

IN THE COURT OF THE PRL. CIVIL JUDGE AND
J.M.F.C., KARKALA

Present: - Sri. Puttaraju, B.A.,LL.B.,
Prl.Civil Judge & J.M.F.C., Karkala.

Dated this the 14th day of February, 2019.

ORIGINAL SUIT 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.

(Plaintiff: Absent.)

- AND -

1.Mrs. Lathishia Mathias,
aged about 45 years,
W/o John Mathias,
residing at 'Levia Villa',
Ranganapalke, Kowdoor
Village, Karkala Taluk,
Udupi District.(Since deceased, LR's brought on record)

1(a). Sri John Mathias,
aged about 55 years.

1(b). Levia mathias,
aged about 21 years.

No.1(a) is the husband and
No.1(b) is the daughter of
Late Lathishia Mathias and
both are residing at Levia Villa,
Ranganapalke, Kowdoor village,
Karkala Taluk, Udupi District. ...Defendants.

(Defendant No.1(a) & (b): Absent;
Defendant No.1: Dead)

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

(Judgment passed on 24-11-2014
and remanded on 19-12-2018) : 19-12-2018

Nature of the suit : Suit for Possession.

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

Date on which the judgment
was pronounced : 14-02-2019

	<u>Year/s</u>	<u>Month/s</u>	<u>Day/s</u>
Total duration after remand:	00	01	25

J U D G M E N T

This is a suit filed by the plaintiff for possession of suit
schedule property with mesne profits at the rate of ₹. 500/- per
month.

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

The suit 'A' schedule property belongs absolutely to the plaintiff which is a portion of land purchased by the plaintiff as per sale deed dated 28-8-2001 executed by Mrs. Mabel Nazareth. 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 which includes the suit property and subsequently she sold the same to the plaintiff. It is the case of plaintiff that after purchase of said land he constructed a house, planted cocoanut plants and effected vast improvements therein. In the month of May 2009 when the plaintiff got measured his property through surveyor, he noticed that the house constructed by him is situated in the property belonging to one Mr. Vittala Sapaliga, hence he purchased the said portion of land in Sy.No. 391/2 measuring 0.45 acre of Kowdoor village. At the time of said survey he also noticed that land measuring 0.30 acre in Sy.No. 160/3 of Kowdoor village (suit property) which was purchased by him from Mrs. Mabel Nazareth is in the possession of defendant itself under confusion and the house of defendant is also situated therein. The plaintiff requested the defendant to hand over the possession of that land which is his absolute property and also given option to compromise the matter, but the defendant has not agreed. The plaintiff issued lawyer's notice dated 23-11-2010 to defendant

to hand over the possession of suit land to which the defendant sent a false reply. Since survey number was wrongly mentioned in the said notice, another notice dated 21-1-2011 sent to defendant which has been served on the defendant, but she has not responded to the same. Therefore, the present suit has been filed seeking possession.

3. The defendant has filed her written statement denying the plaint averments and contended that she is in exclusive possession and enjoyment of property measuring 0.59 acre comprised in Sy.No. 160/3 and her house is situated therein. Initially, she was in possession of totally 1.38 acres in Sy.No. 160/3 ever since 1992, she constructed a house therein, raised cocoanut garden, after measurement she 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, she has put up barbed wire fence on all sides of her property in 1997 itself, the suit property was never sold by the defendant to any one and she is not liable to surrender the schedule property or to vacate it. Hence, she has prayed to dismiss the suit with 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. 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.

6. It is to be noted that in this case this court had passed judgment on 24-11-2014 dismissing the suit. Meanwhile defendant died. Aggrieved by the judgment, the plaintiff herein preferred R.A.No. 4/2015 before the court of Senior Civil Judge & ACJM., Karkala, against the legal heirs of defendant, wherein the appeal was allowed, judgment was set aside and the matter was remitted back to trial court with a direction to appoint the court commissioner at the cost of appellant and dispose of the suit in accordance with law.

7. Accordingly, the file was taken up again by this court and notice was issued to GPA Holder of plaintiff as well as legal heirs of

deceased defendant, despite service of notice the GPA Holder of plaintiff did not appear to proceed with matter to take steps for appointment of commissioner as directed by the Hon'ble Appellate Court and remained absent, the defendant No.1 (a) and 1(b) are also absent in spite of service of notice. The plaintiff has not appeared at least to amend the plaint properly by bringing legal heirs of deceased defendant since before preferring appeal defendant died and appeal was preferred against legal heirs of deceased defendant. Hence, since the parties are remained absent, posted case for judgment as steps has not been taken for appointment of commissioner and argument taken as not addressed.

8. Having regarding considering the oral and documentary evidence available on record on the basis of rival pleadings of parties, I have answered the above issues as follows:-

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

9. **Issues No.1:-** It is the case of plaintiff that he had purchased the suit schedule property from one Mrs. Mabel Nazareth through a

registered sale deed dated 28-8-2001 and she becomes absolute owner in possession of same, said Mabel Nazarath 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 which includes the suit schedule property herein. It is his further case that he constructed a residential house in the purchased property and planted cocoanut trees and made vast improvements. When he measured the property through surveyor in the year 2009 he came to know that his house is constructed in the land belonging to one Mr. Vittala Sapaliga. Thereafter he purchased the said portion of land in Sy.No. 391/2 measuring 0.45 acre of Kowdoor village. It is also his further case that during said survey he 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. The plaintiff in order to prove this aspect got examined his G.P.A. Holder as P.W.1 and got marked certain documents, they are, Ex.P.1 is GPA dated 11-11-2010 executed by plaintiff in favour of PW.1, Ex.P.2 is RTC extract pertaining to property purchased by plaintiff, Ex.P.3 is the notice dated 23-11-2010 issued by plaintiff to defendant calling upon her to hand-over possession of suit land, Ex.P.4 is the reply issued by defendant, Ex.P.4 is the another notice dated 20-12-2010 issued by plaintiff to defendant since survey number in the earlier notice was wrongly mentioned, Ex.P.6 is the postal acknowledgment card, Ex.P.7 is the registered sale deed dated 28-08-

2001 pertaining to property purchased by plaintiff from Mabel Nazarath and Ex.P.8 is the registered sale deed dated 19-09-2019 along with sketch pertaining to property purchased by Mabel Nazarath from defendant.

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. Exs D.1 to D.3 are the photos, Ex.D.4 is the original GPA executed by defendant infavour of DW.1, Exs. D.5 and D.6 are R.T.C extracts pertaining to the suit property, Ex.D.7 is the certificate issued by Grama Panchayath, Bailur and Ex.D.8 is tax paid receipt relating to the suit property.

12. From careful perusal of oral evidence and documents produced by the plaintiff as well as defendant, it appears that the vendor of plaintiff Mabel Nazarath purchased property measuring 0.79 acre in Sy.No.160/3 of Kawdoor village under Ex.P.8 registered sale deed dated 19-09-1997 and thereafter plaintiff purchased same from said Mabel Nazarath under Ex.P.7 registered sale deed dated 28-08-2001 and she has been in possession of same as absolute owner is not in dispute.

13. The question involved in the case is as to whether the defendant possessed suit land unauthorisedly or not, which came to know to the plaintiff when he got measured property by the surveyor in the month of May 2009. In this regard, though, PW.1 deposed in

her evidence affidavit regarding said aspect, to substantiate her oral evidence PW.1 has to place the documents regarding survey sketch prepared by the surveyor in the month of May 2009, but nothing is brought on record, there is no materials placed on record to show that fact, no reason is forthcoming as to what prevented him to make efforts in that regard.

14. PW.1 in the cross-examination categorically admitted that she knows about house building constructed by defendant in her property before property purchased by plaintiff under Ex.P.8, further deposed that while purchasing the property from Mabel Nazarath plaintiff having knowledge about no building is referred in her sale deed Ex.P.9. Further also deposed that defendant fenced around four corners of her property, constructed building and grown coconut trees as shown in the photos Ex.D.1 to 3, from the clear admission of PW.1 as to defendant fenced around her portion of property by constructing house before sell the property to Mabel Nazarath under Ex.P.9. Therefore, in the absence of proof regarding plaintiff got measured property by surveyor and he came to know alleged encroachment and also considering the clear admission of PW.1 it is not sufficient to hold that the defendant is in unauthorized possession of suit land.

15. So far as the notice issued by plaintiff as per Ex.P.3 and P.5 are concerned irrespective of reply sent by defendant as per Ex.P.4 though the plaintiff issued these notices to defendant calling upon her to remove building and vacate suit land within 15 days after receipt of

notice, mere issuing notice to defendant calling upon her to hand over vacant possession of suit land itself is not sufficient to prove unauthorized possession of defendant and the same cannot be accepted.

16. The plaintiff during cross-examination of DW.1 tried to elicit facts that after filing suit defendant has not made any efforts to measure the property, but which is no way helps to plaintiff to prove unauthorized possession of defendant over suit land for the reasons that it is for the plaintiff to establish said facts what asserted in his plaint and burden is on the plaintiff to prove it, the defendant need not prove it.

17. Furthermore, even though plaintiff preferred appeal and matter remanded by the Hon'ble Appellate Court with direction to appoint commissioner at the costs of plaintiff, in spite of service of notice the plaintiff remained absent and he has not come before court to take any steps to appoint court commissioner to prove the fact of unauthorized possession of defendant. It shows the conduct of plaintiff that plaintiff has not approached the court with clean hands. Therefore, for the reasons aforesaid, the considered opinion is of the court that the plaintiff has failed to establish that the defendant is in unauthorized possession of suit land and accordingly, answered this issue in the negative.

18. **Issues No.2 and 3:-**This court while answering on issue No.1 has come to the conclusion that plaintiff has failed to prove that defendant is in unauthorized possession of suit land, when the plaintiff has failed to prove the unauthorized possession of defendant over suit land with satisfactory evidence, question of considering that the plaintiff is entitled to possession of suit land and entitlement of mesne profit at the rate of Rs.500/- from the defendant does not arise at all and accordingly answered these issues in the negative.

19. **Issue No.4:-**The defendant taken contention that suit is bad for non-joinder of necessary parties alleging that if plaintiff aggrieved by Ex.P.7 sale deed executed by Mabel Nazarath, he would have moved against his vendor and set right it, he cannot file suit against him. But nothing is brought on record to prove this fact, however, mere contention that plaintiff has to approach his vendor to set right his grievance is not sufficient. Furthermore, in the case on hand the vendor of plaintiff would be a formal party to suit or at the most neither plaintiff nor defendant can examine her as witness to arrive at a right conclusion on disputed fact, but she cannot be a necessary party to the suit, in her absence suit can be adjudicated affectively, so contention of defendant is curable one, which does not affect the suit. Hence, for the reasons aforesaid, defendant has not been able to establish that suit is bad for non-joinder of necessary party and accordingly, answered this issue in the 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 14th day of February, 2019.)

(Puttaraju)
Prl. Civil Judge & JMFC., Karkala.

IN THE COURT OF THE PRL. CIVIL JUDGE AND
J.M.F.C., KARKALA

OS.No.54/2011

Mr. Valerian Danthi,
 Represented by his G.P.A.Holder
 Mrs. Philomina Danthi. ... Plaintiff.

- Vs -

Mrs. Lathishia Mathias(since deceased)
 and two others. ... Defendants.

ANNEXURE

(Before Remand)

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.

