

IN THE COURT OF THE SENIOR CIVIL JUDGE, BHATKAL

**PRESENT: Sri. J. B. Shivapuji, B.Sc., LL.B.(Spl.)
Senior Civil Judge & JMFC, Bhatkal**

Dated this the 07th day of January, 2022

R.A.No.06/2020

Appellant : Sri. Narayan Timmappa Naik,
(Org. Plaintiff) Aged about 63 years,
R/o Garadigadde, Murdeshwara,
Mavalli-I village, Bhatkal Tq.

(By - Sri. R.R.S., Advocate)

V/s

Respondent : Smt. Laxmi w/o Madev Naik,
(Org. Defendant) Aged about 51 years,
R/o Madev S. Naik,
Shabari Sweets, Bhatkal,
Bhatkal Taluk.

(By - Sri. ASNH/JDB., Advocate)

ORDER ON IA.NOS. I & II

The appellant being the plaintiff in OS.No.72/2014 has filed the present IAs against the respondent - the defendant under Order 39 Rule 1 and 2 read with Sec. 151 of the Code of Civil Procedure seeking the order of temporary injunction and the order of interim mandatory injunction restraining the defendant from constructing the compound both on the north – west and south – west portion of his

property and vacating the constructed compound therein accommodating him for ingress and egress to his property.

2. The ranks of the parties hereinafter will be referred to their ranks as before the trial court. The appellant is the plaintiff and the respondent is the defendant before the trial court.

3. The facts of both the cases of the plaintiff and the defendant that led to filing of the present appeal and the IAs in brief are as hereunder;

The plaintiff is the owner of the suit A schedule property bearing Sy.No.350/1A measuring 0-34-0 and Sy.No.350/1B measuring 0-13-0 situated at Mavalli village, Bhatkal Tq. The defendant is the owner of the suit B schedule property the agricultural land situated on the northern side of the suit A schedule property. The case of the plaintiff is that since time immemorial he has been using the north - south portion on the western edge of the suit B schedule property for ingress and egress to his suit A schedule property and as the defendant interfered for his easementary right he has filed the suit OS.No.72/2014 on the file of the Additional Civil Judge Court, Bhatkal seeking the order of permanent injunction. The defendant has disputed the easementary right of the plaintiff. He has specifically contended that the plaintiff never use the suit B schedule property as a passage in order to reach his property and the

plaintiff is having the alternative way and he has been using the same and as such, the suit filed by the plaintiff is not maintainable.

4. The Hon'ble trial court after hearing both sides on merit by accepting the stance of the defendant dismissed the suit. The plaintiff aggrieved by the judgment and decree has filed the appeal in this court and in the appeal he has filed IA.No.I and II under Order 39 Rule 1 & 2 of the CPC, seeking the order of temporary injunction and the interim order of mandatory injunction asking the restraint order against the defendant and also the mandatory injunction directing the defendant to remove the constructed compound and allow him to use his property to reach the property of the plaintiff. The defendant has filed his objection and opposed the claim of the plaintiff.

5. After registration of the appeal the notice has been issued and served to the defendant. The defendant has appeared through his counsel and contested the claim of the plaintiff.

6. Heard both sides. The trial court records have been secured. The advocate for the defendant has filed the memo with citations relied by them.

7. On the materials available on record and also on the argument advanced, the points that arises for my consideration are:

POINTS

1. Whether the plaintiff has made out a prima facie case in order to seek the order of temporary injunction and interim order of mandatory injunction?
 2. Whether the plaintiff has made out the balance of convenience and relative hardship in his favour?
 3. What order ?
8. My findings to the above framed points are as hereunder:
- | | |
|-------------|--|
| Point No.1: | In the Negative |
| Point No.2: | In the Negative |
| Point No.3: | As per the final order
for the following: |

REASONS

9. **POINT NOS. 1 AND 2:** The plaintiff has filed the suit seeking the order of permanent injunction restraining the defendant from obstructing him to use the north to south portion on the western edge of the property of the defendant for ingress and egress to his suit property. The trial court in its judgment on merit has held that the plaintiff has failed to prove the presence of passage in the property of the defendant in order to reach the property of the plaintiff and the plaintiff is having the alternative way from his land to the main road. So, in presence of the judgment passed by the trial

court instead of disposing the appeal on merit it seems to be improper to entertain the claim of the plaintiff. Therefore, I am of the opinion that at this juncture the plaintiff has not made any prima-facie case in order to seek both the order of temporary injunction and mandatory injunction. In the absence of prima-facie case, the balance of convenience and relative hardship are only the imaginary. Accordingly, I answered the Point Nos.1 and 2 **in the Negative**.

10. **POINT NO.3:** In view of the reasons assigned supra, I proceed to pass the following:

ORDER

I.A. Nos.I & II filed by the plaintiff under Order 39 Rule 1 and 2 read with Sec. 151 of the Code of Civil Procedure are hereby dismissed.

Keeping in view of the facts and circumstances of the case, no order as to costs.

*(Dictated to the Stenographer directly on the computer, computerized by him, corrected by me and then pronounced in the open Court on **07th** day of **January, 2022**)*

Sd/-
(J. B. Shivapuji)
Senior Civil Judge & JMFC., Bhatkal