

KABI510013012018



IN THE COURT OF CIVIL JUDGE & JMFC, AT KUDLIGI

**Present: Smt. C. Mahalakshmi,
*B.A.L., L.L.M.,***

Civil Judge & J.M.F.C.,

O.S. No. 14/2018

Dated this 18th day of November 2023

BETWEEN

L.S. Basheer Ahamed,
S/o Late L.S. Fakruddin Saheb,
Aged about 45 years,
R/o H.no.474, Sheepaha manzil,
11th wad, Hosapete main road,
Kudligi town, Ballari District.

PLAINTIFF

(By Sri. A.Ravi, Advocate)

Vs

Dilshad Begum,
W/o Late Beldar Fazullulasab,
Aged about 61 years,
House hold,
R/o 11th ward, Halikacheri, Bagadi,
Near house of Ex-minister B.M.Sidanagouda,
Hosapete Main road,
Kudligi Taluk, Ballari District.

DEFENDANT

(By Sri. H.B. Advocate)

Date of Institution of suit	12.01.2018
Nature of the suit	Declaration and Mandatory injunction
Date of commencement of recording of evidence	22.03.2019
Date of Judgment	18.11.2023
Total Duration	Year/s Month/s Day/s 05 09 28

: JUDGMENT :

01. This is a suit for declaration and mandatory injunction filed by the plaintiff against the defendant seeking declaration of his ownership over the B schedule property and to grant mandatory injunction directing the defendant to remove the illegal construction on B schedule property put up by defendant by encroaching the A schedule property.

02. In the plaint, it is stated that the property bearing door no.474 situated in old bearing door no.3 and new bearing door no.9 of Kudligi town and measuring East -West : 56 feet, North - South : 36 feet totally measuring 1904 square feet's roofed house is the ancestral property of the plaintiff. It was purchased by the plaintiff's mother and

she was in the possession of the same. Thereafter, she has gifted the same to the plaintiff on 25.10.2003 and the same has been accepted by the plaintiff, the same is referred as A schedule property. The plaintiff thereafter got changed the katha in his name and is paying tax regularly. Towards the western side of the house of the plaintiff, there exists a 6 feet lane left by the plaintiff for free flow of light and air into the plaintiff's house and reaches to the main road towards the southern side of late Veeranna. The defendant is owning house towards the western side of plaintiff's house after 6 feet lane, there exists a sandu of 6 feet in between the plaintiff and defendant house and the same is B schedule property. That the defendant has no right over the same, but the defendant has constructed a toilet in the year of January 2014 without the consent and knowledge of plaintiff and without obtaining permission from the Grama Panchayath, Kudligi and the same is B schedule property. The same is causing nuisance to the inhabitants around the suit schedule property. Even though he has given representation to the Town Panchayath, no action is taken against the defendant. Earlier he had filed a suit before the Hon'ble Senior Civil Judge and J.M.F.C., Kudligi and withdrew the same on technical grounds. Therefore, he has filed suit for the relief of

declaration that he is the owner of the B schedule property and for grant of mandatory injunction directing the defendant to the remove the illegal construction made in the B schedule property.

03. The defendant has filed the written statement and admitted that the defendant is having the house towards western side after 6 feet 9 inches but not 6 feet and has denied the other averments in the plaint and contended that the suit instituted by the plaintiff is not maintainable under section 9 of cpc and liable to be dismissed. That the plaintiff has not sought for declaration in respect of A schedule property. Therefore, the suit is not maintainable. Since the B suit schedule property is part and parcel of A schedule property, the plaintiff's suit for declaration only in respect of B schedule property is not maintainable. That the plaintiff and defendant's husband have entered into the Oppigi Kararu Pathra on 01.07.2004. In view of the same, the plaintiff is estopped from instituting the suit. That during the road widening process, A schedule property was reduced. Therefore, the measurements and boundaries for A schedule property is not admitted. On these grounds, the defendant prayed for rejection of the suit. However, after the issues were framed, the defendant has

not appeared and cross-examined the plaintiff witnesses and not led any evidence.

04. On the basis of the pleadings, the following points that arise for my consideration are:-

: P O I N T S :

- 1. Whether the plaintiff proves that he is the absolute owner of B suit property?**
- 2. Whether the plaintiff proves that the defendant has put up illegal construction in the B schedule property and the same needs to be removed by way of mandatory injunction?**
- 3. Whether the plaintiff is entitled for relief sought in the plaint prayer ?**
- 4. What order or decree ?**

05. In order to prove the case of the plaintiff, plaintiff examined himself as P.W-1 and examined two other witnesses as P.W.-2 and P.W.-3. The plaintiff witnesses were not cross-examined by the defendant and defendant did not lead her evidence.

06. Heard. Perused and my answer to above points is as follows:

Point No.1 -3 : In the Negative

Point No.4 : As per the final order for the following

:REASONS:

07. Point No.1-3 :- I have taken these issues together for common discussion as they are interconnected to each other and also to avoid repetition of facts and appreciation of evidence. The case of the plaintiff is stated above. In order to prove his case, plaintiff has examined himself as P.W.-1 and reiterated the averments of the plaint and also got marked 23 documents at Ex.P.-1 to Ex.P.-23 and examined two other persons as P.W.-2 and P.W-3.

08. In order to prove the case, plaintiff has examined P.W.-1 to 3 and they have reiterated the case mentioned in the plaint and their evidence has remained unchallenged. The plaintiff has marked Ex.P-1 which is the sale deed as per which the house property bearing door number 474 measuring East – West : 56 feet and North – South : 34 feet was purchased by the plaintiff's mother. As per the sale deed, it can be seen that another property towards the western side of plaint A schedule property measuring East – West : 15 feet and North – South : 6 feet is also purchased by the plaintiff's mother. However

there is no reference to the another property purchased by the plaintiff's mother in this suit.

09. The plaintiff has produced Ex.P.2 gift deed as per which A suit schedule property was gifted to the plaintiff. Perusal of the gift deed shows the property measuring 56X34 feet which is the A suit property was gifted to the plaintiff and in particular it is stated that a house property measuring 1904 sq. feet is gifted to the plaintiff. Therefore, it is clear that there is house in the entire measurement of 1904 sq. feet which is the schedule A property herein and is gifted to the plaintiff. Similarly, the pleadings of the plaintiff is that a house property measuring 1904 sq. feet is gifted to the plaintiff which has a lane of 6 feet towards the western side of the plaintiff's property measuring 1904 sq. feet which is A schedule property.

10. In the gift deed and pleadings, the boundary towards the western side of the A schedule property is shown as 6 feet sandu. Therefore, this makes it clear that the A schedule property is different and the 6 feet sandu i.e. the lane are different. This shows that there is a house in entire measurement 56X34 feet and the case of the plaintiff is that the defendant has encroached the portion of A

schedule property and constructed toilet therein. The case of the plaintiff is that B suit schedule property is the part of A suit schedule property. However, when there is house in entire A schedule property, the question of defendant encroaching the measurement as shown to be B schedule property being the portion of A schedule property doesn't arise. Therefore, this makes it clear that the A schedule property is completely built up and there is no space left by plaintiff in A schedule property for free flow of air and light and thereby there is no encroachment in A schedule property as stated by the plaintiff.

11. The plaintiff has produced photographs at Ex.P.23. The perusal of the same shows that there is gap between the house of the plaintiff and the defendant's house and a room appears to have been constructed between the property of the plaintiff and that of the defendant. But as per the plaintiff, now the defendant has encroached property measuring 4.6 X 6 feet in A schedule property. Therefore, he has sought for declaration of ownership over that property. However, it is held above that the plaintiff has not left vacant space in A schedule property as stated by him. The perusal of the photos shows that the vacant space appears to be common passage for the use of

public and it appears that B suit schedule property is not the part and parcel of A suit schedule property. Moreover if plaintiff has really left space for free flow of air and light definitely, he would have fenced that space. But plaintiff has not guarded his own property. This also goes to show that B schedule property is not part of A schedule property.

12. At one juncture, the plaintiff states that the B schedule property is 6 feet lane between the plaintiff and defendant's house and at another juncture, the plaintiff states that the B suit schedule property is the part of A suit schedule property. However, it was observed above that there cannot be any encroachment in A schedule property as the entire measurement in A suit schedule property consists of roofed house as per the pleadings and documents placed before the court. So also from the perusal of the gift deed, it is clear that there was no vacant place gifted to the plaintiff. It is pertinent to note that the 6 feet lane appears to be purchased by the plaintiff's mother. However, no material is produced to show that the vendor of plaintiff's mother had the right to sell 6 feet lane and no material is produced to show that the plaintiff's mother has gifted the 6 feet lane

to the plaintiff. Therefore, the say of the plaintiff with respect to ownership of the said B suit schedule property does not appear to be probable. Therefore, it can be held that the plaintiff has not proved his ownership over B schedule property. Therefore, point no.1 needs to be answered in the **Negative**.

13. Point no.2 :- While discussing the point no.1, it was held that the plaintiff has failed to probabalise that he is the owner of B suit schedule property. It was also held that B suit schedule property is not the part of A suit schedule property. From the photographs produced it is clear that the illegal construction is not made in the B suit schedule property. Therefore, it is to be held that the plaintiff has failed to probablise point no.2. Therefore, the point no.2 needs to be answered in the **Negative**.

14. Point No.3: This Point is regarding the entitlement of reliefs. It is pertinent to note that the plaintiff has sought for ownership over B schedule property and for mandatory injunction for removal of the construction over the B suit schedule property. By seeking mandatory injunction, he admits the defendant's possession over the suit "B" schedule property. Thus, when he

admits the defendant's possession over the suit "B" schedule, he cannot seek only for declaration that he is the owner of the suit "B" schedule property and for mandatory injunction directing the defendants to demolish the illegal construction made therein. He ought to seek for possession of the alleged encroached area. Mere seeking a mandatory injunction to demolish the unlawful construction without seeking a further relief of possession is not maintainable. It is relevant to mention that in the matter of Sri. Aralappa V/s Sri.Jagannath reported in ILR-2007-KAR-339 the Hon'ble High court of Karnataka held that *"In a suit for declaration of ownership and permanent injunction.....The appropriate relief consequential to the declaration of ownership would be recovery of the possession of the property. When the plaintiff is out of the possession of the property and does not seek relief for possession, a mere suit for declaration is not maintainable. The reason is not far to seek. It is well settled that no Court would grant any relief which is not useful or futile and not effective. If title of the plaintiff is to be declared and he is not in possession and the possession is with defendant or some other person, the plaintiff would be having title of the property and the person in possession would be having possessory title to the property.*

It would lead to anomalous situation and create confusion in the public, which is to be avoided.” Thus, when the plaintiff alleges the encroachment of his property by the defendant mere seeking the relief of mandatory injunction without relief of recovery of possession is not maintainable. On this ground also the plaintiff is not entitled for the relief sought for. While discussing the point no.1 and 2, it was held that the plaintiff is not the owner of the B suit schedule property. Hence **I answer this Point in the Negative.**

15. Point No.4:- In view of discussion and conclusion arrived at Point No.1 to 3, I proceed to pass the following:

:O R D E R:

The suit of the Plaintiff is hereby dismissed.

No order to cost.

Draw the decree accordingly.

(Dictated to the stenographer directly on computer typed by him corrected and then pronounced by me in the open Court on this **18th day of November 2023.**)

(Smt. C. Mahalakshmi),
Civil Judge and JMFC, Kudligi

ANNEXURE

List of witnesses examined on behalf of Plaintiffs :

P.W.-1 : L.S. Basheer Ahamed
P.W.-2 : S. Yarriswamy
P.W.-3 : Goneppa

List of exhibits marked on behalf of Plaintiffs :

- Ex.P.-1 : Certified copy of registered sale deed
Dt:12.12.1972
- Ex.P.-2 : Certified copy of gift deed dtd:25.10.2003
- Ex.P.-3 : Certified copy of katha extract
to 5
- Ex.P.-6 : Tax paid receipts
to 17
- Ex.P.-18 : Applications
and 19
- Ex.P.-20 : Legal notices
and 21
- Ex.P.-22 : Tax paid receipt book
- Ex.P.-23 : Photos and C.D

List of witnesses examined on behalf of defendants :

NIL

List of exhibits marked on behalf of defendants :

NIL

(Smt. C. Mahalakshmi)
Civil Judge and JMFC, Kudligi

However, it is contention of the plaintiff that suit "B" schedule property is the part of and parcel of the suit "A" schedule property and while constructing the house in suit "A" schedule property he left vacant space on Western side of his property for the purpose his free movement and uninterrupted supply of air and light. The plaintiff has sought for Declaration of his title over the suit schedule "B" property and also sought for Mandatory Injunction directing the defendants to demolish the illegal construction of stair case in the suit "B" schedule property. In 1st prayer he sought for declaration of his title and possession over the suit "B" schedule property. However, in 2nd prayer he sought for mandatory injunction directing the defendants to demolish the illegal stair case put up in the suit schedule "B" property. By seeking mandatory injunction he admits the defendants possession over the suit "B" schedule property. Thus, when he admits the defendants possession over the suit "B" schedule lane he can seek only for declaration that he is the owner of the suit "B" schedule property and for mandatory injunction directing the defendants to demolish the illegal construction made therein. He cannot seek declaration that he is the owner in possession of the suit "B" schedule property. If he is in possession of the suit "B" schedule property the question of seeking the Mandatory Injunction does not arise at all.

13. Further, it is pertinent to note that in 2nd prayer the plaintiff has sought only for mandatory injunction to demolish the illegal construction. In addition to that he has not sought for handing over the vacant possession of the suit "B" schedule property. It is pertinent to mention that it is the case of the plaintiff that he is the absolute owner of the suit schedule properties and the defendants have

encroached the suit 'B' schedule property and illegally put up a stair case therein. When he contends the alleged encroachment by the defendants he ought to seek for possession of the alleged encroached area. Mere seeking a mandatory injunction to demolish the unlawful construction without seeking a further relief of possession is not maintainable. It is relevant to mention that in the matter of **Sri. Aralappa V/s Sri.Jagannath reported in ILR-2007-KAR-339 the Hon'ble High court of Karnataka held that** *"In a suit for declaration of ownership and permanent injunction, not only the plaintiff has to prove his title to the property but also his possession over the property on the date of the suit. When the plaintiff is not in the possession of the property on the date of the suit, the relief of permanent injunction is not an appropriate consequential relief. The appropriate relief consequential to the declaration of ownership would be recovery of the possession of the property. When the plaintiff is out of the possession of the property and does not seek relief for possession, a mere suit for declaration is not maintainable. The reason is not far to seek. It is well settled that no Court would grant any relief which is not useful or futile and not effective. If title of the plaintiff is to be declared and he is not in possession and the possession is with defendant or some other person, the plaintiff would be having title of the property and the person*

in possession would be having possessory title to the property. It would lead to anomalous situation and create confusion in the public, which is to be avoided.” Further, in the matter of **Sri.Bharathesh Balasaheb Kuppanatte V/s Sri.Noorbasab Peeraso Mantoorkar dead by LRs in RSA No.5004/2011 dated 09.02.2018 the Hon'ble High Court of Karnataka held that** "*Admittedly, if the evidence clearly go to show that the plaintiff is not in possession of the property as on the date of the suit, then under such circumstances, the relief of permanent injunction is not the appropriate consequential relief, the appropriate consequential relief that is required to be sought along with the declaration of ownership, would be recovery of possession of the property. When the plaintiff is out of the possession of the property and does not seek the relief of possession, then under such circumstances the suit for mere declaration is not maintainable*". Thus, when the plaintiff alleges the encroachment of his property by the defendants mere seeking the relief of mandatory injunction without relief of recovery of possession is not maintainable.

14. Further, for getting the 2nd relief first the plaintiff has to prove that he is the owner of the suit "B" schedule property. Thus, it is the burden on the plaintiff to prove his title over the suit "B" schedule property. It is

pertinent to mention that it is the contention of plaintiff that he is the owner of the suit "A" schedule property and the suit "B" schedule lane is the part of the suit "A" schedule property. However, in the schedule he has not mentioned the total extent of the suit "A" schedule property. It is the bounden duty of the parties to give a clear description of the property. Law requires that when the property involved in the suit is immovable property the parties to the suit shall give the clear description of the property with survey number, boundary, extent etc for clear identification of the property. Without such description it is not possible to identify the property. Further, the plaintiff has simply stated in the plaint that in the Western side of his "A" schedule property he left "B" schedule lane measuring East to West 2 ½ feet and North to South 24 vacant the purpose of his free movement and uninterrupted supply of air and light. Except his pleading he has not produced a piece of document to show his ownership over the suit "B" schedule property and it is the part and parcel of suit "A" schedule property. Further, except Ex. P-2 he has not produced any document to show the total extent of suit "A" schedule property and he has not produced any document to show a total measurement of the RCC house built in the suit 'A' schedule property and extent of vacant space left therein. It is the burden on

the plaintiff to plead and prove his case with oral and documentary evidence.

**(Vide Separate Judgment)
Judgment pronounced in the
open Court vide Dt. 18.11.2023**

: O R D E R :

The suit of the Plaintiff is hereby
dismissed.

No order to cost.

Draw the Preliminary Decree
accordingly.

**Civil Judge & JMFC.,
Kudligi**

