

BEFORE THE CIVIL JUDGE & JMFC., AT HALIYAL
PRESENT: - DESHABHUSHAN KOUJALAGI, B.A.LLB.,
CIVIL JUDGE & JMFC., AT HALIYAL

DATED THIS THE 03rd DAY OF MARCH, 2023

O.S. No.172/2018

PLAINTIFF : Sri. Durgappa S/o Basappa Waddar,
Age: 56 Years, Occ: Business,
R/o: Bus Stand Road, Haliyal,
Tal: Haliyal, Dist: Karwar.

(By: Sri. S. R. H., Advocate)

V/s

DEFENDANTS: 01. Smt. Hanamavva W/o Omanna Waddar,
Age: 46 Years, Occ: Household &
Agriculture, R/o: Dharwad Road,
Haliyal, Tal: Haliyal,
Dist: Uttara Kannada.

02. Sri. Adivappa S/o Mukharya Waddar,
Age: 38 Years, Occ: Coolie,
R/o: Dharwad Road, Haliyal,
Tal: Haliyal, Dist: Uttara Kannada.

*(D.1 by Smt. S. R. G, Adv.
& for D.2 by Sri. A. P. M, Adv.)*

ORDERS ON PRELIMINARY ISSUE

The present suit is filed by the plaintiff against the
defendants for the relief of declaration of easementary right and for

consequential relief of permanent injunction in respect of the suit schedule property.

02. In pursuance of service of suit summons, the defendants have appeared through their respective counsels. The defendant No.1 has filed written statement wherein she has raised the question of maintainability of the suit on the principle of resjudicata and on the ground of Order 2 Rule 2 of CPC. By noticing the same, the Learned Pre-Decessor-in-Office has framed the following Preliminary Issue on 25-03-2021:

Preliminary Issue: Whether the suit of the plaintiff is hit by principle of res-judicata?

03. Heard on Preliminary Issue on both side. Perused the entire materials.

04. Having heard and perusal of the records, answer of the Court to the aforesaid Preliminary Issue is as under:

Preliminary Issue: Answered in the **NEGATIVE** for the following:

REASONS

05. Before discussion on core issue, Court deems it proper to narrate the brief facts of the case of the plaintiff and defendants.

It is the case of the plaintiff that, there is an existence of 'XY' portion in Block No.139/2A/1A/3 to ingress and egress to his property from the southern side of Haliyal-Dhawrad Road to an extent of 09 meters width towards northern side strip and the plaintiff has got a right of easement over the said passage by way of prescription and absolute necessity. It is further case of the plaintiff that, he has purchased the suit property from defendant No.2 and his mother by name late Smt. Balavva through a registered sale deed dated 18-07-2006 and at that time, the property in question has been demarcated by preparing KDT map. It is further case of the plaintiff that, the defendant No.1 being the daughter of late Sri. Mukharya had filed O.S.No.45/2008 before this Court for her 1/3rd share in the family property and the same was dismissed. But in R.A.No.19/2010, the defendant No.1 herein was allotted with 1/3rd share and in the said appeal, it was observed that, the sale deed executed by defendant No.2 and his late mother in favour of the plaintiff herein is not binding to the extent of share allotted to the defendant No.1. As such, the defendant No.1 herein is only entitled for 06 guntas and 02.5 anas of land out of 18 guntas 08 anas of total extent. After the appeal,

the defendant No.1 herein has filed FDP No.04/2012 and final decree was also drawn in the said petition on 07-10-2016 and to execute the same, the defendant No.1 herein has filed EP No.28/2016 and in the said petition, the defendant No.1 herein has taken the possession as per final decree drawn in FDP No.04/2012.

06. It is further case of the plaintiff that, towards southern side, there is a road from Haliyal to Dharwad. From the said southern side road towards northern side, there is a strip and the same could be seen from the map prepared by the Court Commissioner and the property which is purchased by the plaintiff herein i.e., suit property is adjacent to the aforesaid strip which is demarcated in yellow colour in the hand sketch produced along with the plaint and from that strip, the plaintiff has to ingress and egress to the main road and except the said road, there is no alternative way. It is further case of the plaintiff that, since the defendants started to interfere with use and enjoyment of the suit property, the instant suit is filed for easementary right.

07. On the other hand it is the case of the defendant No.1 that, the property on which the plaintiff is claiming easementary rights is belongs to her and there is no passage in the suit schedule

property as contended by the plaintiff. There is no KDP map pertaining to the suit schedule property and it does not binds the defendant No.1 in view of judgment and decree passed in RA No.19/2010 by the Hon'ble Senior Civil Judge, Haliyal.

08. It is further case of the defendant No.1, it is specifically ordered in RA No.19/2010 that, the present defendant No.1 is having her share to an extent of 06 guntas 2.5 anas out of total extent of land measuring 18 guntas in Sy No.139/2A/1A/1B of Guttigeri Village of Haliyal Taluka and it is also observed in the said judgment that, sale deed executed in favour of present plaintiff does not binds the share of present defendant No.1 as the sale deed is in respect of share of mother of defendant No.1 herein. The share allotted to the defendant No.1 herein in RA No.19/2010 shall not be disturbed or reduced and as such suit of the plaintiff is liable to be dismissed.

09. It is further case of the defendant No.1 that, the plaintiff has described the suit property by asserting 'XY' passage by reducing the share allotted to defendant No.1 herein in RA No.19/2010. The plaintiff cannot claim any alleged MOU of the predecessor in title of the land and the plaintiff being the purchaser

cannot claim the share of the plaintiff as he has purchased property from defendant No.2 herein and from mother of defendant No.1. Even the Hon'ble Ist Appellate restrained the plaintiff herein permanently from ousting the defendant No.1 herein. In spite of having knowledge of judgment and decree passed in RA No.19/2010, the plaintiff has filed the present suit without preferring any appeal against the said judgment. The plaintiff in order to gulp the property allotted to the present defendant No.1 has filed present vexatious suit which is barred by doctrine of res-judicata and also barred under Order 2 Rule 2 of CPC and as such, the present suit is liable to be dismissed.

10. One of the main contentions of the defendant No.1 is that, the suit of the plaintiff is hit by the principle of res-judicata. According to the defendant No.1, the rights of the plaintiff herein and the rights of the defendants herein are already decided in RA No.19/2010 and as such, the present suit is hit by the principle of res-judicata. Section 11 of CPC deals with the principles of res-judicata. The concept of res-judicata is nothing but the rule of conclusiveness of a judgment. The main object of the principle of res-judicata is to not vex a person twice for the same cause and to see

that, there should be an end to a litigation. Section 11 of CPC bars the Court to try a suit or an issue if the matter directly and substantially is in issue in the subsequent suit has already been heard and finally decided by the court in the former suit. Another condition to apply the principle of res judicata is that, the former suit must have been between same parties or between the parties under whom they or any of them claim and the Court which has decided the matter must be a competent Court to try subsequent suit. Another ingredients of principle of res judicata is the parties must have been litigating under the same title in the former suit.

11. In the present suit, the defendant No.1 contends that, the matter in issue of the present suit is directly and substantially an issue in the former litigation i.e., in RA No.19/2010 and the same has already been decided by Hon'ble Senior Civil Judge Court, Haliyal and as such, plaintiff cannot brought another suit on same cause. However, in support of her case, the defendant No.1 has not produced any documents. It is the plaintiff who has produced the certified copy of judgment and decree passed in OS No.45/2008 and RA No.19/2010. Court has gone through the said documents.

12. The suit in O.S No.45/2008 was filed for the relief of partition and separate possession in respect of Block No.139/2A1A/3A measuring 13 guntas and Block No.139/2A1A/3B measuring 05 guntas and 08 anas situated at Guttigeri Village of Haliyal Taluka and in respect of one house property. The said suit was filed before this Court by the defendant No.1 herein against the plaintiff herein and against defendant No.2 herein and against one Smt. Balawwa Mukharaya Waddar. The said suit was dismissed by this Court and the plaintiff therein i.e., the defendant No.1 herein has preferred RA No.19/2010 before the Hon'ble Senior Civil Judge, Haliyal wherein, the Hon'ble first appellate Court set aside the judgment and decree passed by the Trail Court and suit in OS No.45/2008 was decreed by holding that, the defendant No.1 herein is entitled for 1/3rd share in the suit schedule properties and it was also held in the said appeal that, the sale deed dated 27-09-2006 executed by the defendants No.1 and 2 therein in favour of defendant No.3 therein is not binding on the plaintiff therein.

13. Whereas, the present suit is filed by the plaintiff herein who was the defendant No.3 in OS No.45/2008. The present

suit is filed for the relief of declaration of easementary rights and consequential relief of permanent injunction in respect of XY portion passage measuring 09 meters in Block No.139/2A1A/3B measuring 05 guntas and 08 anas situated at Guttigeri Village of Haliyal Taluka. Admittedly, the parties in OS No.45/2008 or RA No.19/2010 and the parties in the present suit are not one and the same. The earlier litigation was for the relief of partition and separate possession whereas, the present suit is for the relief of declaration of easementary rights and permanent injunction in respect of 09 meters passage. Hence, the parties in earlier litigation and the subsequent litigation are not one and the same. Similarly, the matter in issue of the present suit is not directly and substantially was an issue in the former litigation i.e., OS No.45/2008 and in RA No.19/2010. Hence, the principle of res judicata would is not applicable to the present suit.

14. Moreover, the defendant No.1 herein has not produced the sale deed dated 27-09-2006 to show that, there is a recital in the said sale deed in respect of alleged passage and inspite of the same, the plaintiff herein has not raised the issue of easementary rights in the former suit i.e., in OS No.45/2008. Therefore, it is considered

opinion of the Court that, this suit is not hit by the principle of res judicata and the suit is maintainable. Accordingly, Preliminary Issue is answered in the Negative and Court proceeds to pass the following:

ORDER

Preliminary Issue is answered in the Negative.

Consequently, it is held that, suit of the plaintiff is maintainable.

(Computerized to my dictation by the stenographer, printout then revised, corrected, signed and then pronounced in the Open Court on this the 03rd Day of March, 2023)

(DESHABHUSHAN KOUJALAGI)
Civil Judge & J.M.F.C., Haliyal.