

**IN THE COURT OF THE ADDL. SENIOR CIVIL JUDGE & JMFC.,
AT: MAGADI**

Present:

**Sri.Hanumanth Satwik.,LL.M,
Addl. Senior Civil Judge & JMFC., Magadi**

Dated : This the 19th day of April 2021

O.S.No.300/2020

- Plaintiffs** : 1. Shafi Ulla S/o late Akbar Sab,
Aged about 67 years,
R/at Ward No.23, Magadi Town,
Magadi Taluk, Ramanagara District.
2. Mohammed Rafi S/o late Akbar Sab,
Aged about 57 years,
R/at Ward No.23,
Magadi Town, Magadi Taluk,
Ramanagara District.

(By **Sri. S.K.P.**, Advocate)

--V/s--

- Defendants** : 1. Maimunnissa W/o late Ameer Sab,
Aged about 71 years,
R/at New Masjid Mohalla,
Magadi Town, Magadi Taluk,
Ramanagara District.
2. M/s Al-Falah Education Social
& Economic Trust ®
Behind Kalyagate, Magadi town,
Magadi, Represented by its President
Abdul Rehman S/o late Fakaruddin Saheb,
Aged about 66 years.

(Defendant no.1 By Sri. **R.K.R.**, Advocate)

(Defendant no.2 By Sri. **R.H.**, Advocate)

ORDER ON IA NO.IV

The present suit is for perpetual injunction and to declare that the registered sale deed dated:03-12-2004 as void-ab-initio.

2. The present application has been filed by defendant no.2 U/o VII rule 11(a) & (d) of C.P.C. praying this court to reject the plaint. The defendant submits that the present suit is filed on the basis of mortgage deed dated:18-01-1960. The same is barred by limitation. The said deed has become void and unenforcible in law. Further, declaration sought for in the plaint to declare that the registered sale deed dated:03-12-2004 as void-ab-initio is barred by law of limitation. Defendant no.2 is in possession of the suit schedule property. The mortgage dated:18-01-1960 was for a period of 3 years and it got expired on 18-01-1963. Thus, the possession of late Mohammad Akbar Sab became unlawful. Thus, the possession if at all, of the plaintiffs is not lawful. In this regard defendant no.2 prays as above.

3. The plaintiffs filed objections to the application. The plaintiffs contended that the right to sue accrued on them only when the

defendants attempted to dispossess them from the suit schedule property. They have filed the present suit to safeguard their possession. The question on limitation is a mixed question of law and fact and the same cannot be decided at the inception of the suit. They are in possession of the suit schedule property. In this regard, the plaintiffs pray to reject the application.

4. Heard arguments of both counsel. Learned counsel for defendant no.2 filed written arguments. I have perused the written arguments.

5. Considering the contentions of both counsel, following points arise for my consideration.

1. Whether defendant no.2 has made out grounds to reject the plaint as the plaint does not disclose cause of action?
2. Whether defendant no.2 has made out grounds to reject the plaint as the plaint is barred by law of limitation?
3. What order?

6. My findings for the above points are as under.

Order

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- Point No.1 : In the negative
Point No.2 : In the negative
Point No.3 : As per final order
For the following;

REASONS

7. **Point No.1**:- It is the case of defendant no.2 that the plaint does not disclose cause of action. The plaintiffs are not in possession of the suit schedule property. In this regard, I have perused the plaint. The plaint indicates that the suit schedule property originally belonged to one S.R.Rama Shetty S/o Shingri Rangadasappa Shetty. The said Rama Shetty mortgaged the suit schedule property in favour of the father of plaintiffs by name Mohammed Akbar Sab. The said mortgage was usufructuary mortgage and the father of plaintiffs was put in possession of the suit schedule property. It was agreed that the mortgage would be discharged within the period of 3 years, otherwise the father of plaintiffs was to continue in possession of the suit schedule property till redemption of mortgage. Thus, the father of plaintiffs continued to be in possession of the suit schedule property. The younger brother of Mohammed Akbar Sab by name Ameer Sab

filed application before land tribunal to register him as occupant of suit schedule property. The said case is pending for disposal. During the pendency of the case, defendant no.1, the wife of Ameer Sab, sold the suit schedule property in favour of defendant no.2, vide sale deed dated:03-12-2004. Defendant no.2 tried to dispossess the plaintiffs from the suit schedule property. Thus, having read the plaint in its entirety, I am of the view that the plaint does disclose cause of action.

8. The learned counsel for defendant no.2 contended that the mortgage is dated:18-01-1960. Which was to be discharged within a period of 3 years. Thus, the mortgage deed has become unenforceable. Be it stated, the plaintiffs are claiming possession over the suit schedule property on the basis of the mortgage deed. This being the case, I am of the view that the question of enforcement of the mortgage deed is the subject matter of trial. Thus, I am of the further view that, at this stage of the case the said contention cannot be decided.

9. The learned counsel further contended that the father of plaintiffs continued to remain in possession of the suit schedule

property even after the expiry of the mortgage. Thus, the possession of plaintiffs is unlawful. Be it stated, whether the plaintiffs are in possession of the suit schedule property or not or whether the possession of plaintiffs over the suit schedule property is lawful or not is the subject matter of trial. In this circumstances, I am of the view that this contention of defendant no.2 does not hold water.

10. In the case at hand for the above said reasons it is held that the plaint discloses cause of action. Further, it is held that the contentions of defendant no.2 are of no avail to him at this stage of the case. In this circumstances, considering the application and objection and the plaint averments, I am of the view that defendant no.2 failed to show that the present suit lacks cause of action and warrants rejection. Accordingly, point no.1 is answered in the negative.

11. **Point No.2** : - Defendant no.2 is seeking rejection of plaint on the ground that the suit is barred by law of limitation. The defendant submits that enforcement of mortgage deed is expired by law of limitation. The relief of declaration to declare that the

sale deed dated:03-12-2004 is also barred by law of limitation. In this regard, I have perused the plaint. The plaint reflects that the father of plaintiffs was in possession of the suit schedule property on the strength of mortgage deed dated:18-01-1960. The plaint shows that the plaintiffs are not enforcing the mortgage deed against mortgagor. So also, they are not seeking for recovery of money on the basis of mortgage deed against S.R.Rama Shetty. The plaintiffs are claiming possession over the suit schedule property on the basis of the mortgage deed. Thus, I am of the view that Article 62 and 63 of Limitation Act referred by learned counsel for defendant no.2 in the written argument have no application to the facts of the present case. Even otherwise, the question about the enforcement of the mortgage deed being barred by law of Limitation is the question which can be decided by taking evidence. Thus, I am of the view that this contention of defendant no.2 merits no acceptance.

12. Defendant no.2 contended that the relief of declaration to declare that the sale deed dated:03-12-2004 is barred by Article 59 of Limitation Act. In this regard, I have perused Article 59 of

Limitation Act the same goes as follows;

Description of Suit	Period of limitation	Time from which period begins to run
59. To cancel or set aside an instrument or decree or for the rescission of a contract	Three years	When the facts entitling the plaintiff to have the instrument or decree canceled or set aside or the contract rescinded first become known to him.

In the case at the plaintiff is seeking declaration to declare that the said sale deed as void-ab-initio. Thus, when the facts entitling the plaintiffs to have the sale deed canceled or set aside first become known to him, is the subject matter of evidence. This being the case, I am of the view that whether the suit is barred by law of limitation can be decided by taking evidence and during trial. Thus, I am of the view that this contention of defendant no.2 holds no water.

13. In the case at hand, the plaintiffs are not enforcing the mortgage deed against Rama Shetty in the capacity of mortgagee. Rather, the plaintiffs are claiming possession over the suit schedule property on the basis of the said mortgage deed. Further, the issues regarding limitation is the subject matter of

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trial. Therefore, considering the application, objection and plaint averment, I am of the view that defendant no.2 failed to show that the plaint is liable to be rejected as it is barred by law of limitation. Accordingly, point no.2 is answered in the negative.

14. **Point no.3**:- In view of reasons on point no.1 and 2, I proceed to pass the following,

ORDER

**IA No.IV filed U/o VII rule 11(a) & (d) of C.P.C.
by defendant no.2 is hereby rejected on cost of
Rs.100/-.**

(Dictated to the stenographer, typed by him corrected by me and then pronounced in the open court on this the 19th day of April 2021.)

**(Hanumanth Satwik)
Addl. Senior Civil Judge & JMFC.,
Magadi.**