

DATED: THIS THE 11th DAY OF JANUARY 2021

2. In the affidavit accompanying the application, it is stated that the plaintiff is the owner of the suit schedule property and defendant who has no right, title and interest in the suit schedule property is threatening to encroach upon the plaintiff's land to construct residential building and has already stored building material in the suit schedule property and has started illegal construction. Therefore, the plaintiff has filed this suit seeking for the relief of permanent injunction and mandatory injunction and has filed this interim application seeking for the relief as mentioned in the application. It is further stated that the plaintiff has prima facie case, the balance of convenience leans in favour of plaintiff and it is the plaintiff who will suffer irreparable loss and injury if T.I. is not granted and hence he seeks for allowing of the application.

3. On issuance of suit summons and notice on I.A.I, the defendant has appeared and has filed his written statement and objection to the I.A.No.1.

In the objections it is stated that the plaintiff has filed the suit only with an intention to harass the defendant as the plaintiff has filed this application seeking for injunction only on the basis of survey map of the year 2017 and the present situation in the suit schedule property has entirely change. Further stated that the surveyor has surveyed the same land in the year 2019 and has found no encroachment in the suit

schedule property. Therefore, it is clear that the plaintiff has no prima-facie case, the balance of convenience leans in favour of the defendant and it is the defendant who will suffer irreparable loss and injury if T.I. is granted and hence he seeks for dismissal of the application.

4. Heard the learned advocate for the plaintiff and the learned advocate for the defendant and perused the documents.

5. The following points arise for my consideration:-

- 1) Whether the plaintiff has prima-facie case in favour?
- 2) Whether the balance of convenience leans in favour of the plaintiff?
- 3) Whether the plaintiff will suffer irreparable loss and hardship if temporary injunction is not granted?
- 4) What Order?

6. My answers to the above points are 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** :-

7. **Point No.1** :-

The learned advocate for the plaintiff submits that the ownership of the plaintiff over the suit schedule property is not disputed by the defendant and the encroachment is clearly shown by the surveyor in his survey of the year 2017 and existence of two survey reports itself shows that there is a prima-facie case in favour of the plaintiff as the exact position has to be ascertained during the course of trial and the defendant is not claiming any adverse possession and therefore the plaintiff is entitled for the relief of temporary injunction as sought for. In support of his contention he relies upon the judgment of Hon'ble High Court of Karnataka in the case of *Putlabai V/s Vaijanath and others* reported in *ILR 2005 Karnataka 5155* and submits that the suit for injunction without seeking relief of declaration is maintainable as there is no cloud raised over the title of the plaintiff over suit schedule property.

8. In support of his contention he draws my attention to sketch issued by Survey Department, Karwar, Hadbasta Map of Sy.No. 283/*/1b2, Record of rights of Sy. No. 283/1b2 for the year 2015-16 letter dated: 21.02.2019 addressed by the plaintiff to Commissioner, City Municipality, Karwar the show cause notice issued by the City Municipal Council, Karwar dated: 11.03.2019, letter addressed by the plaintiff to

Commissioner, CMC, Karwar dated: 31.08.2020, the 2nd show cause notice issued by City Municipal Council, Karwar dated: 01.09.2020 and one photograph of the suit schedule property and prays for allowing of the application.

9. On the other hand the learned advocate for the defendant submits that in the plaint the plaintiff has not shown as how much encroachment made, where the encroachment made and when the encroachment made in the plaint which is essential for deciding the lis between the parties. He further submit that without seeking the relief of declaration the suit for bare injunction is not maintainable and the plaintiff has to seek for possession also if the plaintiff's contention with respect to alleged encroachment already committed by the defendant is taken in consideration. Further he submits that the survey map relied upon by learned Advocate for the plaintiff is of the year 2017 and no explanation is coming forth with respect to why the plaintiff has kept mum for a period of more than 2 years. Further he submits that in the year 2019 another survey was conducted of the same property by the same department and the survey report clearly shows that there is no encroachment committed by the defendant in the suit schedule property. He further submits that again the plaintiff has filed application seeking for survey and the said fact is not averred in the plaint and no reasons are assigned as to why re-survey is sought if the plaintiff is certain about

the alleged encroachment committed by the defendant. Hence, he seeks for dismissal of the application. In support of his contention he draws my attention to Hadbasta map of Sy.No. 283/1b/1 and record of rights of Sy.No. 283/1b/1 of the year 2020-21. Further he submits that in view of dictum of Hon'ble Apex Court in the case of ***Anathula Sudhakar V/s P. Buchi Reddy (dead) by Lrs. and others*** reported in ***2008 (4) SCC 594*** and the dictum of Hon'ble High Court of Karnataka in the case of ***Mangala Gowramma V/s Rukmini*** reported in ***2015 SCC online KAR 4609*** and draws my attention to paragraph No. 5 of the said judgment and prays for dismissal of the application.

10. The plaintiff has admittedly filed this suit seeking for the relief of permanent injunction and mandatory injunction. For clarity with respect to prayer sought by the plaintiff it is necessary to cull-out the prayer column in the plaint, which reads as under:

“Therefore, it is most respectfully prayed that the Hon’ble Court may be pleased to pass a decree against the defendants as under:

a) Restraining the defendant, their men agents, servants or anybody who is claiming any right under the defendants from

raising any construction and from entering in the suit property by granting permanent injunction.

b) Directing the defendant to remove the unauthorised construction constructed on the plaintiff's land and remove the encroachment from the suit schedule property as per the report issued by the Survey Department, Karwar.

c) Directing the defendant their men agents, servants or anybody who is claiming any right under the defendant to remove the building material stored in the suit property by granting Mandatory Injunction.

d) Any other relief this Hon'ble Court deem fit and proper and the cost of the suit in the interest of justice and equity."

11. In the context of the prayer it is relevant to note that the plaintiff has produced the P.T. sheet and hadbasta map which

are of the year 2017 whereby it is clearly shown as per the said map that there is encroachment committed by the defendant in the plaintiff's property. Therefore, apparently as per the plaintiff since 2017, the plaintiff is not in possession of the encroached portion. In this context, it is relevant to note the dictum of Hon'ble Apex Court in the case of ***Anathula Sudhakar V/s P. Buchi Reddy (dead) by Lrs. and others*** reported in ***2008 (4) SCC 594*** whereby the Hon'ble Apex Court has observed as under:

“To summarize, the position in regard to suits for prohibitory injunction relating to immovable property, is as under:

(a) Where a cloud is raised over the plaintiff's title and he does not have possession, a suit for declaration and possession, with or without a consequential injunction, is the remedy. Where the plaintiff's title is not in dispute or under a cloud, but he is out of possession, he has to sue for possession with a consequential injunction. Where there is merely an interference with the plaintiff's lawful possession or threat of dispossession,

it is sufficient to sue for an injunction simpliciter.

(b) As a suit for injunction simpliciter is concerned only with possession, normally the issue of title will not be directly and substantially in issue. The prayer for injunction will be decided with reference to the finding on possession. But in cases where de jure possession has to be established on the basis of title to the property, as in the case of vacant sites, the issue of title may directly and substantially arise for consideration, as without a finding thereon, it will not be possible to decide the issue of possession.

(c) But a finding on title cannot be recorded in a suit for injunction, unless there are necessary pleadings and appropriate issue regarding title (either specific, or implied as noticed in *Annaimuthu Thevar* [*Annaimuthu Thevar* v. *Alagammal*, (2005) 6 SCC 202]). Where the averments regarding title are absent in a plaint

and where there is no issue relating to title, the court will not investigate or examine or render a finding on a question of title, in a suit for injunction. Even where there are necessary pleadings and issue, if the matter involves complicated questions of fact and law relating to title, the court will relegate the parties to the remedy by way of comprehensive suit for declaration of title, instead of deciding the issue in a suit for mere injunction.

(d) Where there are necessary pleadings regarding title, and appropriate issue relating to title on which parties lead evidence, if the matter involved is simple and straightforward, the court may decide upon the issue regarding title, even in a suit for injunction. But such cases, are the exception to the normal rule that question of title will not be decided in suits for injunction. But persons having clear title and possession suing for injunction,

should not be driven to the costlier and more cumbersome remedy of a suit for declaration, merely because some meddler vexatiously or wrongfully makes a claim or tries to encroach upon his property. The court should use its discretion carefully to identify cases where it will enquire into title and cases where it will refer to the plaintiff to a more comprehensive declaratory suit, depending upon the facts of the case.”

12. On perusal of the said dictum of Hon'ble Apex Court in the above said landmark case it can be seen that as the plaintiff is not in possession of the property then he has to seek for possession and injunction . However, in this case the plaintiff according to his own case though is not in possession of the encroached portion has not sought for possession of the same and therefore the very relief sought by the plaintiff comes under cloud with respect to maintainability of the suit. Though learned Advocate for the plaintiff relies upon the dictum of Hon'ble High Court of Karnataka in the case of ***Putlabai V/s Vaijanath and others*** reported in ***ILR 2005 Karnataka 5155***, though no cloud is raised over title of the

plaintiff, the plaintiff in view of the facts and circumstances of the case and in view of dictum of Hon'ble Apex Court as stated above and in view of his own admission by production of document regarding alleged encroachment in the year 2017 ought to have sought for possession. Therefore, as the very maintainability of the suit in the present form is under cloud, the question of holding that the plaintiff has prima-facie case in her favour does not arise. Hence, ***I answer point No. 1 in the negative against the plaintiff.***

13. **Point No. 2 and 3:**

Both points are discussed together as separate discussion with respect to the same with lead to replicating the findings.

As far as balance of convenience and irreparable loss and injury are concerned, it is relevant to note the judgment of Hon'ble Supreme Court of India in the case of ***Kashi Math Samsthan and another V/s Srimad Sudhindra Thirtha Swamy and another*** reported in ***AIR 2010 SC 296*** whereby the Hon'ble Apex Court at paragraph No. 13 has observed that if the plaintiff doesn't have prima-facie case in his favour then the question of granting temporary injunction even though balance of convenience leans in her favour and even if she suffers irreparable loss and injury doesn't arise and therefore, ***I answer point No. 2 and 3 in the negative against the plaintiff.***

14. Point No. 4: Therefore, I proceed to pass the following

:- ORDER :-

IA No. I filed U/o. XXXIX Rule 1 and 2 of CPC by the learned Advocate for the plaintiff is hereby dismissed.

Both parties bear their own cost.

(Dictated to the Typist directly on system, corrected, signed by me & then pronounced in the Open court on this the 11th day of January 2021.)

(Vivek Gramopadhye)
Prl. Civil Judge, Karwar