

IN THE COURT OF CIVIL JUDGE & JMFC, DEVADURGA.

Present:

Sri. Rajashekhar. S. Harsoor
B.A. LL.B.,
Civil Judge & JMFC, Devadurga.

O.S. No. 60/2014 & O.S. No. 61/2014.
Dated the 05th day of August 2019.

Rank of the parties in O.S. No. 60/2014.

1. Hasnamma W/o Late. Hussain Naik,

Since deceased by L.Rs. i.e., Plaintiffs No. 2 to 5.

**2. Hasmath Begum D/o late. Hussain Naik &
W/o Osman Sab,** Age: 50 years,
R/o R.R. Colony, Ashapur Road, Raichur.

3. Shalam Naik S/o Late. Hussain Naik,
Age: 30 years, Occ Agriculture,
R/o Naik Street Gabbur, Tq. Devadurga.
Mentally unsound i.e. insane person, represented through
his next friend i.e., his elder Sister Plintiff No.2-Hasmath
Begum.

4. Rangala Bee D/o Late. Hussain Naik,
Age: 38 years, R/o Naik Street,
Gabbur village. Tq. Devadurga.

5. Kamal Bee D/o Late. Hussain Naik & W/o Gouse Patil,
Age: 35 years, R/o Bugayya Building Wadi.
Tq. Chitapur, Dist. Gulbarga.

(Represented by learned Shri. MMBG. Advocate)

.....Plaintiffs,

Versus

20/08/19

- 1 **Gangamma W/o Late. Ganganagouda Police Patil, ,**
Age: 44 years, Occ agriculture,
R/o Ramadurga village,
Tq. Devadurga, Dist. Raichur.
- 2 **Eshappa Gouda S/o Late. Ganganagouda Police Patil,**
Age: 18 years, minor, represented by his natural mother
Smt. Gangamma i.e., defendant No.1.
- 3 **Mallappagouda S/o Late. Ganganagouda Police Patil,**
Age: 16 years, minor represented by his natural mother
Smt. Gangamma i.e., defendant No.1.
- 4 **Ramanagouda S/o Virupakshappa Police Patil,**
Age: 49 years, Occ agriculture,
R/o Ramadurga village, Tq. Devadurga, Dist. Raichur.
- 5 **Mahadevamma D/o Late. Viupakshappa Police Patil,**
Age: 68 years, Occ agriculture,
R/o Ramadurga village, Tq. Devadurga, Dist. Raichur.
- 6 **Veeranagouda S/o Late. Viupakshappa Police Patil, Age:**
45 years, Occ agriculture,
R/o Ramadurga village, Tq. Devadurga, Dist. Raichur.
- 7 **Sugareddy S/o Late. Virupakshappa Police Patil,**
Age: 48 years, Occ: agriculture,
R/o Ramadurga village, Tq. Devadurga, Dist. Raichur.
- 8 **Devamma D/o Late. Virupakshappa Police Patil,**
Age: 47 years, Occ agriculture,
R/o Ramadurga village, Tq. Devadurga, Dist. Raichur.
- 9 **Akkanagamma D/o Late. Virupakshappa Police Patil,**
Age: major, Occ agriculture,
R/o Ramadurga village, Tq. Devadurga, Dist. Raichur.

(Represented by learned Sri. S.G.K. Advocate)

05/08/19

.....Defendants,

Rank of the parties in O.S. No. 61/2014.

1. Hasnamma W/o Late. Hussain Naik,

Since deceased by L.Rs. i.e., Plaintiffs No. 2 to 5.

2. Hasmath Begum D/o late. Hussain Naik &

W/o Osman Sab, Age: 50 years,
R/o R.R. Colony, Ashapur Road, Raichur.

3. Shalam Naik S/o Late. Hussain Naik,

Age: 30 years, Occ Agriculture,
R/o Naik Street Gabbur, Tq. Devadurga.
Mentally unsound i.e. insane person, represented through
his next friend i.e., his elder Sister Plaintiff No.2-Hasmath
Begum.

4. Rangala Bee D/o Late. Hussain Naik,

Age: 38 years, R/o Naik Street,
Gabbur village. Tq. Devadurga.

5. Kamal Bee D/o Late. Hussain Naik & W/o Gouse Patil,

Age: 35 years, R/o Bugayya Building Wadi.
Tq. Chitapur, Dist. Gulbarga.

(Represented by learned Shri. MMBG. Advocate)

.....Plaintiffs,

Versus

1. Ramanagouda S/o Virupakshappa Police Patil,

Age: 49 years, Occ: agriculture,

2. Mahadevamma D/o Late. Viupakshappa Police Patil,

Age: 68 years, Occ: agriculture,

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3. **Veeranagouda S/o Late. Viupakshappa Police Patil,**
Age: 45 years, Occ: agriculture,
4. **Sugareddy S/o Late. Virupakshappa Police Patil,**
Age: 48 years, Occ: Nil,
5. **Smt. Devamma D/o Late. Virupakshappa Police Patil,**
Age: 47 years, Occ: Nil
All are R/o Ramaduga village, Tq. Devaduga. Dist. Raichur.
6. **Gangamma W/o Late. Ganganagouda Police Patil,**
Age: 44 years, Occ: Nil,
7. **Eshappa Gouda S/o Late. Ganganagouda Police Patil,**
Age: 18 years, Occ: Nil
8. **Mallappagouda S/o Late. Ganganagouda Police Patil,**
Age: 16 years, Deft. No. 7 & 8 are minors, represented
through their next friend & natural Mother Smt.
Gangamma W/o Ganganagouda Police Patil, i.e., Deft. No.6
Deft. No. 6 to 8 are all residents of Ramaduga village,
Tq. Devadurga. Dist. Raichur.
9. **Akkanagamma D/o Late. Virupakshappa Police Patil,**
Age: major, Occ agriculture,
R/o Ramadurga village, Tq. Devadurga, Dist. Raichur.

(Represented by learned Sri. S.G.K. Advocate)

.....Defendants,

ORDER ON I.A. NO. IV

1. The plaintiffs have filed I.A. No. IV U/o. XXXIX Rule 1 & 2
R/w Sec. 151 of C.P.C., with a prayer to restrain the defendants in
O.S. No.60/2014 & O.S. No.61/2014, their men, agents, servants
and all the persons claiming through them, from causing any

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damage, alteration, digging or taking up any illegal acts in the suit properties till the disposal of afore said suits.

2. In the affidavit annexed to the above application, plaintiff No.2 has stated that, herself and other plaintiffs have filed above suits against the defendants for redemption of mortgaged properties. Her father by name Hussain Naik died leaving behind him, the plaintiffs as his legal heirs. He executed Usufructuary mortgage deeds in favour of defendants of both the suits in respect of suit properties. The defendants are enjoying the suit properties in lieu of interest of mortgage money. The defendants are mortgagees. They are not the owners of suit properties. Such being the facts, they have illegally got mutated the suit properties in their name. Though the plaintiffs are always ready to redeem mortgaged properties by repaying the mortgagee money, but the defendants are not ready to receive the mortgage money and hand over the suit properties to them. The said plaintiff further stated that, by taking advantage of their names appearing in the RTC of suit properties, the defendants are trying to create charge, loan and also trying to dig the suit properties and thereby causing damage to the suit properties without any right and title. On 03-03-2019, the defendants with the assistance of their henchmen started to dig the suit properties with intent to sell the soil. However the plaintiffs with the help of their well wishers and relatives succeeded to stop the illegal acts of defendants. The

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defendants gave threat to the plaintiffs that, they will continue the said work with the assistance of more men. Thus the plaintiffs have approached the concerned police. The said police have also advised the defendants not to do any illegal acts in the suit properties. They did not heed to the said advice. Therefore the plaintiffs have filed this application to restrain the illegal acts of defendants.

3. The defendants have filed objection to above application denying the contents of above application. In the objection, the defendants have contended that, the suit of the plaintiffs is false, frivolous and vexatious and not maintainable either in law or on facts. The cause title of the plaint discloses that, plaintiff no.3 is insane person. The plaintiff No.2 is acting as next friend of plaintiff No.3 without obtaining permission of the court. Thus it is necessary to hold an enquiry U/o XXXII rule 14 & 15 of CPC. It is further contended by defendants that, the registered documents executed by said Hussain Nayak in respect of suit properties were not the Usufructuary mortgage deeds. In fact he had executed sale deed with a condition of repurchase the suit properties on or before 30/05/1973 by paying the mortgage money. Therefore the plaintiffs are not entitled for any decree as sought for. The defendants have submitted that, due to scarcity of canal water for cultivation, they have made a pond about 8 years ago. Now the said pond is accumulated with silt and as result its water holding capacity is reduced. Therefore they have

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undertaken the work to remove the silt accumulated in said pond. However they have removed 90% of silt from the pond. They have not at all caused any damage to the suit properties as alleged by the plaintiffs. Moreover the plaintiffs have no locus standi to question about the acts of the defendants. The plaintiffs have kept quiet for 45 years and now filed this suit only with intent to harass the defendants. Thus the plaintiffs are not entitled for equitable relief of injunction. With these contentions, the defendants have prayed for rejection of application with costs.

4. Heard argument. Perused all materials placed on the record.

5. Learned counsel for the plaintiffs Shri.BGK has urged that, the father of plaintiffs deceased Hussain Nayak had executed registered Usufructuary mortgage deeds in respect of suit properties in favour of defendants. Though the plaintiffs are ready to redeem the mortgaged properties by paying the mortgage money, but the defendants are not ready for the same. The defendants have illegally got mutated the suit properties in their names. By taking the undue advantage of their names appearing in the RTC of suit properties, they are trying to dig the suit lands with intent to sell the soil. The plaintiffs have produced photographs in this regard. During the course of arguments he stated that, the plaintiffs have sought more than one relief in I.A.No.IV. However, they press for only the relief

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that, to restrain the defendants from digging the suit properties. He further urged that, the plaintiffs have made out prima faice case and balance of convenience lies in their fevour. If the temporary injunction is not granted, the plaintiffs will be put irreparable loss. On these grounds, counsel for the plaintiffs prayed to allow the above application.

6. On the other hand, the defendants' counsel Shri.SGK has urged that, the suit of the plaintiffs is not legally maintainable. They have no locus standi to file this suit. As per plaint averments plaintiff No.3 is insane person. The plaintiff No.2 is acting as next friend of plaintiff No.2 without permission of the court. As such suit is not maintainable. He further urged that, the father of plaintiffs by name Hussain Nayak had executed registered sale deed with a condition to repurchase the suit properties by paying the mortgage money within stipulated time. But he has failed to comply the condition within stipulated time. Therefore, the said sale deeds become absolute. In view of the same the suit itself is not maintainable. He further urged that, the defendants have not caused any damage to the suit properties as alleged by the plaintiffs. The defendants have removed the silt accumulated in the eight years old pond which situated in the suit properties. The plaintiffs have not made out prima facie case, as such they are not entitled for equitable relief of injunction. With these contentions, counsel for the defendants has prayed to reject the application.

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7. After hearing arguments addressed by both counsels and upon going through the materials placed on record, the following points arise for my consideration:

1. Whether the plaintiffs have made out prima-facie case?

2. Whether the balance of convenience tilts in favour plaintiffs?

3. Whether the plaintiffs put to irreparable loss if temporary injunction is not granted?

4. What order?

8. My answer to above points is as under:

Point No.1 : In the Negative.

Point No.2 : In the Negative.

Point No.3 : In the Negative.

Point No.4 : As per final order for the following

REASONS

9. **Point No. 1:** The plaint averments reveal that, the plaintiffs have filed suit bearing O.S. No.60/2014 & O.S. No.61/2014 against deferent defendants for the same relief i.e., redemption of mortgaged properties i.e., suit properties in both suits. It is specific case of the plaintiffs that, their father by name Hussain Naik died leaving behind them, as his legal heirs. He had executed Usufructuary mortgage deeds in fevour of defendants in both the suits in respect

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of suit properties. As such the defendants are enjoying the suit properties in lieu of interest of mortgage money. The defendants are not the owners of suit properties. But, they have illegally got mutated the suit properties in their name. Though the plaintiffs are always ready to redeem mortgaged properties by repaying mortgage money, but the defendants did not ready to receive mortgage money and hand over the suit properties to them. Now the defendants, by taking advantage of their names appearing in the RTC of suit properties, they are trying to create charge, loan and also trying to dig the suit properties and thereby causing damage to the suit properties without any right and title. On 03-03-2019, the defendants with the assistance of their henchmen started to dig the suit properties with intent to sell the soil. However the plaintiffs with the help of their well wishers and relatives succeeded to stop the illegal acts of defendants. The defendants gave threat to the plaintiffs that, they will continue the said work with the assistance of more men. Thus they have approached to this court. On the other hand the defendants have mainly contended that, the plaintiffs have no locus standi to file this suit. In fact the deceased Hussain Nayak had executed the registered sale deed in frvour of defendants with a condition that, he will repurchase the suit properties, on or before 30/05/1973 by repaying the mortgage money. Therefore the plaintiffs are not entitled for any decree as sought for. They further contended that, due scarcity of canal water for cultivation, they have

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made a pond in the suit properties about 8 years ago. Now the silt is accumulated in the said pond, as result water holding capacity is reduced. Therefore the defendants have undertaken the work to remove the silt accumulated in the said pond. However they have removed 90% of silt from the pond. They have not at all caused any damage to the suit properties. Moreover the plaintiffs have no locus standi to question about the acts of the defendants. The plaintiffs have kept quiet for 45 years and filed this suit only with intent to harass the defendants. Thus the plaintiffs are not entitled for equitable relief of injunction.

10. It is to note here that O.S.No.61/2014 is clubbed with O.S.No.60/2014. Therefore I have meticulously gone through the pleadings of both suits and documents produced in both the suits. As stated above, the plaintiffs have these two suits for redemption of mortgaged properties i.e., suit properties. After clubbing both the suits and after framing issues, the suits were set down for plaintiffs' evidence. As such plaintiff No.2 herself examined as PW.1 and got marked the documents. When matter was posted for cross examination of PW.1, the plaintiffs have filed the above application.

11. Upon going through the contents of above application, it appears that, the plaintiffs have not stated in which suit land, the defendants are trying to digging. Further they have not whispered

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about which defendant or defendants are trying to dig the suit properties and causing damage to the suit properties. However the plaintiffs produced photographs in support of their contention, but they have not stated in their application about the survey number of suit land, which is appearing in the photographs. Under such circumstances, it is very difficult to believe the allegation of the plaintiffs.

12. It is important to note here that, in both the suits the plaintiffs and defendants have relied upon the same documents. The main controversy between plaintiffs and defendants in both suits is that, as per plaintiffs their deceased father Hussain Nayak had executed Usufructuary mortgage deeds with respect to suit properties in favour of defendants. On the other hand, it is definite contention of the defendants that, said Hussain Nayak had executed registered mortgage deeds in respect of suit properties in their favour with a condition that, he will repurchase the suit properties on or before 30.05.1973. But he did not repay the mortgage money on specified date. Therefore the sale becomes absolute. Therefore the plaintiffs have no right to file the present suit. It is relevant to note here that, Section 58 of Transfer of property Act deals with mortgage and kinds of mortgage. In the said provision the Mortgage by conditional sale and Usufructuary mortgage defined as under:

Section 58 of Transfer of property Act:

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(c) Mortgage by conditional sale. -

Where, the mortgagor ostensibly sells the mortgaged property-

On condition that on default of payment of the mortgage-money on a certain date the sale shall become absolute, or

On condition that on such payment being made the sale shall become void, or

On condition that on such payment being made the buyer shall transfer the property to the seller,

The transaction is called mortgage by conditional sale and the mortgagee a mortgagee by conditional sale:

[Provided that no such transaction shall be deemed to be a mortgage, unless the condition is embodied in the document which effects or purports to effect the sale.]

(d) Usufructuary mortgage. - Where the mortgagor delivers possession [or expressly or by implication binds himself to deliver possession] of the mortgaged property to the mortgagee, and authorizes him to retain such possession until payment of the mortgage-money, and to receive the

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rents and profits accruing from the property [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 [or partly in payment of the mortgage-money, the transaction is called an usufructuary mortgage and the mortgagee an usufructuary mortgagee.

13. On perusal of contents of Ex.P.1- CERTIFIED COPY OF DEED OF MORTGAGE BY CONDITIONAL SALE" bearing document No. 333/1968 dated 04-06-1968, it appears that, said deceased Hussain Nayak executed said registered document fevour of defendant No.1 of O.S.No.61/2014 in respect of suit properties involved in the said suit. Likewise Ex.P.96 - CERTIFIED COPY OF DEED OF MORTGAGE BY CONDITIONAL SALE" bearing document No.332/1968-68 dated 04-6-1968, which discloses that, said deceased Hussain Nayak executed said registered document fevour of defendant No.1 of O.S.No.61/2014 in respect of suit properties involved in the said suit. The recitals of both documents clearly disclose that, said Hussain Nayak had executed both the documents as deed of mortgage by conditional sale. Further he had agreed the terms that, if he fails to repay the mortgage money on or before 30-05-1973, the sale become absolute and the mortgagee i.e.,

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defendant No.1 of both the suits shall be entitled foreclosure the mortgage. The above provisions and recitals of both the documents make it clear that, both the documents are not Usufructuary mortgage deeds. However the plaintiffs have stated in the plaint that, their father had executed Usufractory mortgage deeds in fevover of defendant No.1 of both the suits in respect of suit properties. In support of said particular contention, they have not produced any documents before this court at this juncture. However the burden of proving said aspect is on the plaintiffs. However upon going through the pleadings and documents placed on record, it appears that, the plaintiffs have failed to substantiate that, they have made out prima facie case at this juncture. Having regard to the above discussions, I answer to point No.1 in the negative.

14. POINT NO.2 & 3 : As discussed above, the plaintiffs have failed to make out prima facie, the question of deciding the points balance of convenience & irreparable loss does not arise. Accordingly, I answer to Point No.2 and 3 in the negative.

15. POINT NO.4 : In view of above discussions, the following order is passed:

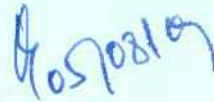
8/05/2019

ORDER

I.A. No.IV filed U/o XXXIX Rule 1 & 2
R/w Sec.151 CPC by the plaintiffs is hereby
dismissed.

No order as to costs.

(Dictated to typist on my laptop, typed by him, corrected & signed by me and then pronounced
in the Open Court on 5th day of August 2019)



(Rajashekhar. S. Harsoor)
Civil Judge & JMFC, Devadurga.