injunction is based on his title or right asserted in the body of the plaint in other words plaint makes it clear that the suit has been filed for establishing title of plaintiff and on that basis is seeking the decree for permanent injunction against defendant – appellant.”

The Authority cited above and the ratio held therein are rightly applicable to the facts and circumstances of this case and are imbibed in the case discussions, wherever necessarily applicable.

2) AIR 1989 SC 1809 ***in between Corporation of the City of Bangalore V/s Papaiah And Anr.,-*** wherein it is held that-

“.....It is well established that for deciding the nature of a suit the entire plaint has to be read and

not merely the relief portion, and the plaint in the present case does not leave any manner of doubt that the suit has been filed for establishing the title of the plaintiffs and on that basis getting an injunction against the appellant Corporation. The court fee payable on the plaint has also to be assessed accordingly. It follows that the appellant's objection that the suit is not maintainable has to be rejected. The additional Civil Judge, who heard the appeal from the judgment of the trial court, examined the question of plaintiffs' title and rejected their case. The question of possession was also separately taken up, and it was found that the plaintiffs had failed to prove their possession until 24.8.1973 when they allege that the appellant Corporation trespassed. Accordingly, the appeal was allowed and the suit was dismissed."

The facts and circumstances of this case does not apply to the present case in hand and hence not applicable. Hence, for the discussion made supra, I answer Additional issue No.1 is '**Negative.**'

20. Issue No.4: For the reasons stated supra in issues No.1, 2 and 3, I answer Issue No.4 in '**Affirmative.**'

21. Issue No.5:- In view of my findings in Issues No.1 to 4 and Additional Issue No.1, I proceed to pass the following;

:- ORDER :-

The suit of the plaintiff is hereby decreed with costs.

The defendant, his family members, brothers, agents or anybody acting on his behalf are permanently restrained from disturbing with the peaceful possession and enjoyment of 'D' schedule road by the plaintiff and her family members.

Draw decree accordingly.

(Directly dictated to the Stenographer on computer same is corrected and signed and then pronounced by me in the open court on this 30th day of November 2019)

Sd/-
(BENNIKAL SUMALATHA)
Prl.Civil Judge & JMFC.,
Harihara.

:: A N N E X U R E ::

1. **List of Witnesses examined for the Plaintiff/s:**
PW.1 - Basamma
PW.2 - Basavarajappa
2. **List of Witnesses examined for the Defendant/s:**
DW.1 - Chandrashekharappa.Y.S
DW.2 - Shivakumar
DW.3 - Parameshwarappa
3. **List of Documents exhibited for the plaintiff/s:-**
Ex.P.1 - C/c of partition deed dated 29.01.1981,
Ex.P.2 - Tax paid receipt,
Ex.P.3 - House list register of 327/1 and 327/2
(new No.376, 377),
Ex.P.4 & 5- RTC extracts of Sy.No.85/1P2
and 85/2AP1, Record of Rights,
Ex.P.6 to 16- 10 photographs,
Ex.P.17 - one C.D,
Ex.P.18 - copy of mutation register,
Ex.P.19 to 21- Tax paid receipts,
Ex.P.22 - C/c of sale deed dated 17.02.1994,
Ex.P.23 - House list register New No.375
(Old No.326),
Ex.P.27 to 34- 11 photographs,
Ex.P.35 - photo studio receipt
4. **List of Documents exhibited for the Defendant/s:-**
Ex.D.1 - Tax paid receipt of Sy.No.111
Ex.D.2 - Tax paid receipt of house property

Sd/-
(BENNIKAL SUMALATHA)
Prl.Civil Judge & JMFC.,
Harihara.