



**IN THE COURT OF THE ADDL. SENIOR CIVIL JUDGE,
GADAG.**

PRESENT : Prakash Channappa Kurabett
Bsc, LLB.,(Spl)
Prl. Senior Civil Judge & CJM, Gadag.
C/c. Addl. Senior Civil Judge, Gadag.

O.S. No. 14/2022

Dated this the 2nd day of March 2023

PLAINTIFF:

Subhas S/o Nagendrasa Pawar,
Age : 40 years, Occ : Agriculture & Business,
R/o Bankers colony, Keshav nagar, Gadag,
Tq: Dist: Gadag.

(By Sri. VAC Adv.,)

-Vs-

DEFENDANTS :

1. Bapugouda S/o Basanagouda
Surappagoudra, Age : 65 years,
Occ : Agriculture, R/o Narayanpur,
Tq: Dist: Gadag.
2. Abdulrajak S/o Rajesab Danked
Age : 54 years, Occ : Agriculture,
R/o Taj Nagar, Hubli road, Gadag
Tq: Dist: Gadag.

**(D1 by Sri. AAH Adv.,
D2 by Sri. BMS Adv.,)**

Date of institution of suit.	:	14.01.2022
Nature of the suit	:	Declaration and
	:	Injunction
Date of commencement of recording of Evidence.	:	-
Date on which the judgment was pronounced	:	20.02.2022
Total duration	:	Year/s Month/s Day/s
		00 01 06

ORDER ON PRELIMINARY ISSUES

This is a suit filed by the plaintiff against the defendants for the relief of declaration to declare that, he is the owner of suit property as per the Will executed by his father deceased Nagendrasa in favour of plaintiff on 23.03.1994 in respect of suit property bearing Sy. No.286/1 situated at Gadag and also for consequential relief of permanent injunction against the defendants restrain them from obstructing the peaceful possession and enjoyment of the plaintiff over the suit property

2. The brief averments of the plaint are as follows:

The suit property is the agricultural land bearing sy. No.286*/1 measuring 7 acres 4 guntas situated within the limits of Gadag. The father of the plaintiff by name Nagendrasa Pawar was died on 25.06.2009, he was having movable and immovable properties. The plaintiff is the Class-I heir of deceased Nagendrasa. The suit property original Sy. No.286/2, it has been changed as Sy. No.286*/1. The said property belong to defendant No.1. The defendant No.1 has executed mortgage deed

on 11.10.1990 in favour of father of plaintiff and his name was mutated as owner and in possession of the said property. After the death of father of plaintiff, the plaintiff is in possession of the same.

3. Further it is case of the plaintiff that, the defendant No.1 behind the back of plaintiff got mutated his name in the year 2002 during the lifetime of said deceased Nagerndrasa in respect of suit property. But the defendant No.1 is not in possession of the said property till today. The defendant No.1 was transferred and given possession of the said property in favour of deceased Nagendrasa due to his family necessities and executed registered deed in favour of father of plaintiff.
4. Further it is case of the plaintiff that, the said Nagendrasa was in care and custody of plaintiff during his old age and the plaintiff was also look after him, out of love and affection towards the plaintiff, Nagendrasa executed Will in favour of plaintiff on 23.03.1994 in respect of suit property. But the defendant No.1 illegally, without having any right got mutated his name in respect

of suit property and executed sale deed in favour of defendant No.2 in respect of said property on 09.04.2015. The name of Nagendrasa appearing continued from 1990 to 2001 in the suit property.

5. Further it is case of the plaintiff that, on the basis of said alleged sale deed executed by defendant No.1 in favour of defendant No.2, the defendant No.2 obstructed the peaceful possession and enjoyment of the suit property. After came to know the said fact, the plaintiff traced out Will executed by his father in respect of suit property. By virtue of the said Will the plaintiff is the owner and in possession of the suit property. Hence, the plaintiff has constrained to file this suit.
6. After institution of the suit, suit summons were issued to the defendants. The defendants have appeared before this court through their respective counsels and filed their separate written statements.
7. **The written statement filed by the defendant No.1 is as under:**

The defendant No.1 has denied all the plaintiff allegations and contended that, the suit of the plaintiff is not maintainable. Further contended that, the court fee paid by the plaintiff is not proper. Further contended that, the plaintiff has created Will deed dated 23.03.1994, it is unregistered, sham, Bogus and forged document. The signature on the said Will is created, he has over write in 1st page of 4th line as “ ಶ್ರೀ ನಾಗೇಂದ್ರಸಾ ತಂದೆ ಸುಬ್ಬಣ್ಣಸಾ ಪವಾರ ” . At the time of execution of said Will deed Nagendrasa was not owner, not having title over the suit property.

8. Further contended that, in the column No.11 other rights and encumbrances the name of one Babugouda B. Surappagouda has been appeared, as per Sec. 58 of Transfer of Property Act, in the ownership column original owner name is to be kept and in column No.11 mortgagee name is to be kept, but as per the RoR produce by the plaintiff, the mortgagee name has been mentioned as if he is the owner, it can not be possible to enter the name of the mortgagee as a owner in the

property extract of immovable property. The said mortgage deed is usufructuary mortgage in such a usufructuary mortgage as per Sec. 58(g) of Transfer of Property Act the said mortgagee can not claim the ownership and title of the said immovable property against the true owner (mortgager).

9. Further contended that, the defendant No.2 is a real purchaser and has invested huge amount as per sale deed dated 09.04.2015 executed defendant No.1 in favour of defendant No.2 in respect of suit property. The defendant No.2 has purchased the said property after verifying the documents. Hence, the defendant No.2 is bonafide purchaser. But, taking advantage of TI Order the plaintiff interfering peaceful possession and enjoyment of the defendant No.2 over the suit property. Further contended that, the plaintiff has not be explained and what basis his father's name entered in the RoR and also to recover the amount of Rs.50,000/- of the transactions of the mortgage deed by the Nagendrasa no

document has been produced. Hence, the said Nagendrasa no right to executed Will deed.

10. Further contended that, the suit of the plaintiff is barred by law of limitation. Further contended that, by looking to the alleged mortgage deed appears as a usufructous mortgage. As such, mortgagee is always a mortgagee. He never becomes the owner of the suit land, it would be valid till another period of 3 years. There is no renewal of the same deed of mortgage after laps of 3 years from 11.10.1990 or after laps of 3 years i.e., 11.10.1993. Hence, the said deed of mortgage is nonest in law. Further contended that, the plaintiff has not produced document dated 11.03.1986, further the original document on which the plaintiff relies is not produced. Further no documents are produced by the plaintiff towards the possession of his father, after the death of his father the possession of the plaintiff is not produced before this court. Further no survival certificate, ration card, Adhar card, voter list produced by the plaintiff to claim the suit property as a mortgagee after the death of

his father. No prayer is made to declare him as the mortgagee. No document produced by the plaintiff towards the overt and covert acts being made by the father of the plaintiff and later by the plaintiff. Further contended that, if the court comes to conclusion that, there is a deed of mortgage, defendant No.1 is liable to pay Rs.50,000/-, and ready to deposit the same to rescind the contract or rescind the mortgage. Hence, prayed to dismiss the suit with cost.

11. The written statement filed by the defendant No.2 is as under:

The defendant No.2 has denied all the plaintiff allegations and contended that, the suit of the plaintiff is not maintainable. Further contended that, the court fee paid by the plaintiff is not proper. Further contended that, the plaintiff has created Will deed dated 23.03.1994, it is unregistered, sham, Bogus and forged document. The signature on the said Will is created, he has over write in 1st page of 4th line as “ಶ್ರೀ ನಾಗೇಂದ್ರಸಾ ತಂದೆ ಸುಬ್ಬಣ್ಣಸಾ ಪವಾರ” . At the time of execution of said Will deed

Nagendrassa was not owner, not having title over the suit property.

12. Further contended that, in the column No.11 other rights and encumbrances the name of one Babugouda B. Surappagouda has been appeared, as per Sec. 58 of Transfer of Property Act, in the ownership column original owner name is to be kept and in column No.11 mortgagee name is to be kept, but as per the RoR produce by the plaintiff, the mortgagee name has been mentioned as if he is the owner, it can not be possible to enter the name of the mortgagee as a owner in the property extract of immovable property. The said mortgage deed is usufructuary mortgage in such a usufructuary mortgage as per Sec. 58(g) of Transfer of Property Act the said mortgagee can not claim the ownership and title of the said immovable property against the true owner (mortgager).
13. Further contended that, the defendant No.2 is a bonafide purchaser on the date of purchase i.e., 09.04.2015, sale deed executed defendant No.1 in favour of defendant

No.2 in respect of suit property. He has purchased the said property after verifying the documents. Taking advantage of TI Order the plaintiff interfering peaceful possession and enjoyment of the defendant No.2 over the suit property. Further contended that, the plaintiff has not be explained and what basis his father's name entered in the RoR and also to recover the amount of Rs.50,000/- of the transactions of the mortgage deed by the Nagendrasa no document has been produced. Hence, the said Nagendrasa no right to executed Will deed. Hence, prayed to dismiss the suit with cost.

14. On the basis of the above pleadings of the parties this court has framed 16 issues and also 1 additional issue, which are reproduced as under:

ISSUES

1. Whether the plaintiff proves that, the suit property earlier belongs to defendant No.1, and he has executed a registered mortgage deed on 11.10.1990 in favour of father of plaintiff?
2. Whether the plaintiff further proves that, as per mortgage deed the father of the plaintiff is become owner and in possession of the suit property?

3. Whether the plaintiff proves that, out of love and affection the deceased Nagendrasa executed Will in favour of plaintiff on 23.03.1994 and by virtue of same he is the owner?
4. Whether the plaintiff proves that, the defendant No.1 illegally executed Will deed in favour of defendant No.2 on 09.04.2015?
5. Whether the plaintiff proves that, the defendant No.1 is not the owner and he has not having interest, right to sell the suit property to defendant No.2?
6. Whether the plaintiff is entitled for permanent injunction?
7. Whether the defendant No.2 proves that, there is no cause of action to file this suit?
8. Whether the defendant No.2 further proves that, the court fee paid by the plaintiff is not proper?
9. Whether the defendant N.2 proves that, the unregistered Will deed dated 23.03.1994 is sham, bogus, created and forged document?
10. Whether the defendant No.2 proves that, the deceased Nagerndrasa has no right or power to execute the Will deed in favour of plaintiff over the suit property?
11. Whether the defendant No.2 proves that, the mortgage deed is usufructuary mortgage as per Sec.58(g) of the TP Act mortgagee cannot claim ownership in the said immovable property against the true owner?
12. Whether the defendant No.2 proves that, he is the bonafide purchaser for valuable consideration?

13. Whether the defendant No.2 proves that, the suit of the plaintiff is not maintainable under the eye of law?
14. Whether the defendant No.2 proves that, the suit of the plaintiff is hit by law limitation?
15. Whether the plaintiff is entitled for claim as sought in the plaint?
16. What order or decree?

Additional Issue dated: 20.02.2023

1. Whether the suit of the plaintiff is maintainable, on the ground that as one the date of the suit whether the present plaintiff has got any title, right over the property?

Note: Addl. Issue No.1 treated as preliminary issue.

15. Heard the arguments from both sides.
16. On perusing the same, my answers to the above preliminary issues are as under:

Addl. Issue No.1 : In the negative
for the following:

R E A S O N S

17. **Addl. Issue No.1 :-** This suit is filed by the plaintiff against the defendants for the relief of declaration to declare that, he is the owner of suit property as per the Will executed by his father deceased Nagendrasa in

favour of plaintiff on 23.03.1994 in respect of suit property bearing Sy. No.286/1 situated at Gadag and also for consequential relief of permanent injunction against the defendants restrain them from obstructing the peaceful possession and enjoyment of the plaintiff over the suit property. After appearance, the defendants have filed their written statement and this Court has framed the 16 issues and 1 additional issue, among them additional issue No.1 is treated as preliminary issue. Without touching the other issues, it necessary to give findings on preliminary issue.

18. The plaintiff in the plaint stated that, the suit property is the agricultural land bearing Sy. No.286*/1 measuring 7 acres 4 guntas situated within the limits of Gadag. The father of the plaintiff by name Nagendrasa Pawar was died on 25.06.2009, he was having movable and immovable properties. The plaintiff is the Class-I heir of deceased Nagendrasa. The suit property original Sy. No.286/2, it has been changed as Sy. No.286*/1. The said property belong to defendant No.1. The defendant

No.1 has executed mortgage deed on 11.10.1990 in favour of father of plaintiff and his name was mutated as owner and in possession of the said property. After the death of father of plaintiff, the plaintiff is in possession of the same.

19. Further it is case of the plaintiff that, the defendant No.1 behind the back of plaintiff got mutated his name in the year 2002 during the lifetime of said deceased Nagerndrasa in respect of suit property. But the defendant No.1 is not in possession of the said property till today. The defendant No.1 was transferred and given possession of the said property in favour of deceased Nagendrasa due to his family necessities and executed registered deed in favour of father of plaintiff.
20. Further it is case of the plaintiff that, the said Nagendrasa was in care and custody of plaintiff during his old age and the plaintiff was also look after him, out of love and affection towards the plaintiff, Nagendrasa executed Will in favour of plaintiff on 23.03.1994 in respect of suit property. But the defendant No.1 illegally,

without having any right got mutated his name in respect of suit property and executed sale deed in favour of defendant No.2 in respect of said property on 09.04.2015. The name of Nagendrasa appearing continued from 1990 to 2001 in the suit property.

21. Further it is case of the plaintiff that, on the basis of said alleged sale deed executed by defendant No.1 in favour of defendant No.2, the defendant No.2 obstructed the peaceful possession and enjoyment of the suit property. After came to know the said fact, the plaintiff traced out Will executed by his father in respect of suit property. By virtue of the said Will the plaintiff is the owner and in possession of the suit property. Hence, the plaintiff has constrained to file this suit.
22. Per contra, the defendant No.1 has denied all the plaintiff allegations and contended that, the suit of the plaintiff is not maintainable. Further contended that, the court fee paid by the plaintiff is not proper. Further contended that, the plaintiff has created Will deed dated 23.03.1994, it is unregistered, sham, Bogus and forged

document. The signature on the said Will is created, he has over write in 1st page of 4th line as “ ಶ್ರೀ ನಾಗೇಂದ್ರಸಾ ತಂದೆ ಸುಬ್ಬಣ್ಣಸಾ ಪವಾರ ” . At the time of execution of said Will deed Nagendrasa was not owner, not having title over the suit property.

23. Further contended that, in the column No.11 other rights and encumbrances the name of one Babugouda B. Surappagouda has been appeared, as per Sec. 58 of Transfer of Property Act, in the ownership column original owner name is to be kept and in column No.11 mortgagee name is to be kept, but as per the RoR produce by the plaintiff, the mortgagee name has been mentioned as if he is the owner, it can not be possible to enter the name of the mortgagee as a owner in the property extract of immovable property. The said mortgage deed is usufructuary mortgage in such a usufructuary mortgage as per Sec. 58(g) of Transfer of Property Act the said mortgagee can not claim the ownership and title of the said immovable property against the true owner (mortgager).

24. Further contended that, the defendant No.2 is a real purchaser and has invested huge amount as per sale deed dated 09.04.2015 executed defendant No.1 in favour of defendant No.2 in respect of suit property. The defendant No.2 has purchased the said property after verifying the documents. Hence, the defendant No.2 is bonafide purchaser. But, taking advantage of TI Order the plaintiff interfering peaceful possession and enjoyment of the defendant No.2 over the suit property. Further contended that, the plaintiff has not be explained and what basis his father's name entered in the RoR and also to recover the amount of Rs.50,000/- of the transactions of the mortgage deed by the Nagendrasa no document has been produced. Hence, the said Nagendrasa no right to executed Will deed.
25. Further contended that, the suit of the plaintiff is barred by law of limitation. Further contended that, by looking to the alleged mortgage deed appears as a usufructous mortgage. As such, mortgagee is always a mortgagee. He never becomes the owner of the suit land, it would be

valid till another period of 3 years. There is no renewal of the same deed of mortgage after laps of 3 years from 11.10.1990 or after laps of 3 years i.e., 11.10.1993. Hence, the said deed of mortgage is nonest in law. Further contended that, the plaintiff has not produced document dated 11.03.1986, further the original document on which the plaintiff relies is not produced. Further no documents are produced by the plaintiff towards the possession of his father, after the death of his father the possession of the plaintiff is not produced before this court. Further no survival certificate, ration card, Adhar card, voter list produced by the plaintiff to claim the suit property as a mortgagee after the death of his father. No prayer is made to declare him as the mortgagee. No document produced by the plaintiff towards the overt and covert acts being made by the father of the plaintiff and later by the plaintiff. Further contended that, if the court comes to conclusion that, there is a deed of mortgage, defendant No.1 is liable to pay Rs.50,000/-, and ready to deposit the same to

rescind the contract or rescind the mortgage. Hence, prayed to dismiss the suit with cost.

26. Per contra, the defendant No.2 has denied all the plaint allegations and contended that, the suit of the plaintiff is not maintainable. Further contended that, the court fee paid by the plaintiff is not proper. Further contended that, the plaintiff has created Will deed dated 23.03.1994, it is unregistered, sham, Bogus and forged document. The signature on the said Will is created, he has over write in 1st page of 4th line as “ ಶ್ರೀ ನಾಗೇಂದ್ರಸಾ ತಂದೆ ಸುಬ್ಬಣ್ಣಸಾ ಪವಾರ” . At the time of execution of said Will deed Nagendrasa was not owner, not having title over the suit property.

27. Further contended that, in the column No.11 other rights and encumbrances the name of one Babugouda B. Surappagouda has been appeared, as per Sec. 58 of Transfer of Property Act, in the ownership column original owner name is to be kept and in column No.11 mortgagee name is to be kept, but as per the RoR produce by the plaintiff, the mortgagee name has been

mentioned as if he is the owner, it can not be possible to enter the name of the mortgagee as a owner in the property extract of immovable property. The said mortgage deed is usufructuary mortgage in such a usufructuary mortgage as per Sec. 58(g) of Transfer of Property Act the said mortgagee can not claim the ownership and title of the said immovable property against the true owner (mortgager).

28. Further contended that, the defendant No.2 is a bonafide purchaser on the date of purchase i.e., 09.04.2015, sale deed executed defendant No.1 in favour of defendant No.2 in respect of suit property. He has purchased the said property after verifying the documents. Taking advantage of TI Order the plaintiff interfering peaceful possession and enjoyment of the defendant No.2 over the suit property. Further contended that, the plaintiff has not be explained and what basis his father's name entered in the RoR and also to recover the amount of Rs.50,000/- of the transactions of the mortgage deed by the Nagendrasa no document has been produced. Hence, the said

Nagendrasa no right to executed Will deed. Hence, prayed to dismiss the suit with cost.

29. The defendant No.2 in his written statement he has taken contention that, the suit of the plaintiff is not maintainable, on the ground that, and on what basis the name of deceased in Nagendrasa entered in the RoR in respect of suit property has not explained and also to recover amount of Rs. 50,000/- no documents has been produced by the plaintiff. The said Nagendrasa has no right to execute Will, and plaintiff can not claim his ownership on the strength of bogus Will.
30. On perusal of documents it reveals that, the plaintiff has produced un-registered Will deed dated 23.03.1994. But as per the contents of the copy of mortgage deed produced by the plaintiff is usufructuary mortgage in such a usufructuary mortgage as per Sec.58(g) of Transfer of property Act the said mortgagee cannot claim the ownership and title of the said immovable property against the true owner (mortgager).

Usufructuary mortgage.—Where the mortgagor delivers possession 1[or expressly or by implication binds himself to deliver possession] of the mortgaged property to the mortgagee, and authorises him to retain such possession until payment of the mortgage-money, and to receive the rents and profits accruing from the property 2[or any part of such rents and profits and to appropriate the same] in lieu of interest, or in payment of the mortgage-money, or partly in lieu of interest 3[or] partly in payment of the mortgage-money, the transaction is called an usufructuary mortgage and the mortgagee an usufructuary mortgagee.

31. From the above observation it clear that, the mortgage deed is usufructuary mortgage. But at this stage, the defendant No.1 has also produced some documents which are required trial. Now, the defendant No.2 has stated that, the suit is not maintainable. But the evidence is necessary and it required trial for scrutinizing the documents. The defendant having the opportunity to take contention in their written statement and to put forth their grievances at the time of evidence of plaintiff.

32. Further Sec.11 of Code of Civil Procedure clearly states that, once a suit is finally adjudicated by a court of competent jurisdiction on merits, involving of same parties, with same title and with same question, then no aggrieved party is allowed to open up the same matter again in the subsequent litigation. But herein this case trial is not completed, it is yet to be complete. Let the case heard on merits, there is no merit in the defence contention that, the suit is not maintainable. After considered arguments addressed by both the sides about the maintainability of the suit and has expressed the opinion, when both the parties had addressed arguments and invited decision from the Court. But case is not posted for arguments, the parties have not argued the matter yet. Further after going through the materials on record, I find that this is not a case where the plaintiff has taken forcible or illegal possession by taking law in its own hands.

33. Further in the instant case, the plaintiff stated that, suit is maintainable because since long the suit property is in the possession and enjoyment of the plaintiff's family till today, his father name was mutated the in property records, but the defendant No.1 behind the back got mutated his name. To know the said fact, trial is necessary. Without evidence and material documents it cannot be said that, the plaintiff is in possession and enjoyment of the suit property, and after the death of his father he is owner of said property. On the other hand, the defendant contended that, the father of the plaintiff received Rs.50,000/- on 28.08.2001 by executing redemption deed. To know the said fact, the father of the plaintiff is received Rs.50,000/- it required trial. It is relevant to mention here that, the said case is to be trailed and disposed off for the same after scrutinizing evidence of both side and documents. Only on the ground that, he has produced documents towards the redemption of usufructous mortgage executed by the

father of plaintiff is not a ground that, suit is not maintainable.

34. The defendant has contended that, father of the plaintiff executed redemption deed in respect of suit property. Further contended that, the plaintiff has created Will deed dated 23.03.1994, it is unregistered, sham, Bogus and forged document. The signature on the said Will is created, he has over write in 1st page of 4th line as “ ಶ್ರೀ ನಾಗೇಂದ್ರಸಾ ತಂದೆ ಸುಬ್ಬಣ್ಣಸಾ ಪವಾರ”. At the time of execution of said Will deed Nagendrasa was not owner, not having title over the suit property. To know the said fact, whether the plaintiff is created Will, whether Nagerndrasa is the absolute owner or not, it required evidence. On the other hand, the plaintiff has stated that, he is the owner of suit property by virtue of Will executed by his father. To establish the same trial is required. The plaintiff has to prove the Will executed by his father, he has establish his case by adducing cogent evidence and by producing material documents before this court. The plaintiff has filed this suit for he is the

owner of suit property as per the Will executed by his father deceased Nagendrasa in favour of plaintiff on 23.03.1994 in respect of suit property bearing Sy. No.286/1 situated at Gadag and also for consequential relief of permanent injunction against the defendants restrain them from obstructing the peaceful possession and enjoyment of the plaintiff over the suit property, unless it is shown that, there is a severance and in view of the same the relief sought for by the plaintiff would not attract not maintainability of the suit. To adjudicate the matter between the parties on merit, and to do fair justice, it requires evidence. Hence, the contention raised by the defendant is not acceptable, because rights of the parties not determined. Under these circumstance, the defendant has failed to establish that, the suit of the plaintiff is not at all maintainable. **Accordingly, I answered this preliminary issue in the negative** and for the aforesaid reasons, I proceed to pass the following:

ORDER

The suit of the plaintiff is maintainable.

(Directly dictated to the Stenographer on the computer, revised by me and then pronounced in the open court, this 2nd day of March 2023)

(PRAKASH C. KURABETT)

Prl. Senior Civil Judge & CJM,. Gadag.

C/c. Addl. Senior Civil Judge, Gadag.