

IN THE COURT OF THE CIVIL JUDGE & JMFC,
AT: SHAHABAD

-:PRESENT:-

Sri. Shreekant R. Vaidya.,

B.Sc., LL.B.

CIVIL JUDGE & JMFC, SHAHABAD.

O.S.No. 13/2015

Dated this the 19th day of March 2020

PLAINTIFF:-

1. Shabbir Patel S/o Sayed Patel,
Age: 47 years, Occ: Agriculture,
R/o Konchur now at Maddi No.2,
Shahabad, Tq: Chittapur,
Dist: Kalaburagi.
2. Habeeb Patel S/o Sayed Patel,
Age: 40 years, Occ: Agriculture,
R/o Konchur now at Wadi,
Tq: Chittapur, Dist: Kalaburagi.
3. Bandgi Patel S/o Sayed Patel,
Age: 52 years, Occ: Agriculture,
R/o Konchur now at Wadi,
Tq: Chittapur, Dist: Kalaburagi.

(By Smt M.V.L, Advocate)

-V/s-

DEFENDANT/S:-

1. Aameena Begum W/o Kasim Patel,
Age: 58 years, Occ: Agriculture,
R/o Konchur village, Tq: Chittapur.
2. Mehaboob Patel S/o Usman Patel,
Age: 40 years, Occ: Agriculture,
R/o Konchur village, Tq: Chittapur.

3. Rajia Begum W/o Khader Patel,
Age: 44 years, Occ: Agriculture,
R/o Konchur village, Tq: Chittapur.

(D-1 and 3 by Sri C.S.P Advocate)

(D-2 by Sri S.B.M Advocate)

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Date of institution of suit	:	17/04/2015
Nature of the suit	:	Suit for Declaration and Perpetual injunction
Date of Recording evidence	:	23/03/2016
Date of closing of evidence	:	18/07/2019
Date of judgment pronounced	:	19/03/2020
Total duration	:	Year/s Month/s Day/s 04 11 02

-Sd-

Civil Judge & JMFC,
Shahabad

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

This is the suit for declaration to declare that plaintiffs are entitled to easementary right over the suit bund and injunction in respect of suit way situated in between land Sy.No. 48 and land Sy.No. 4 and 5 situated at Konchur village.

2. Plaintiffs case in brief:

The suit property is a bund shown in red colour in rough hand sketch map annexed with plaint existing in between land

Sy.No 48 belonging to defendant No.3 and land Sy.No. 4 and 5 belonging to defendant No.1 and 2 situated at Konchur village. That plaintiff No.1 is the owner and possessor of land Sy.No.37/1 measuring 12 Acres 08 Guntas and plaintiff No.2 and 3 are the owner and possessor of 37/2 measuring 3 Acres 10 Guntas and 3 Acres 09 Guntas respectively situated at village Konchur Tq: Chittapur.

3. That defendant No.1 is the owner and possessor of land Sy.No.4 measuring 02 Acres 27 Guntas and land Sy.No.5 measuring 10 Acres 07 Guntas both situated at village Konchur Tq: Chittapur as shown in yellow color in the rough sketch map annexed with the plaint. That defendant No.2 is the owner and possessor of land Sy.No.4 measuring 02 Acres 26 Guntas situated at village Konchur Tq: Chittapur as shown in blue colour in the rough sketch map. Defendant No.3 is the owner and possessor of land Sy.No. 48 measuring 07 Acres 33 Guntas situated at Konchur, Tq: Chittapur more specifically shown in pink colour in the rough sketch map annexed with the plaint.

4. That the lands of defendants and plaintiff are adjoining each other as could be seen from rough sketch map. There is cart way leading from village Konchur to Halkatta as shown in the black colour in rough sketch map touching the land Sy.No.48 belonging to defendant No.3 and land Sy.No. 4 belonging to defendant No.1 and 2. The plaintiffs who are the owners of land Sy.No.37 have to pass on suit bund as shown in red colour in rough sketch map existing in between land Sy.No. 48 belonging to defendant No.3 on one side and land Sy.No. 4

and 5 belonging to defendant No.1 and 2 on the other side to access their land and there is no any alternate way to reach their land and they have been using this suit bund to reach their land since time immemorial. That the plaintiffs and their ancestors have been going on this bund with their carts to reach their land from time immemorial. Thus, the plaintiffs have easement by antiquity and also easement of necessity to use the suit bund existing between Sy.No. 48 and Sy.No. 4, 5, as the land Sy.No. 37 belonging to plaintiffs is not attached to any cart way or pathway directly. That, as the land belonging to defendants intervenes between the land of plaintiffs Sy.No.37 and Cart way it is compulsory for the the plaintiffs to cross the suit bund existing between the land belonging to defendants.

5. That, as per the law of easement of necessity, the defendants are bound to provide the cart way to the plaintiffs on suit bund which is used by plaintiffs and their ancestor from time immemorial.

6. That, the land Sy.No. 48 belonging to defendant No.3 is not her ancestral property but said property purchased by her in the year 2008. Recently about two months back, defendant No.3 has started raising the wire fencing on the suit bund on which the plaintiffs used to pass with their cart and bullock to access their land. She also has raised a room in the west-south corner of her land Sy.No. 48 on the suit bund thereby restraining the plaintiffs from using the suit bund. That the defendant No.1 and 2 are also not allowing the plaintiffs to move from Sy.No. 4 and 5

touching the bund saying that plaintiffs cannot use the suit bund. As already said, plaintiffs have no other way to access their land Sy.No. 37 except suit bund.

7. That, if the plaintiffs are not allowed to use the suit bund existing in between the lands of defendants with their carts and labour and equipments, it would be difficult for the plaintiffs to carry out their agriculture operation in their lands. That because of defendant No.3 has raised the wire fence on the suit bund, plaintiffs are restrained from passing on the suit bund. That plaintiffs requested the defendant No.3 to remove the fence on the suit bund and put the same after leaving three feet from the suit bund, but the defendant No.3 did not heed to the request of the plaintiffs and hence, the plaintiffs constrained to file this suit.

8. After registration of the suit, summonses were issued to the defendants. The defendant No.1 and 3 have filed their written statement, the defendant No.2 has also filed his detailed written statement separately.

Contents of the Written Statement of defendant No.1 and 3

9. The defendant No.1 and 3 have denied each and every allegation mentioned in the plaint and they contended that the defendant No.3 has got constructed agriculture form house in the year 2008 and got erected fencing wire to protect her land from cattle and animals. They further contended that the plaintiffs were using different way to access their land since

many decades but now they are bent upon to have a short cut to their land and have shown wrong pathway. By way of further pleas they contended as under;

FURTHER PLEAS

10. It is submitted that plaintiff No.1 and 2 have inimical terms with defendants and with a sole intention of troubling and harassing the defendants the present suit has been filed against them. Since time immemorial the plaintiffs were using the way emerging from Konchur village passing through in the extreme south and of land Sy.No. 5 of defendant No.1 which proceeds towards East and in between land Sy.No. 5 and 35 and proceeding towards the land of plaintiffs, which thereafter proceeds through Railway line.

11. It is submitted that the way which has been used by the plaintiffs since many decades has direct link to village Konchur. But Now, the plaintiffs wanted to short cut way to access to their land through suit bund, which is not agreeable and impermissible under the law. As such, there is no any way in existence as alleged by the plaintiffs. Hence, no such new passage/cart way would be abruptly opened in the lands of defendants which may cause assailment over the proprietary rights of defendants over their landed properties.

12. For the reasons stated above suit of the plaintiffs is devoid of merits and fit to be dismissed with compensatory cost of Rs 10,000/-. The defendants have filed sketch map indicating

the existence of pathway of the plaintiffs in blue colour along with photographs. Hence, the suit of the plaintiffs is fit to be dismissed with cost.

Contents of the Written Statement of defendant No.2

13. The defendant No.2 also denied the contents of the plaint in toto. He contended that the description of the suit property is incorrect there is no any way as shown in the rough sketch map. The land of the plaintiffs and defendant No.2 are not adjoining with each other, after the lands of plaintiffs there are lands of defendant No.1 and 3. Hence, sketch map annexed to the plaint is incorrect. The allegations mentioned in Para No.6 of plaint are also false. The plaintiffs in order to have a cart way directly to their land have come up with this suit. The allegations mentioned in Para No. 7, 8 are also false and baseless. The village map filed by him clearly shows that plaintiffs have pathway to reach their lands more particularly shown in red colour in the hands sketch map. There is no any pathway as alleged by the plaintiffs. Hence question of allowing them the use the same does not arise at all. It is admitted fact that the plaintiffs are passing through the bund which is small and made of mud in order to avoid damage to the standing crops of the land of defendants. The bunds are not meant for taking the carts and agricultural equipments. Hence, question of permitting the plaintiffs to move of the suit bund does not arise at all. The suit is not properly valued and no sufficient court fee has been paid. The plaintiffs are not entitled to claim any easementary rights over the suit bund as there is already

another existing way to access their lands. There is no cause of action for filing the suit. The suit of the plaintiff is not maintainable in the present form. This defendant is not a necessary party to the suit. Hence, suit is also defective for mis-joinder of parties. Hence, the suit of the plaintiffs is fit to be dismissed with cost.

14. On the basis of above rival pleadings my predecessor in the office framed the following;

ISSUES

1. Whether the plaintiffs prove that there is an existence of Cart way as described in plaint Para No.6?
2. Whether the plaintiffs prove that they are in lawful enjoyment of suit Cart way?
3. Whether the defendant No.1 and 3 prove that there is an alternate way as described in written statement Para No. 11?
4. Whether the defendant No.2 proves that suit is bad for mis-joinder of necessary parties?
5. Whether the plaintiffs are entitled for relief sought for?
6. What order or decree?

15. In order to prove the case the plaintiff No.1 himself entered into witness box, got examined as P.W.1, he got examined one supporting witness as P.W.2. Further he got marked the documents at Ex.P-1 to 9. Likewise, the defendant No.2 got

examined himself as DW.2, got examined one supporting witness as DW-3. Further he got marked the documents at Ex.D-1 to 7. In fact, examination-in-chief affidavit of DW-1 was not pressed by the counsel. I have heard the arguments of both the counsel and appreciated oral and documentary evidence on record. My answers to the above issues are as under:

Issue No.1	:- In the Affirmative
Issue No.2	:- In the Affirmative
Issue No.3	:- In the Negative
Issue No.4	:- In the Negative
Issue No.5	:- In the Affirmative
Issue No.6	:- As per final order for the following;

:-: R E A S O N S :-:

16. ISSUE NO.1 to 3: Since issue No. 1 to 3 are interconnected with each other I have taken the said issues together for common discussion to avoid the repetition of the fact and evidence. In order to prove his case the plaintiff No.1 himself entered into witness box and got examined as P.W.1 as stated supra. He reiterated the contents of the plaint in the chief-examination. It is specific case of the plaintiffs that plaintiff No.1 is the owner of land Sy.No. 37/1, plaintiffs No.2 and 3 are the owners of land Sy.No. 37/2. Likewise, defendant No.1 is owner of land Sy.No.4 measuring 02 Acres 27 Guntas and Sy.No.5. The defendant No.2 is the owner of the land Sy.No. 4 measuring 02 Acres 26 Guntas, defendant No.3 is the owner of the land Sy.No.48 all situated at Konchur village. The lands of

the defendants and plaintiffs are adjoining with each other as shown in the sketch map. There is a cart way which leads from Konchur to Halkatta touching land Sy.No. 48 belonging to defendant No.3 and land Sy.No.4 belonging to defendant No.1 and 2. The plaintiffs being owners of land Sy.No.37 have to pass on the suit bund existing in between land Sy.No.48 and Sy.No.4 and 5 to access their lands. Except the said way there is no any alternate way to access their lands. They have easementary rights over the said suit bund. Recently, the defendants in collusion with each other started obstructions and the defendant No.3 is in particular has raised wire fencing on the suit bund which caused difficulty to plaintiffs to use the same. Hence, they constrained to file the suit.

17. Per contra, the entire objection of the defendants is that there is no any cart way on the suit bund as alleged by the plaintiffs. Since time immemorial the plaintiffs are using the way which is situated on extreme southern end of land Sy.No.5 of defendant No.1. It is situated in between land Sy.No.5 and 35. The plaintiffs in order to make short cut way to reach their lands have made false allegations stating that they are using the suit bund to reach their lands.

18. In order to substantiate their claim, the plaintiffs got marked village map at Ex.P-9 and have produced relevant extract with the plaint. According to the same there exists bund which bifurcates land Sy.No.48 and land Sy.No 4 and 5 belonging to the defendants. They used to go to their lands through suit bund which starts from main cart road situated

towards extreme Western side of land Sy.No.1, 48 and 47. Except this way there are no other ways to access land Sy.No.37. The defendants contended that the plaintiffs used to go to their lands through the bund situated in between land Sy.No. 5 and 6, Sy.No.5 and 35. The arguments of learned counsel for the defendants is that the existence suit bund is not at all mentioned in the village map hence, the plaintiffs cannot claim that they are using the suit bund to access their lands. If this objection is considered for the sake of arguments for a movement, the existence of way in between land Sy.No.5, 6 and 35 is also not shown in the village map.

19. In fact, the defendant No.3 is not the original owner of the land Sy.No. 48 measuring 08 Acres 06 Guntas of land. The said land has been purchased by her from one Saibanna S/o Bhimaraya who has been examined as P.W.2. The said witness i.e, P.W.2 has clearly stated in the evidence that he has sold 08 Acres 06 Guntas of land in Sy.No. 48 which is numbered as 48/A. The land of plaintiff No.1 situated towards Eastern side of the land sold by him. To reach the land of Shabbir Patel he has to pass on the bund of the land sold by him to the defendant No.3. The said land is his ancestral property. In the cross-examination it was tried to elucidate from the mouth of the witness that there is some alternate way in front of the temple situated near the land Sy.No.5 and 35 but the witness did not admit the said suggestion.

20. As I have already discussed either the suit way or the way alleged to be existing in between the land Sy.No.5 and 35 are

mentioned in the village map produced by the plaintiffs. Under such circumstances the evidence of P.W.2 plays vital role for ascertaining the existence of the suit cart road. He specifically stated that the land Sy.No.48 is his ancestral property and the plaintiffs are using the suit bund since long. The counsel for the plaintiffs has relied on the Judgment published **in AIR 2010 SC 622** in the said Judgment the Hon'ble Apex Court of India has clearly observed that "*in a case where the original plaintiff was claiming easement right either as grant or as of necessity, the plaintiff has only a primary burden to prove the absence of any alternate way. If the defendants failed to establish the existence of alternate way their defense cannot be accepted.*"

21. Per contra, the counsel for the defendants has relied on the Judgment reported **in AIR 2005 SC 236**. In the said Judgment the Hon'ble Apex Court of India has held that "*the plaintiff has to specifically aver in the plaint or in the evidence showing that they used the suit way as a right for last 20 years peacefully and openly, without any obstructions.*"

22. In the instant case the plaintiffs successfully pleaded that they are using the suit bund since time immemorial without any obstructions, recently the defendant No.3 has raised some wire fencing which is causing difficulty to access their lands, hence they approached the court. They got examined the original owner of land Sy.No. 48 to establish that they are using the suit bund since long and well prior to sale of land Sy.No.48 to the defendant No.3 and others. Per contra, the defendants failed to

prove that the plaintiffs have some other way other than the suit bund. Hence, I am of the considered view that the case of the plaintiff is more probable than the defense taken by the defendants as discussed supra. Accordingly, I answer **issue No. 1 and 2 in Affirmative and issue No.3 in Negative.**

23. ISSUE NO. 4: The defendant No.2 contended that the suit is bad for mis-joinder of necessary parties. He is mis-joinder and not proper party to the suit. He never specifically pleaded the reasons for his contention. On the other hand the plaintiffs specifically pleaded that the defendant No.2 is owner of land Sy.No.4 measuring 02 Acres 26 Guntas of land which is situated adjacent to the suit bund. They clearly pleaded that suit bund is situated in between the land Sy.No.4, 5 and 48. Under such circumstances, it cannot said that the defendant No.2 is mis-joinder and not a necessary party to the suit. It appears it is only formal defense taken by him. Accordingly, I answer **issue No.4 in Negative.**

24. ISSUE NO.5: The plaintiffs successfully established the fact that they are using suit bund since time immemorial and have easementary right over the same. Per contra, the defendants failed to prove that there is other alternate way to access the lands of the plaintiffs other than suit bund. Hence, I opine that the plaintiffs are entitled to the relief as sought in the plaint. Accordingly, I answer **issue No.5 in Affirmative.**

25. ISSUE NO.6: For the reasons stated above and my discussion on issue No.1 to 5, I proceed to pass the following;

ORDER

The suit filed by the plaintiff is hereby decreed.

It is declared that the plaintiffs have easementary right over the suit bund situated in between the land Sy.No.4, 5 and Sy.No. 48 of Konchur village.

The defendants, their men, servants, agents, any person claiming under them are hereby ordered not to restrain the plaintiffs from using the suit bund.

The defendant No.1 to 3 are hereby restrained from rising wire fencing on the suit bund which causes hurdle to the plaintiffs to access their lands.

In the facts and circumstances of the case, the parties to bare their own cost.

Draw decree accordingly.

(Dictated to Stenographer, directly on the Computer, Computerized by him, corrected, signed and then pronounced by me in the Open Court on this the 19th day of March, 2020)

-Sd-

Civil Judge & JMFC,
Shahabad

:: ANNEXURE ::

List of witnesses examined for the plaintiff side:-

PW-1 : Shabbir Patel S/o Sayed Patel
PW-2 : Saibanna S/o Bhimaraya

List of documents exhibited for the plaintiffs side:-

Ex.P-1 to 7 : RORs
Ex.P-8 : Sketch Map
Ex.P-9 : Konchur village Map

List of witnesses examined for the defendants side:

DW-1 : Raziya Begum W/o Khadeer Patel (**Not pressed**)
DW-2 : Mehaboob Patel S/o Usman Patel
DW-3 : Khader Patel S/o Khasim Patel

List of documents exhibited for the Defendant side:-

Ex.D-1 to 5 : Photos
Ex.D-6 : CD
Ex.D-7 : S.P.A

-Sd-

Civil Judge & JMFC,
Shahabad.