

**IN THE COURT OF THE PRL.CIVIL JUDGE AND JMFC.,
KARKALA**

Present: Smt. Poornima N.Pai, B.Com., LL.B.,
Prl. Civil Judge and J.M.F.C., Karkala.

Dated:- This the 24th day of November, 2014.

O.S.No.54 of 2011

Between:

Mr. Valerian Danthi,
aged about 43 years,
Son of Ligory Danthi,
residing at 'Danthi Nekethan',
Ninjoor Post, Karkala Taluk,
Represented by his G.P.A.Holder
Mrs. Philomina Danthi,
aged about 40 years,
Wife of Valerian Danthi,
residing at Vivian Villa,
Kowdoor Village, Karkala Taluk,
Udupi District.

.... Plaintiff.

(By Sri.H.S.M., Advocate)

- AND -

Mrs. Lathishia Mathias,
aged about 45 years,
W/o John Mathias,
residing at 'Levia Villa',
Ranganapalke, Kowdoor
Village, Karkala Taluk,
Udupi District.

...Defendant.

(By Sri S.K.N., Advocate)

Date of institution of the suit : 22-03-2011

Nature of the suit : Suit for Possession.

Date of commencement of
recording of evidence : 24-08-2011

Date on which the judgment
was pronounced : 19-11-2014

	<u>Year/s</u>	<u>Month/s</u>	<u>Day/s</u>
Total Duration:	03	07	27

J U D G M E N T

This is a suit filed by the plaintiff against the defendant for directing the defendant to deliver possession of suit schedule property to the plaintiff within the time to be fixed by the court and on her failure, to permit the plaintiff to take possession through the process of court and also for directing the defendant to pay mesne profits at the rate of ₹. 500/- per month till delivery of possession to the plaintiff and for such other reliefs.

2. The brief facts of the suit of the plaintiff are as follows:

The suit property described in the schedule belongs absolutely to the plaintiff. It is a portion of land purchased by the plaintiff as per sale deed dated 28-8-2001 executed in his favour by Mrs. Mabel Nazareth. The said sale deed

was registered in the office of Sub Registrar, Karkala, as document No. 602/2001-02. It is further submitted that the said Mrs. Mabel Nazareth had purchased 0.79 acre of land in Sy.No. 160/3 of Kowdoor village from the defendant as per sale deed dated 19-9-1997 registered in the office of Sub Registrar, Karkala, as document No. 800/1997-98. The said land includes the suit schedule property herein. Subsequently Mrs. Mabel Nazareth sold the said property to the plaintiff. It is the case of plaintiff that after purchase of said 0.79 acre of land he constructed a house, planted cocoanut plants and effected vast improvements therein. In the month of May 2009 when the plaintiff got his property measured through surveyor, he noticed that the house constructed by him is situated in the property belonging to one Mr. Vittala Sapaliga. Thereafter the plaintiff purchased the said portion of land in Sy.No. 391/2 measuring 0.45 acre of Kowdoor village. At the time of said survey measurement it is also noticed by the plaintiff that land measuring 0.30 acre in extent in Sy.No. 160/3 of Kowdoor village which was purchased by him from Mrs. Mabel Nazareth is in the possession of defendant. The house of defendant is also situated in the said land measuring 0.30 acre. It appears that the defendant sold the land to the above said Mrs. Mabel Nazareth under confusion with regard to the location of the land under the sale deed dated 28-1-2001. Even after the sale 0.30 acre of

land remained with the defendant without handing over the possession to Mrs. Mabel Nazareth. The plaintiff after noticing the same requested the defendant to hand over the possession of 0.30 acre of land in respect of which he is the absolute owner. The plaintiff has also given option to compromise by requesting the defendant to give 30 cents of her land in any portion as an amicable settlement. The defendant is not agreeing for any compromise. Hence the suit was filed. It is further submitted that a notice dated 23-11-2010 is also issued by the plaintiff to defendant to hand over the possession of above said land and the defendant after receipt of notice has sent a false reply through her advocate. She is not ready to hand over the possession of the said land. It is also stated that in the above notice survey number was wrongly mentioned as 169/3P2 instead of 160/3P2. So, the plaintiff sent another notice dated 21-1-2011 to defendant. The said notice has been served on the defendant and she has not responded to the same. Therefore, the present suit has been filed seeking possession.

3. The suit summons was issued to the defendant who appeared through her counsel Sri S.K.N. and filed her written statement. She has entirely denied the claim of the plaintiff and stated that it is an effort to obtain unlawful gain by the plaintiff. She has totally denied that suit

schedule property belongs to plaintiff and it is a portion of land purchased by the plaintiff as per sale deed dated 28-8-2001 from Mrs. Mabel Nazareth. It is also denied that the defendant had sold 0.79 acre of land to Mrs. Mabel Nazareth and kept 0.30 acre in her possession under confusion. It is submitted that the plaintiff is trying to grab the property of defendant and to cause harassment to her. The defendant is in exclusive and absolute possession and enjoyment of the property comprised in Sy.No. 160/3 measuring 0.59 acre. Infact, she was in possession of totally 1.38 acres in Sy.No. 160/3 ever since 1992. She constructed a house in the said property in the year 1992 itself and raised cocoanut garden. In the year 1997 this defendant sold vacant land measuring 0.79 acre on the western portion of said property to Mrs. Mabel Nazareth under the registered sale deed dated 19-9-1997. Prior to execution of sale deed the property was duly measured and identified through survey in the presence of defendant and the purchaser Mrs. Mabel Nazareth. The defendant at no point of time agreed to sell 0.59 acre of land wherein the residential house is built. The house building constructed by the defendant in the year 1992 is situated in above said 0.59 acre of land which is in exclusive possession and enjoyment of defendant. It was constructed much prior to sale of portion of property to Mrs. Mabel Nazareth. The defendant has put up barbed wire fence on all sides of her

property in the year 1997 itself. The property purchased by Mrs. Mabel Nazareth has been surveyed and clearly demarcated, thereafter barbed wire fence was put by the defendant in between the property of herself and Mrs. Mabel Nazareth. Hence, there is no chance to keep 0.30 acre in unauthorized possession by the defendant as alleged by the plaintiff. Hence, she has prayed to reject the suit and she has also denied that the plaintiff is entitled for any mesne profits as claimed by him. It is also submitted that property of defendant and property sold to Mrs. Mabel Nazareth are not at all plotted so far. The suit property was never sold by the defendant to any one. The defendant is not liable to surrender the schedule property or to vacate it. Hence, she has prayed to dismiss the suit with exemplary costs.

4. Based upon the pleadings of both the parties, this court has framed the following issues:

1. Whether the plaintiff proves that, the defendant is in unauthorized possession of 'A' schedule property?
2. Whether the plaintiff proves that, he is entitled for possession of 'A' schedule property?
3. Whether the plaintiff is entitled for mesne profit at the rate of ₹. 500/- per

month till delivery of possession of 'A' schedule property?

4. Whether the defendant proves that, the suit of the plaintiff is bad for non-joinder of necessary party and mis-joinder of parties?

5. What order or decree?

5. The plaintiff in order to prove his case, got examined his G.P.A. Holder as P.W.1 and got marked Exs. P.1 to P.8 and closed plaintiff's evidence. To prove defendant's case, the G.P.A.Holder of defendant got examined as D.W.1 and got marked Exs. D.1 to D.8 and closed his evidence.

6. Heard arguments of Sri H.S.M., advocate for the plaintiff and Sri S.K.N., Advocate for the defendant in detail.

7. Based on the oral and documentary evidence and arguments of both the parties, I have answered the above issues in the following ways:

Issue No.1: In Negative.

Issue No.2: In Negative.

Issue No.3: In Negative.

Issue No.4: In Negative.

Issue No.5: As per final order, for the following:

REASONS

8. **Issues No.1 to 3:-** Since these issues are inter connected, in order to avoid repetition of facts, these issues are taken up together for consideration.

9. It is the case of plaintiff that he had purchased the suit schedule property from one Mrs. Mabel Nazareth on 28-8-2001 as per document No. 602/2001-02. It is his case that he is the absolute owner of suit schedule property as per sale deed. It is also the case of plaintiff that Mrs. Mabel Nazareth had purchased 0.79 acre of land in Sy.No. 160/3 of Kowdoor village from the defendant as per sale deed dated 19-9-1997. The said land includes the suit schedule property herein and subsequently Mrs. Mabel Nazareth sold the said property to plaintiff. It is his case that he constructed a residential house in the purchased property and planted cocoanut trees and made vast improvements. In the year 2009 he had surveyed the property and came to know that his house is constructed in the land belonging to one Mr. Vittala Sapaliga. Thereafter the plaintiff purchased the said portion of land in Sy.No. 391/2 measuring 0.45 acre of Kowdoor village. It is his case that during said survey he also noticed that the land measuring 0.30 acre in extent in Sy.No. 160/3 of Kowdoor village purchased by him from Mrs. Mabel Nazareth is in possession of the defendant.

10. To prove this aspect the G.P.A. Holder of plaintiff Philomina Danthi got examined as P.W.1 and she got marked certain documents. The certified copy of RTC relating to Sy.No. 160/3 of Kowdoor village is marked as Ex.P.2, the original G.P.A. is marked as Ex.P.1, the office copy of legal notice dated 23-11-2010 issued to defendant is marked as Ex.P.3, the reply sent by the defendant dated 20-12-2010 is marked as Ex.P.4, another legal notice dated 21-1-2011 got issued to defendant is marked as Ex.P.5, the postal acknowledgement is marked as Ex.P.6, the original sale deed of 28-8-2001 in between plaintiff and Mrs. Mabel Nazareth is marked as Ex.P.7 and the sale deed of the year 1997 between the defendant and Mrs. Mabel Nazareth is marked as Ex.P.8. The sketch prepared and annexed to the sale deed is also produced regarding the suit schedule property. Based on these documents it is the case of plaintiff that he is the absolute owner of 0.30 acre of land, which is in the possession of defendant even after sale.

11. On the other hand, to disprove this fact, the defendant got examined her G.P.A.Holder Felix D'Souza as D.W.1 and got marked certain documents. Three photos were got marked as Exs D.1 to D.3, the original G.P.A. is marked as Ex.D.4, two R.T.C. extracts pertaining to the suit property are marked as Exs. D.5 and D.6, the certificate issued by Grama Panchayath, Bailur, is marked as Ex.D.7

and tax paid receipt relating to the suit property is marked as Ex.D.8. On the basis of these documents the defendant prays to reject the suit of the plaintiff.

12. The advocate for plaintiff Sri H.S.Madival has argued that, the plaintiff had purchased the suit property from one Mrs. Mabel Nazareth in the year 2001 and he had made vast improvements in the suit property, he constructed a house and later in the year 2009, when he got surveyed his land, he came to know that the house constructed by him is in the land of one Vittala Sapaliga, hence, he purchased it from said Vittala Sapaliga. Thereafter he came to know that 0.30 acre of land is still in the possession of defendant. Hence, he requested the defendant to hand over 0.30 acre of her land in any portion as amicable settlement, but defendant refused to do so. Hence, notice was issued and present suit was filed. It is his argument that the original vendor Mrs. Mabel Nazareth when purchased 0.79 acre of land, the defendant kept 0.30 acre of land in his possession and did not hand over the same to the original vendor, hence, the said mistake has continued when plaintiff purchased the suit property and now he came to know about this mistake or confusion. Hence, he wants this court to declare that he is the absolute owner of 0.30 acre and it has to be handed over by the defendant to him.

13. On the other hand, advocate Sri S.K.N. for the defendant has argued that, it is totally false suit filed by the plaintiff to make unlawful gain by grabbing 0.30 acre of land from the defendant. The house constructed by the defendant is of the year 1992 which is much prior to he sold one portion of land to Mrs. Mabel Nazareth. He never intended to sell any land wherein his house is situated. At the time of sale to Mrs. Mabel Nazareth the said land has been surveyed and boundaries are demarcated before the sale deed was executed by the defendant. It is also his argument that only after clear demarcation a barbed wire fence was put in the year 1997 itself between the land of defendant and purchaser Mrs. Mabel Nazareth. The said Mrs. Mabel Nazareth was also in possession of purchased portion till the year 2001 and she sold the same to this plaintiff. Hence this question of unauthorized possession of 30 cents of land by the defendant even after selling the land to Mabel Nazareth never came from the year 1997. It is admitted by the plaintiff that the house of defendant is constructed long back in the year 1991 and it is in his own land. Hence, this new contention of the plaintiff that defendant is in unauthorized possession of 30 cents of land is clear after thought to grab the valuable land of defendant. Hence, he has prayed to dismiss the suit with exemplary costs.

14. I have gone through the documents produced by the plaintiff as well as defendant. The plaintiff has relied upon Ex.P.2 R.T.C. Extract which is pertaining to the year 2010-2011. A portion of Sy.No. 160/3-P2 measuring 0.74 acre is in possession of Valerian Danthi i.e. the plaintiff and in column No. 10 it is clearly shown that it was as per sale deed of the year 2001-2002. Apart from said R.T.C., nothing is coming forth to establish the case of plaintiff. Ex.P.3 is a legal notice issued on 23-11-2010 to the defendant by the plaintiff stating that while measuring the land in the month of July 2009 it was noticed by the plaintiff that defendant is in unauthorized possession of land measuring 0.30 acre. It is also stated in the notice that the house constructed by the defendant is also situated in the said encroached portion of 30 cents. A notice was given to vacate the said land and hand over the vacant possession within 15 days by removing the building. This notice has been replied by the defendant on 20-12-2010 denying the entire allegations. At the first instance itself defendant has stated that she is in exclusive and absolute possession and enjoyment of property measuring 0.59 acre in Sy.No. 160/3. In the notice itself it is stated that the house is constructed in the year 1992 itself and cocoanut garden is also raised. A portion of land measuring 0.79 acre was sold by this defendant to Mabel Nazareth. He has also stated about putting up of barbed wire fence on all sides of her property in the year 1997 itself after

due measurement while selling the 0.79 acre to Mabel Nazareth.

15. It is strange to note that once the notice was issued in the year 2010 and it was duly replied by the defendant and instead of taking any steps against the defendant, the second notice was issued as per Ex.P.5 by the plaintiff stating that the survey number mentioned was wrong in the previous notice by clerical error. Hence, he has issued another notice to the defendant. Apart from the R.T.C. which is relied upon by the plaintiff and the original sale deed of himself and his vendor which are marked as Exs. P.7 and P.8, the plaintiff has not at all taken any effort to at least produce the survey sketch which is alleged to be prepared in the year 2009 wherein he came to know about unauthorized possession of defendant. If at all any such survey sketch prepared by authorized surveyor was present, then nothing had prevented the plaintiff to produce it and got that surveyor examined as a witness to prove the alleged unauthorized occupation by defendant. But, no such effort was made by the plaintiff. On the other hand, the defendant has produced the photographs of the entire suit property which clearly goes to show that there are barbed wire fence which divides the lands of plaintiff and defendant since long back. Even in the evidence of D.W.1 this fact is substantiated.

16. The plaintiff has tried to elicit from the defendant that after filing this suit the defendant has not taken any effort to measure her property and prepare the sketch. But it is to be noted that when certain fact is alleged by the plaintiff and denied by the defendant, the burden is on the plaintiff to prove this fact as per section 103 of Indian Evidence Act. The defendant need not prove that she is not in unauthorized occupation of 0.30 acre of land belonging to the plaintiff. But, when the plaintiff has come before the court with the specific case that the defendant is in unauthorized possession, it is for the plaintiff to prove this issue.

17. It is found in the cross examination of the defendant that the plaintiff is trying to make of this court to get measure the suit property once again and to find out whether there is an encroachment by the defendant or not. The application filed by the advocate for defendant for appointment of court commissioner to measure the property of plaintiff and defendant was rejected by this court. Nothing has been produced by the plaintiff to prove that the defendant is in unauthorized occupation of 0.30 acre of land belonging to the plaintiff. Moreover, if it was the specific case, he could have got examined his vendor Mabel Nazareth in this regard. But the said vendor never questioned the validity of sale deed after she purchased 0.79 acre of land from the present defendant. Hence, this is a clear after

thought by the plaintiff to make unlawful gain by filing this suit.

18. It is specifically proved by the defendant that the house in which the defendant is residing is constructed in the year 1992. On perusal of Ex.P.8 sale deed, in the schedule, there is no description of any house building. It is specifically averred in Ex.P.8 sale deed that this property bears no building, but consists of one old well and electric pumpset was installed to the said well together with right of road relating thereto. Hence, when the house of defendant is existing in the suit schedule property since the year 1992, the defendant has clearly proved that it is not the portion of land sold to Mabel Nazareth and the plaintiff has filed a false suit alleging false claim. Hence, the plaintiff has failed to prove that the defendant is in unauthorized possession of 'A' schedule property and he is entitled for the possession of the same. The plaintiff is not entitled for any mesne profits as claimed by him from 'A' schedule property. Hence, I have answered issues No. 1 to 3 in negative.

19. **Issues No.4:-** The defendant has taken this specific plea in his written statement that the suit is bad for non-joinder of necessary party and mis-joinder of the parties. It is a denial made in the written statement that the defendant if aggrieved by the sale deed, he should have moved against his

vendor and the vendor has to set right it or to pay the compensation. He cannot file a suit against this defendant. Hence, the suit is bad for non-joinder of necessary party. Apart from taking this contention, nothing was brought in the evidence by the defendant to prove this aspect. It was an evasive defence taken in the written statement, but not established by the defendant. Moreover, the suit cannot fail only for the purpose of non-joinder of necessary party or mis-joinder of parties, it is a curable defect which can be cured by the plaintiff by amendment. Hence, the defendant has not proved this issue which was alleged in the written statement. Hence, I have answered issue No. 4 in negative.

20. **Issue No.5:-** In view of my findings on above issues, I proceed to pass the following:

ORDER

The suit of the plaintiff is hereby
dismissed with costs.

Draw decree accordingly.

(Dictated to the Stenographer, transcribed by her, corrected by me and then pronounced in the open court, this the 24th day of November, 2014.)

(Poornima N.Pai)
Prl. Civil Judge & JMFC., Karkala.

ANNEXURES

List of witness examined for plaintiff:-

PW.1 – Mrs. Philomina Danthis.

List of witness examined for Defendant:-

DW.1 – Mr. Felix D'Souza.

List of documents exhibited for plaintiff:-

Ex.P.1 – G.P.A. executed by plaintiff.	.. 11-11-2010
Ex.P.2 – R.T.C	..2010-2011
Ex.P.3– Legal Notice.	.. 23-11-2010
Ex.P.4 – Reply by defendant to Ex..3.	..20-12-2010
Ex.P.5 – Legal Notice.	..21-01-2011
Ex.P.6 – Postal Acknowledgement.	..21-01-2011
Ex.P.7 – Sale Deed executed by Mabel Nazareth in favour of plaintiff.	..28-08-2001
Ex.P.8 – Sale Deed executed by defendant in favour of Mabel Nazareth.	..19-09-1997

List of documents exhibited for the defendants:

Ex.D.1to 3 – Photos.	
Ex.D.4 – G.P.A. executed by plaintiff.	.. 16-11-2012
Ex.D.5&6 – R.T.C. Extracts.	
Ex.D.7 – Certificate issued by Grama Panchayath, Bailoor.	.. 09-12-2010

Ex.D.8 – Tax paid receipt.

..20-10-2009

Prl. Civil Judge & JMFC.,Karkala.