

KAVP010059722025



Presented on : 02-08-2025
Registered on : 05-08-2025
Decided on : 16-06-2026
Duration : 10 Months 11 Days

**IN THE COURT OF II ADDL DISTRICT AND
SESSIONS JUDGE, VIJAYAPURA**

PRESENT: SRI ABDUL-RAHIMAN. A. NANDGADI,
B.Com.,LL.B.,(Spl.),
II Addl. District & Sessions Judge,
Vijayapura.

DATE OF JUDGMENT:- 16.06.2026

REGULAR APPEAL No.132/2025

Appellant : 1. *Shivappa S/o Mallappa Budihal,*
Since deceased by his L.Rs.

1A. *Mallappa S/o Shivappa Budihal, Age:*
57 years, Occ: Agriculture, R/o:
Budihal Oni, Babaleshwar, Tq.
Babaleshwar, Dist. Vijayapura.

1B. *Indrabai W/o Rajendra Rugi, Age: 55*
years, Occ: H.H.Work, R/o: Budihal
Oni, Babaleshwar, Tq.
Babaleshwar, Dist. Vijayapura.

1C. *Nilavva W/o Lakshmappa Belagali,*
Age: 46 years, Occ: H.H.Work, R/o:
Jambagi H. Tq. Babaleshwar, Dist.
Vijayapura.

1D. *Basappa S/o Shivappa Budihal, Age:*
51 years, Occ: Agriculture, R/o:
Budihal Oni, Babaleshwar, Tq.

Babaleshwar, Dist. Vijayapura.

1E. Rudrappa S/o Shivappa Budihal,
Age: 49 years, Occ: Agriculture, R/o:
Budihal Oni, Babaleshwar, Tq.
Babaleshwar, Dist. Vijayapura.

1F. Kashibai W/o Shankreppa
Shiramagond, Age: 46 years, Occ:
H.H.Work, R/o: Babaleshwar, Tq.
Babaleshwar, Dist. Vijayapura

(By Sri M.H.K.,- Advocate)

V/s

Respondent: 1. Mahmadyaseen S/o Fareedsaheb
Jalegar, Age: 31 years, Occ:
Agriculture, R/o: House No.922,
Maibusubani Darga Street,
Babaleshwar, Tq. Babaleshwar, Dist.
Vijayapura.

(By Sri. R.M.K., Advocate)

**Judgment &
Decree
challenged
in this
Appeal :** Against the Judgment and Decree
passed by the Learned III Addl. Senior
Civil Judge Vijayapura, passed in
O.S.No.80/2019, dated 01.07.2025.

**(ABDUL-RAHIMAN. A. NANDGADI),
II Addl. DISTRICT & SESSIONS JUDGE,
VIJAYAPURA.**

JUDGMENT

*This Appeal is preferred by the Original
Defendant, being aggrieved by the Judgment and*

Decree passed by the Learned III Addl. Senior Civil Judge and JMFC Vijayapura in O.S.No.80/2019 dated 01.07.2025, wherein the Suit of the Plaintiff is decreed with costs, Plaintiff is declared as lawful owner and in lawful possession of the Suit Scheduled property and Defendant is permanently restrained from interfering in the peaceful possession and enjoyment of the Plaintiff over the Suit Schedule Property.

Parties will be referred to, as per their ranks before the Trial Court, for the sake of convenience.

2. *Brief facts of the case, leading to preferring this Appeal are as under:*

Plaintiff Mahammadyaseen S/o Fareedasaheb Jalegar has filed the Suit for the relief of declaration and permanent injunction against the Defendant in respect of the land bearing Sy.No.109/3, measuring 2.01 Gs situated at Tiganibidari village in newly constituted Babaleshwar Taluka of Vijayapura District, which is described as the Suit Schedule Property (here

in after said property will be termed as Suit Schedule Property for the the sake of convenience and brevity), contending that he is absolute owner and in possession and enjoyment of the Suit Schedule Property, as he has acquired the said property in oral family arrangement cum partition made by his father Fareedsaheb Jalegar. Accordingly, his name was mutated in the records of the said land. He is personally cultivating the said land. He is in lawful possession and enjoyment of the said land. Originally one Haji Galagali and his brother Shamshuddin were the joint owners and possessor of the land bearing Sy.No.109, measuring 10 Acres 05 Gs, situated in Tiganibidari village. Prior 1928, oral partition has taken place inbetween them; and in the said oral partition Northern strip measuring 6 Acres 03 Gs in Sy.No.109, which was renumbered as Sy.No.109/1, measuring 6 Acres 03 Gs was allotted to the share of Haji Galagali; and Southern strip measuring 6 Acres 02 Gs in Sy.No.109, which was renumbered as Sy.No.109/2, measuring 6 Acres 02 Gs was allotted the

share of Shamshuddin. Said Shamshuddin in order to meet his family and legal necessity has sold the land bearing Sy.No.109/2, measuring 6 Acres 02 Gs under registered sale Deed dated 20.06.1928 in favour of Fareedsaheb S/o Dastagirsab Jalegar (grate grand father of the Plaintiff) which is evident from ME No.60 of Tiganibidari. Since then Fareedsaheb Jalegar has acquired exclusive title and possession over the land bearing Sy.No.109/2, measuring 06 Acres 02 Gs of Tiganibidari village. Said Fareedsaheb died on 01.11.1955 leaving behind him his son by name Moulasab S/o Fareedsaheb Jalegar, who has succeeded the land bearing Sy.No.109/2, measuring 06 Acres 02 Gs of Tiganibidari village in Babaleshwar Taluka, as he happens to be the only legal heir to his deceased father; and became absolute owner in possession of the land bearing Sy.No.109/2, measuring 06 Acres 02 Gs of Tiganibidari village, which is evident from ME No.571 of Tiganibidari village. Moulasab Fareedsaheb Jalegar died on 14.07.1998 leaving

behind his his son by name Fareedsaheb (father of the Plaintiff) and a daughter by name Mahiboob; and a widow by name Hajma as his only legal heirs to succeed the land bearing Sy.No.109/2, measuring 06 Acres 02 Gs. Upon the death of Moulsab his legal heirs have become joint owners and in joint possession of the said land, which is evidence from ME 2685. And later on said Mahiboobi and Hajama under oral arrangement, relinquished their undivided share in the land bearing Sy.No.109/2 in favour of Fareedsaheb Jalegar (father of the Plaintiff) which is evident from ME No.103/2009-10; as such father of the Plaintiff by name Fareedsaheb Jalegar has acquired the exclusive title and possession over the land bearing Sy.No.109/2, measuring 06 Acres 02 Gs of Tiganibidari village.

02.01. *Thereafter the father of the Plaintiff made family arrangement cum partition in respect of land bearing Sy.No.109, measuring 06 Acres 02 Gs inbetween him and the Plaintiff; in the said oral family*

arrangement cum partition, the father of the Plaintiff allotted Suit land to the Plaintiff and put the Plaintiff in actual possession and enjoyment of the Suit land as on the date of oral family arrangement, which is taken in the year 2013. Since then the Plaintiff has acquired the exclusive title and possession over the Suit land; he is personally cultivating the said land and he is in lawful possession and enjoyment of the Suit land.

02.02. *The Defendant has no right title or interest of the Suit land. The Defendant on 01.04.2019 came to the Suit land and began to assert his false title over the Suit land by denying the title of the Plaintiff over the Suit land and started causing obstructions to the Plaintiff's peaceful possession and enjoyment over the Suit land; and threatened the Plaintiff that he is going to dispossess the Plaintiff from the Suit land withing fortnight. The Plaintiff was shocked to hear the words of the Defendant and requested him not to cause*

obstruction to his peaceful possession and enjoyment over the Suit land. But in vain.

02.03. *Further it is contended that Haji Galagali died somewhere in the year 1928, leaving behind him, his sons Gaibu S/o Haji Galagali, and this fact is evident from ME No.69 of Tiganibidari village. Thereafter, one Imamsab S/o Peersab Kambagi has purchased the land bearing Sy.No.109/1, measuring 06 Acres 03 Gs of Tiganibidari village in a public auction held British Govt. and has acquired exclusive title and possession over the land bearing Sy.No.109/1 measuring 06 Acres 03 Gs, which is evident from ME No.111 of Tiganibidari village. Thereafter, Imamsab S/o Peersab Kadagai inorder to his family and legal necessity has sold the land bearing Sy.No.109, measuring 06 Acres 03 Gs of Tiganibidari village under the Registered Sale Deed dated 18.04.1941 infavour of one Ameensab S/o Davalsab Bijapur and put him in possession of the said land. While executing the said*

sale deed, Ameensab by mistake mentioned extent of the land bearing Sy.No.109/1 as 10 Acres 13 Gs, instead of 06 Acres 03 Gs. However, Ameensab by virtue of sale deed dated 18.04.1941 never claimed his title and possession to a extent of 10 Acres 13 Gs in Sy.No.109/1; and he was aware that his vendor has got title and possession to a extent of 06 Acres 03 Gs in Sy.No.109/1; and Ameensab began to cultivate the land bearing Sy.No.109/1, measuring 06 Acres 03 Gs. Thereafter, Ameensab S/o Davalsab Bijapur in order to meet his family and legal necessity sold the said land under the Registered Sale Deed dated 24.07.1947 in favour of Mallappa Gurupadappa Budihal and put him in possession and enjoyment of the said land. While executing the Sale Deed Mallappa again committed the said mistake in mentioning the extent of land bearing Sy.No.109/1 as 10 Acres 13 Gs instead of 06 Acres 03 Gs. This fact is evident by ME NO.273 of Tiganibidari village. However, Mallappa Budihal never claimed his title or possession over the land bearing Sy.No.109/1,

to the extent of 10 Acres 13 Gs, but he continued to enjoy the land bearing Sy.No.109/1, measuring 06 Acres 03 Gs of Tiganibidari village, as he was fully aware about the fact that his vendor has got title and possession to an extent of 06 Acres 03 Gs instead of 10 Acres 13 Gs. The said Mallappa Gurupadappa Budihal died on 16.07.1953 leaving behind him, his sons viz. Irappa and Shivappa, who have succeeded the land bearing Sy.No.109/1, measuring 06 Acres 03 Gs from him; the same is evident from ME No.469 of Tiganibidari village. On succeeding Irappa and Shivappa/Defendant have become joint owners in joint possession of the land bearing Sy.No.109/1, measuring 06 Acres 03 Gs and another land bearing Sy.No.103/2, both of Tiganibidari village, subsequently there was a oral partition inbetween Irappa and Shivappa sons of Mallappa Budihal; and in the said partition the land bearing Sy.No.109/1, measuring 06 Acres 03 Gs was allotted to the share of the Shivappa/Defendant and he was put in possession and enjoyment of the said land;

and land bearing Sy.No.103/2 was allotted to the share of Irappa Budihal same is evident by ME No.836 of Tiganibidari village. The Defendant was aware that in partition mutation, the extent of land bearing Sy.No.109/1 was wrongly shown as 06 Acres 13 Gs instead of 06 Acres 03 Gs; and he was also aware that due to the wrongly mention of extent of land in the Registered Sale Deed, Warsa and Mutation etc., as well as in the oral partition, but he was put into possession of the land measuring 06 Acres 03 Gs in Sy.No.109 of Tiganibidari village.

02.04. *Further it is contended that the Defendant and Moulsab Jalegar were thought of making correction in the R/R by deleting the wrong entries so far as extent of land was concerned, inorder to avoid future dispute among themselves and subsequently amongst their legal heirs, as such both of them filed joint Wardi before the Revenue Authorities to correct and rectify the extent of land held by them in the*

year 1967. The Revenue Authorities on receipt of the said joint Wardi made necessary inquiry and arrived at a conclusion that the land bearing Sy.No.109/1 is measuring 06 Acres 03 Gs and not 10 Acres 13 Gs; as well the land bearing Sy.No.109/2 is measuring 06 Acres 02 Gs., thereby the Revenue Authorities have got corrected the extent of the said lands the same is evident as per ME No.1117 of Tiganibidari village. So the Defendant on the basis of previous false revenue entries showing wrong extent of land bearing Sy.No.109/1 as 10 Acres 13 Gs instead of 06 Acres 03 Gs; and at the instance of the ill-wishers of the Plaintiff, in order to gulp the Suit land of the Plaintiff and his father unnecessarily asserted his false title over the Suit land by denying the title of the Plaintiff over the Suit land for the first time on 01.04.2019 and started causing obstructions in peaceful possession and enjoyment over the Suit land and threatening to dispossess from the Suit land. The Defendant did not heed to the request of the Plaintiff.

Hence, Plaintiff was constrained to file the present Suit.

3. *Upon filing the Suit by the Plaintiff, the Trial Court has issued summons to the Defendant. The Defendant has appeared through his Counsel and has filed his Written Statement on 06.08.2021 denying all the allegations made by the Plaintiff in the Suit Plaint, but specifically contending that, earlier one Haji Galagali and his brother Shamshuddin were the joint owners and possessors of the land bearing Sy.No.109; there was a oral partition and as per the said oral partition two strips running East-West directions were made in the land bearing Sy.No.109 of Tiganibidari village, one strip towards the Northern side and another strip towards the Southern side. But specifically denied that land measuring 06 Acres 03 Gs (inclusive 02 Gs pk) was allotted to Haji Galagali towards Northern side and land measuring 06 Acres 02 Gs (0.01 Gs pk) was allotted to the share of Shamshuddin. Further it is*

contended that the land fallen to the share of Haji Galagali situated towards the Northern side infact was measuring 10 Acres 13 Gs and not 06 Acres 03 Gs; and remaining area located towards Southern side was allotted to his brother Shamshuddin. Further it is contended that an area measuring 10 Acres 13 Gs which was allotted to Hajisab, was succeeded by his son Gaibusab Hajisab Galagali; and the said land was purchased by Imamsab Peersab Kambagi, in turn by Ameensab Davalsab Bijapur, who is the vendor of the father of the Defendant. The father of the Defendant by name Mallappa Gurupadappa Budihal has purchased the said land by virtue of sale deed dated 24.07.2047; said Mallappa Gurupadappa Budihal died on 16.07.1953 leaving him, his two sons viz. Irappa and Shivappa sons Mallappa Budihal; and in the family arrangement Defendant received the land bearing Sy.No.109/1 measuring 10 Acres 13 Gs; and since then he is in possession and enjoyment of the land bearing

Sy.No.109/1, measuring 10 Acres 13 Gs situated on the Northern side of the land bearing Sy.No.109.

03.01. *Further it is contended that on 18.04.1941 itself in the Sale Deed the area of Sy.No.109/1 i.e. area of Northern strip is shown 10 Acres 13 Gs and even from beginning even from certification of ME No.60, which is certified on 12.03.1930 i.e. since from Haji to this Defendant, the owners of Sy.No.109/1 are in possession of 10 Acres 13 Gs and said possession is continuous, peaceful and without anybodies obstruction to the knowledge of owners of Sy.No.109/2 i.e. owner of Southern strip and the said possession is hostile with animus and more-than statutory period as such the Defendant has perfected his title over the Suit land by adverse possession. The owners of Southern strip by creating certain illegal Mutations has filed his false suit and hence Suit itself is not maintainable.*

Further it is contended that at the time of partition Haji came into possession of 10 Acres 10 Gs of land towards Northern side of Sy.No.109 i.e. 109/1; and whereas the Southern strip owner came in possession of remaining area of said land; they also came in possession of area of land bearing Sy.No.110 of said village and hence Plaintiff is required to workout his remedy as against the owner of the said land. The Defendant who is owner and in possession of land measuring 10 Acres 13 Gs out of Sy.No.109 towards Northern side i.e. land bearing Sy.No.109/1 and Plaintiff has no right over the said area but the Plaintiff and his vendors behind the back of the Defendant has created ME No.1117 and the said Mutation Entry itself is false and bogus.

Hence, prayed to dismiss the Suit of the Plaintiff.

03.02. *The Defendant has got amended his Written Statement by getting incorporated Para No.19A to his Written Statement, wherein it is contended that,*

in the year 1941 itself i.e. in the Sale Deed dated 18.04.1941, the area of land bearing Sy.No.109/A shown as 10 Acres 13 Gs i.e. Northern strip thus since from the beginning the owner of the land bearing Sy.No.109/1 are in possession of an area measuring, 10 Acres 13 Gs and the said fact is well within the knowledge of the Plaintiff and his vendors; as such the Suit filed by the Plaintiff seeking declaration in the year e 2019 is hopelessly bard by law of limitation and as such the Suit is liable to be dismissed.

4. *On the basis of the pleadings of both the parties, the Trial Court has framed 4 Issues on 29.10.2021, which reads as under:*

- 1. Whether the Plaintiff proves that he is the absolute owner in possession of the Suit Schedule Property as averred?*
- 2. Whether the plaintiff proves that the alleged interference by the Defendant of his peaceful possession over the Suit Schedule Property as averred?*

3. *Whether the plaintiff is entitled to the relief's?*

4. *What order or decree?*

5. *The Plaintiff inorder to prove his case, got examined himself as PW1; and got marked 63 documents as Ex.P.1 to Ex.P.63. P.W.1 was cross-examined on behalf of the Defendant on 08.02.2024, 01.04.2024, 15.07.2024 and 05.03.2025.*

Plaintiff examined Bashasab S/o Hajisab Ekathar as PW2. PW2 was cross-examined on behalf of the Defendant on 20.07.2024.

Percontra, the Defendant got examined his Power Attorney Holder/son-Basappa Shivappa Budihal as DW1 and got marked one document as ExD1. DW1 was cross examined on behalf of the Plaintiff on 04.11.2024. Defendant got examined Mallappa Shanmukhappa Budihal as DW2. DW-2 was cross-examined on behalf of the Plaintiff on 26.11.2024.

Defendant got examined Shivalingappa Gurappa Kotyal as DW3. DW-3 was cross-examined on behalf of the Plaintiff on 26.11.2024.

5.01. *On hearing both the sides the Trial Court has Decreed the Suit of the Plaintiff, declaring the Plaintiff is a owner in possession of the Suit Schedule property; and permanently restraining the Defendant from causing obstructions to the Plaintiff over his peaceful possession and enjoyment over the Suit Schedule property.*

6. *Being aggrieved by the said Judgment and Decree, the Defendant has preferred this Appeal on the following grounds.*

Grounds of Appeal:

a) *The Judgment and Decree passed by the Trial Court is contrary to law and facts; and same is erroneous and liable to be set aside.*

b) *The Trial Court has erred in decreeing the suit of the Plaintiff, which would have been dismissed.*

c) *The findings recorded by the Trial Court on Issue No.1 and 2 in the Affirmative are totally unsustainable and requires to be set aside.*

d) *The Trial Court has failed to consider the important aspects that suit of the Plaintiff is not maintainable without seeking the relief of possession.*

e) *The Trial Court has brushed away the ocular evidence more specifically version of PW-2 wherein he has admitted that the land of Defendant measuring 10 Acres 13 Guntas is situated towards Northern side of his land.*

f) *The Trial Court has failed to consider that the vendors of the father of appellant has purchased 10 Acres 13 Guntas of land in Sy.No.109 which is numbered as 109/1 under the Registered Sale Deed.*

g) *The Trial Court has failed to approached importance to M.E.No.1117, holding that the said*

Mutation Entry is passed with regard to correction of extent of land.

h) The Trial Court has failed to consider that said Mutation Entry has come into existence on the basis of Vardi which is unregistered document; and not on the basis of any registered document; even no notice is shown to have served upon the appellant.

i) The Trial Court ought to have held that the Plaintiff is not in possession of the suit land and ought to have dismissed the suit of the Plaintiff as Plaintiff has not claimed the relief of possession; and the relief of declaration claimed by the Plaintiff is not maintainable in absence of such relief of possession.

j) The findings recorded by the Trial Court in Para No.21 of the Judgment that Ameensab has purchased 6 Acres 3 Guntas of land only; and measurement of the land purchased shown in the sale deed is wrongly shown, is totally untenable.

k) The Trial Court has failed to consider the pleadings taken by the Defendant; and without

considering the such pleadings of the Defendant, the Trial Court has decreed the suit of the Plaintiff leading to miscarriage of justice.

l) Thus findings recorded by the Trial Court in its judgment are capricious, vexatious and injudicious.

Hence, prayed to allow the Appeal and set aside the Judgment and Decree passed by the Trial Court.

7. *Upon preferring this Appeal notice of the Appeal was issued to the Respondent. The Respondent has appeared through his counsel.*

7.01. *Trial Court Records were secured and the Appellant has died during the pendency of the Appeal and his legal heirs brought on record 1A to 1F.*

The Appellants have filed an application on I.A.No.2/2025 U/o 41 Rule 21 of CPC along with PT Sheet praying to permit them to produce the said document as an Additional Evidence.

The Respondent has filed his objection to I.A.No.2/2025 on 5.12.2025.

Since I.A.No.2/2025 is filed U/o 41 Rule 21 of CPC the same cannot be isolated it is heard on main Appeal. So I.A.No.2/2025 was heard along with main Appeal.

Heard the Arguments of the Learned Counsels for the Appellant and the Respondents on the main Appeal as well as I.A.No.2/2025.

The Learned Counsel for the Appellant has filed his reliance on two decisions reported in 2018(3) KCCR 2175 and 2013(4) KCCR 308 (SC)

Per Contra the Learned Counsel for the Respondent has placed his reliance on 7 decisions viz.,

- i) 1987 (2) KLJ 379.*
- ii) 2022 (3) KCCR 2223.*
- iii) 2020 (3) KCCR 1966.*
- iv) AIR 2007 Supreme Court 3067.*
- v) 1992 AIR Karnataka 270.*
- vi) 2013(5) KCCR 4160 and*
- vii) 2020 SAR (Civil) 300.*

8. *Following points arise for consideration :*

1. Whether the Plaintiff has proved that, he is the absolute owner in possession of the Suit Schedule Property as contended by him in Para No.3 of the Suit Plaintiff?

2. Whether the Defendant has proved that measuring 10 Acres 13 Guntas towards Northern side of the land bearing Sy.No.109 was allotted to Haji Galagali, as contended by him in Para-4 of his written Statement

3. Whether the Defendant has proved that he has perfected his title over the suit land by way of adverse possession as contended by him in Para-18 of his written Statement?

4. Whether the Defendant has proved that suit of the Plaintiff seeking relief of declaration is hopelessly barred by law of limitation as contended by him in Para-19(A) of his written Statement?

5. Whether the Plaintiff has proved that interference by the Defendant over his peaceful possession and enjoyment over the Suit Schedule Property as contended by him in para-9 of his suit plaint?

6. Whether the Appellant makes out the grounds as required U/o 41 Rule 27 of

CPC to permit him to produce PT Sheet as produced along with I.A.No.2/2025, as Additional Evidence; and thereby to allow I.A.No.2/2025?

7. Whether the Plaintiff is entitle for the relief of declaration and consequential relief of injunction against the Defendant as claimed by him in the suit plaint?

8. Whether the Appellant proves that the judgment and decree passed by the learned III Additional Senior Civil Judge Vijayapura in O.S.No.80/202 dated 1.7.2025, decreeing the suit of the Plaintiff and declaring him as Suit Schedule Property and restraining him/Appellant from interfering in peaceful possession and Suit Schedule Property is either in correct, or illegal or perverse to law; and thereby calls for interference by this court as required U/o 41 Rule 27 of CPC?

9. What Order?

9. *I have carefully gone through the Pleadings of both the parties before the Trial Court; Issues framed by the Trial Court; the ocular and documentary evidence placed by the Plaintiff and the Defendant before the Trial Court; the Judgment passed by the Trial*

Court, which is under challenge in this Appeal; the grounds urged by the Appellant in this Appeal; and the Arguments canvassed on behalf of the Appellant and the Respondent and citations relied on behalf of the Plaintiff and the Respondent.

10. *Answers to the above Points are as under:*

Point No.1: In the Affirmative;

Point No.2: In the Negative;

Point No.3: In the Negative;

Point No.4: In the Negative;

Point No.5: In the Affirmative;

Point No.6: In the Negative;

Point No.7: In the Affirmative;

Point No.8: In the Negative;

Point No.9: As per final orders for the following:

REASONS

11. Point Nos 1, 2 & 6:

Since these three Points are interconnected with eachother, so they are taken for joint discussion, inorder to have brevity in the discussion.

On the basis of the contentions of both the parties, the undisputed facts are as under:

a) Hajisab Dastagirsab Galagali and his brother Shamashuddin were the joint owners in joint possession of land bearing Sy.No.109 of Tiganibidri village.

b) Oral partition has taken place inbetween Hajisab Dastagirsab Galagali and his brother Shamashuddin in respect of land bearing Sy.No.109 of Tiganibidri village.

c) Land bearing Sy.No.109 was divided in his 2 parts in east-west direction forming 2 strips, one on the Northern side and one on Southern side; and Northern side portion was allotted to Hajisab Dastagirsab Galagali and Southern side portion was allotted to Shamashuddin.

11.01. *The disputed facts are as under:*

a) As per the Plaintiff, Shamashuddin was allotted an area measuring 6 Acres 01 Gunta (exclusive

of 0-01 Gunta pk) in Sy.No.109 which was renumbered as 109/2 and Hajisab Dastagirsab Galagali got retained 6 Acres 01 Gunta (exclusive of 0-02 Guntas pk) in Sy.No.109, which was renumbered as 109/1; and Shamashuddin has sold the said 6 Acres 01 Gunta (exclusive of 0-01 Gunta pk) renumbered as 109/2 to Fareedsab Jalegar under the Registered Sale Deed on 20.6.1928; since than Fareedsab Jalegar was in possession and enjoyment of the land bearing Sy.No.109/2, measuring 6 Acres 01 Guntas (exclusive of 0-01 Guntas pk).

Percontra, the Defendant contends that, Northern portion of Sy.No.109 allotted to Hajisab Dastagirsab Galagali was infact measuring 10 Acres 13 Guntas and remaining portion of Sy.No.109 towards Southern side was allotted to Shashuddin; and Hajisab Dastagirsab Galagali was in possession and enjoyment of 10 Acres 13 Guntas renumbered as Sy.No.109/1, which was succeeded by his son Gaibu Galagali under M.E.No.69/Ex.P-23; and said land was purchased by

Imamsab Peersab Kambagi; from him Ameensab Davalsab Bijapur purchased the said land under the Registered Sale Deed on 18.4.1941/Ex.P.28 and interm Ameensab sold the said land to Mallappa Budihal under the Registered Sale Deed dated 24.7.1947/Ex.P.60; and the said land bearing Sy.No.109/1 is shown to be measuring 10 Acres 13 Guntas in both the said Sale- Deeds. Thus the Defendant being the Legal Heir of Mallappa Budihal is in possession and enjoyment of the land bearing Sy.No.109/1, measuring 10 Acres 13 Guntas.

b) The Plaintiff contends that the measurement of the land bearing Sy.No.109/1 shown in both Sale Deeds viz., Sale Deed dated 18.4.1941/Ex.P-28, Sale Deed dated 24.7.1947/Ex.P-16 as 10 Acres 13 Guntas is wrongly shown; infact Imamsab Peersab Kambagi had received only 6 Acres 01 Gunta (inclusive of 2 Guntas pk); and the same was got rectified by his father Maulasab and the father of the Defendant by name Shivappa, as per ME No 1117/Exp27.

11.02. *Thus on the basis of pleadings and contentions of the Plaintiff, firstly it is for the Plaintiff to prove that,*

a) Land bearing Sy.No.109, was totally measures 12 Acres-05 Guntas (inclusive of 03 Guntas pk); and out of the said land Shamashuddin had received $\frac{1}{2}$ portion i.e., 6 Acres 01 Gunta (exclusive of 01 Gunta pk), which was numbered as Sy.No.109/2; and Hajisab Dastagirsab Galagali had retained $\frac{1}{2}$ portion i.e., 6 Acres 01 Gunta (exclusive of 02 Guntas pk) which was renumbered as 109/1; and interm said Shamashuddin sold Sy.No.109/2 measuring 6 Acres 01 Gunta (exclusive of 01 Gunta pk) to Fareedsab Jalegar under Registered Sale Deed dated 20.6.1928.

b) The Plaintiff has to prove that Gaibusab Galagali had succeeded only 6 Acres 01 Gunta (exclusive 2 Guntas pk) i.e., which was renumbered as 109/1 from Hajisab Dastagirsab Galagali under M.E.No.69.

11.03. *If the Plaintiff proves both these facts, then onus of proof shifts upon the Defendant to prove that an area measuring 10 Acres 13 Guntas, situate towards Northern side in Sy No 109, which was renumbered as 109/1 was allotted to the share of Hajisab Dastagirsab Galagali; and the said extent of land was succeeded by his son Gaibusab Galagali under M.E.No.69.*

12. *On careful perusal of the documentary evidence placed by the Plaintiff, it is seen that,*

a) *Property Register Extract pertaining to the land bearing Sy.No.109 of Tiganibidari village is marked at Ex.P-58. As per this document, it is shown that the land bearing Sy.No.109 is totally measuring 12 Acres 02 Guntas (exclusive of 03 Guntas pk); and the name of Peersab Gaibusab Galagali is shown to be Kabjedar of the said land.*

When the Defendant admits in Para-4 of his Written Statement that, Hajisab Galagali and his

brother Shamashuddin were the joint owners in joint possession of the land bearing Sy.No.109; then it goes without saying that the land bearing Sy.No.109, totally measuring 12 Acres 02 Guntas (exclusive of 03 Guntas pk) situates at Tiganibidari village was succeeded by Hajisab Galagali and his brother Shamashuddin from Peersab Gaibusab Galagali, who is shown to be Khatedar of the said land as per Ex.P-58.

Further the Defendant admits in Para-4 of his written Statement that, there was an oral partition in between Hajisab Galagali and his brother Shamashuddin in respect of land bearing Sy.No.109, in which Hajisab got retained the Northern portion and Southern portion was allotted to Shamshoddin.

b) As per M.E.No.60 dated 1.8.1929/Ex.P-19, which speaks that, there was a partition in between Hajisab Galagali and his brother Shamshuddin; after partition, Shamashuddin has sold the land allotted to him in the said partition to Fareedsab Jalegar, by virtue

of Sale Deed dated 20.6.1928 for valuable consideration of Rs.200/-. Further this Mutation Entry specifies the measurement of the land bearing Sy.No.109/1, to be measuring 6 Acres 01 Guntas (exclusive of 02 Guntas pk), showing Hajisab Dastagirsab Galagali has Kabjedar of the said land; and further specifies that the land bearing Sy.No.109/2 to be measuring 6 Acres 01 Gunta (exclusive of 01 Gunta pk), showing the name of the purchaser i.e., Fareedsab Jalegar as Kabjedar of the said land.

c) Certified copy of Registered Sale Deed dated 20.6.1928 at Ex.P-61; and its translation at Ex.P.61(a). This document speaks that Shamashuddin has sold the land measuring 6 Acres 01 Guntas (exclusive of 01 Gunta pk) which he had received in an oral partition with taken place with his brother Hajisab Dastagirsab Galagali i.e., Southern $\frac{1}{2}$ portion of land bearing Sy.No.109, totally measuring 12 Acres 2 Guntas, Assessment at Rs 8.50 ps, to Fareedsab Jalegar for the

valuable consideration of Rs.200/-. Further these documents speak that the purchaser has been put into possession of the purchased portion i.e., Southern $\frac{1}{2}$ portion of the land bearing Sy.No.109, totally measuring 12 Acres 02 Guntas.

12.01. *Thus as per the above 3 documents it is crystal clear that,*

a) Land bearing Sy.No.109 was totally measuring 12 Acres 02 Guntas (excl of 03 Guntas pk)

b) Oral partition has taken place inbetween Hajisab Dastagirsab Galagali and his brother Shamashuddin; and in the said partition Southern $\frac{1}{2}$ portion of the land bearing Sy.No.109, totally measuring 12 Acres 02 Guntas (excl of 03 Guntas pk) i.e., land measuring 06 Acres- 01 Gts (excl of 0-01 gts p.k) was allotted to the share of Shamashuddin.

c) Northern $\frac{1}{2}$ portion of the land bearing Sy.No.109, measuring 6 Acres 01 Gunta, was got retained by Haji Galagali.

d) Southern $\frac{1}{2}$ portion measuirng 06 Acres-01 Gts allotted to Shamashuddin is renumbered as Sy.No.109/2; and Northern $\frac{1}{2}$ portion retained by Hajisab Dastagirsab Galagali measuring 6 Acres 01 Gunta, is renumbered as 109/1.

e) Southern $\frac{1}{2}$ portion of the land bearing Sy.No.109 allotted to the share of Shamashuddin was sold by Shamashuddin to Fareedsab Jalegar under Registered Sale Deed dated 20.6.1928 for the valuable consideration of Rs.200/-, which was subsequently numbered as Sy No 109/2.

f) Both Registered Sale Deed dated 20.6.1928/Ex.P.61 and M.E.No.60/Ex.P-19 speaks about the measurement of land bearing Sy.No.109/1 as 6 Acres 01 Gunta (exclusive of 02 Guntas pk); and Sy.No.109/2 as 6 Acres 01 Gunta (exclusive of 01 Gunta pk).

g) Thus Hajisab Dastagirsab Galagali retained Southern $\frac{1}{2}$ portion of the land bearing Sy.No.109 measuring 6 Acres 01 Gunta (exclusive of 02 Guntas

pk) which was renumbered as 109/1; and the same was succeeded by his son Gaibusab under M.E.No.69/Ex.P-22.

12.02. *The Learned Counsel for the Respondent would contend that, on observing wrong mention of the extent of land bearing Sy No 109/1, the grandfather of the Plaintiff by name Moulasab and the father of the Defendant/Shivappa filed wardi for rectification of extent of land; on enquiry the Revenue officials have rectified by extent of the lands, by virute of ME No 1117/Exp27.*

12.02.01. *The Plaintiff has produced ME No 1117 dated 08.06.1967 at Exp27. As per this Mutation entry it is shown that Moulasab and Shivappa have filed a Joint wardi to rectify the extent of the lands bearing Sy Nos 109/1 and 109/2; on the basis of the said Wardi, the Revenue Authorities have conducted enquiry and found that measurements of the said land*

shown in the Revenue Records wrongly shown; and thereby the same is rectified.

12.03. *Further it is seen that,*

a) Fareedsab Dastagirsab Jalegar died on 01.11.1955; and the land bearing Sy No 109/1 of Tiganibidari village was succeed from him, by his son Moulasab S/O: Fareedsab Jalegar. The same is evident as per ME No 571 dated 05.01.1956/Exp20 and R/R Extracts for the years 1929-30 to 1940-41 marked at Exp56 and for the years 1953-54 to 1963-64 marked at Exp57.

b) Further it is seen that, Moulasab Fareedsab Jalegar died on 14.07.1998; and the land bearing Sy No 109/1 of Tiganibidari village was succeed from him, by his wife/Hajma, Son/Fareedsab and Daughter/Mehaboobbi. The same is evident as per ME No 2685 dated 03.08.1998/Exp21.

c) Further it is seen that there is a mutual family Arrangement inbetween Hajma, Fareedsab and

Mehaboobbi in respect of the land bearing Sy No 109/1 of Tiganibidari village; and in the said Arrangement the said land was allotted to Fareedsab Moulasab Jalegar. The same is evident as per MR No 103 /2009-10/Exp22.

12.04. *Further the Learned Counsel for the Respondent would contend that the father of the Plaintiff by name Fareedsab Moulasab Jalegar has effected Oral partition inbetween him and his son/Mohammad Yasin/the Plaintiff; and in the said Partition an area measuring 02 Acres- 01 Gts came to be allotted to the Plaintiff; Plaintiff was put into possession of the said portion of area allotted to him; and the name of the Plaintiff came to be mutated in the records of the said land as per MR No H31/2013-14/Exp54.*

12.04.01. *The Plaintiff has produced MR No H31/2013-14/Exp54. As per this document it is shown that a Partition has taken place inbetween Fareedsab*

Moulasab Jalegar and his son/Mohammad Yasin in respect of the land bearing Sy No 109/1, measuring 06 acres- 01 Gts; and in the said Partition, Fareedsab has allotted an area measuring 02 Acres to his son/Mohammad Yasin.

12.05. *Thus the Plaintiff has proved that*

a) Shamashuddin brother of Hajisab Dastagirsab Galagali had received $\frac{1}{2}$ portion of the land bearing Sy.No.109, totally measuring 12 Acres- 02 Gts (exclu of 0-03 Gts), which comes to 6 Acres 01 Gunta (exclusive of 01 Gunta pk) which was renumbered as 109/2;

b) the said land was sold by Shamashuddin to Fareedsab Jalegar under Registered Sale Deed dated 20.6.1928/Ex.P-61; and since the day of sale Fareedsab Jalegar was put into possession and enjoyment of the land bearing Sy.No.109/2, measuring 6 Acres 01 Gunta; and further the name of Fareedsab was mutated in the records of the said land by virtue of M.E.No.60/Ex.P-19;

c) *Haji Dastagirsab Galagali had retained $\frac{1}{2}$ portion of the land bearing Sy.No.109, totally measuring 12 Acres- 02 Gts (exclu of 0-03 Gts), which comes to 6 Acres 01 Gunta (exclusive of 02 Gunta pk) which was renumbered as 109/1; and the said land was by his son/Gaibu Haji Galagali, the same is mutated in the records of the said land by virtue of ME No 69/Ex.P-23;*

d) *After the death of Fareedsab, the land bearing Sy No 109/1 was succeeded by his son/Moulasab, as per ME No 571/ExP20;*

e) *After the death of Moulasab, the land bearing Sy No 109/1 was succeeded by his wife/Hajma, Son/Fareedsab and Daughter/Mehaboobbi, as per ME No 2685/ExP21;*

f) *there was a mutual family arrangement inbetween Hajma, Fareedsab and Mehaboobbi inrespect of the land bearing Sy No 109/1 of Tiganibidari village; and in the said Arrangement the said land was allotted to Fareedsab Moulasab Jalegar, as per MR No 103/2009-10/ExP22;*

g) there is Oral family arrangement in the form of Partition inbetween Fareedsab Moulasab Jalegar and his son/Mohammad Yasin/Plaintiff inrespect of the land bearing Sy No 109/1, measuring 06 acres- 01 Gts of Tiganibidari village; and in the said Arrangement/Partition an area measuring 2 Acres out of the said land was allotted to the Plaintiff, as per MR No H31/2013-14/Exp54.

12.06. *When the Plaintiff has proved these facts, then the onus of proof to prove that Hajisab Galagali was allotted the land measuring 10 Acres 13 Guntas in Sy.No.109, in the oral partition taken place in between him and his brother Shamashuddin, gets shifted upon the Defendant.*

12.06.01. *Though the Defendant has taken-up this specific contention in Para No 4 of his Written Statement, but he has not produced any evidence in the form of documents to suggest that Hajisab Dastagirsab Galagali had retained 10 Acres 13 Guntas out of the*

land bearing Sy.No.109, totally measuring 12 Acres 02 Guntas, when Oral partition had occurred inbetween him and his brother/Shamshoddin.

12.06.02. Coming to the ocular evidence on point morespecifically

a) Cross-examination of PW-1, Page No.1, Para No.1 Line 9 to 11 which reads as under;

"ಸದರಿ ವಿಭಾಗದ ಪ್ರಕಾರ ಉತ್ತರಕ್ಕೆ 10 ಎಕರೆ 13 ಗುಂಟೆ ಜಮೀನು ಹಾಜಿ ಗಲಗಲಿ ಎನ್ನುವವರಿಗೆ ಹಾಗೂ ದಕ್ಷಿಣ ಬದಿಯ 2 ಎಕರೆ ಜಮೀನು ಶಮಶುದ್ದೀನ ಇವರಿಗೆ ಬಂದಿರುತ್ತದೆ ಎಂದರೆ ಸರಿಯಲ್ಲ."

As per this evidence, the Plaintiff/PW1 denies the suggestion made to him on behalf of the Defendant that, in the Partition, Northern portion measuring 10 Acres-13 Gts was fallen to the share of Haji Galagali; and Southern portion of 2 Acres was fallen to the share of Shamshoddin.

b) Cross-examination of DW-1, Page No.1, Para No.1 reads as under;

"ಸರ್ವೆ ನಂ.109 ಆಸ್ತಿ 12 ಎಕರೆ 5 ಗುಂಟೆ ಇತ್ತು ಎಂದರೆ ಸರಿ. 1928 ರಲ್ಲಿ ಆದ ಪಾಲುವಾಟ್ಲಿ ಪ್ರಕಾರ 12 ಎಕರೆ 5 ಗುಂಟೆ ಜಮೀನಿನ

ಪೈಕಿ ದಕ್ಷಿಣ ಭಾಗದ 6 ಎಕರೆ 2 ಗುಂಟೆ ಜಮೀನು ಶಮಶುದ್ದೀನ ಇತನ ಪಾಲಿಗೆ ಬಂದಿತ್ತು ಎಂದರೆ ಸಾಕ್ಷಿ 4 ಎಕರೆ 2 ಗುಂಟೆ ಮಾತ್ರ ಬಂದಿತ್ತು ಎಂದು ಉತ್ತರಿಸಿರುತ್ತಾರೆ. ಶಮಶುದ್ದೀನ ಪಾಲಿಗೆ 4 ಎಕರೆ 2 ಗುಂಟೆ ಮಾತ್ರ ಜಮೀನು ಬಂದಿತ್ತು ಎಂದು ತೋರಿಸಲು ನನ್ನ ಹತ್ತಿರ ಡ ಉತಾರಗಳು ಇವೆ ಅವುಗಳನ್ನು ಹಾಜರುಪಡಿಸುತ್ತೇನೆ. ಸಾಕ್ಷಿ ಅವುಗಳನ್ನು ನಾನು ಇಲ್ಲಿಯವರೆಗೆ ಹಾಜರುಪಡಿಸಿಲ್ಲ ಅವುಗಳನ್ನು ಪಡೆದುಕೊಂಡು ಹಾಜರುಪಡಿಸುತ್ತೇನೆ ಎಂದು ಉತ್ತರಿಸಿರುತ್ತಾರೆ. ಸದರಿ ಡ ಉತಾರನ್ನು ನಾನು ಇಲ್ಲಿಯವರೆಗೆ ನೋಡಿಲ್ಲ. ಶಮಶುದ್ದೀನ ಸರ್ವೆ ನಂ.109/2 ರ ಆಸ್ತಿ ನಿಶಾನೆ ಪಿ-19 ರ ಖರೀದಿ ಪತ್ರದಂತೆ ಫರಿದಸಾಬನಿಗೆ ಮಾರಾಟ ಮಾಡಿದ್ದ ಎಂದರೆ ನನಗೆ ಗೊತ್ತಿಲ್ಲ. ನಾನು ಸದರಿ ಖರೀದಿ ಪತ್ರವನ್ನು ಇವತ್ತಿನವರೆಗೆ ಓದಿ ನೋಡಿಲ್ಲ. ಸದರಿ ಖರೀದಿ ಪತ್ರದ ಬಗ್ಗೆ ನನಗೆ ವೈಯಕ್ತಿಕ ಮಾಹಿತಿ ಇಲ್ಲ ಎಂದರೆ ಸರಿ. ಸದರಿ ಖರೀದಿ ಪತ್ರದ ಬಗ್ಗೆ ನಾನು ಇವತ್ತಿನವರೆಗೆ ಎಲ್ಲಿಯೂ ತಕರಾರು ಮಾಡಿಲ್ಲ ಎಂದರೆ ಸರಿ. ಆದರೆ ಈಗ ಸದರಿ ಖರೀದಿ ಪತ್ರಕ್ಕೆ ನನ್ನ ತಕರಾರು ಇದೆ. ಸದರಿ ಖರೀದಿ ಪತ್ರ ಪ್ರಶ್ನಿಸಿ ನಾನು ದಾವೆ ಸಲ್ಲಿಸಿಲ್ಲ.”

As per this evidence, GPA holder of Ori Defendant/DW1 admits that the land bearing Sy No 109 measures 12 Acres- 02 Gts. Further denies the suggestion that Shamshoddin was allotted 6 Acre- 02 Gts in the land bearing Sy No 109; and contends that Shamshoddin was allotted 4 Acre- 02 Gts; he has not produced any Mutation Entries; he will obtained and produce the same. He has not seen the said Mutation Entries till today. He pleads his ignorance that Shamshoddin has sold the land allotted to him as per

ExP19. He has not seen the said Sale-deed; he has not challenged the said Sale-deed. He is Objecting the said Sale-deed, but he has not filed any case against the said Sale-deed.

13. *The Learned Counsel for the Appellants would contends that, the Defendant is in possession of the land bearing Sy No 109/1, measuring 10 Acres-13 Gts, as the said land is purchased by the Imamsab Peersab Kambagi; inturn Ameensab Davalsab Bijapur from him, under the Registered Sale-deed dated 18.04.1941/Exp28; and from him, the father of the Defendant by name Mallappa Gurupadappa Budhihal has purchased the said land under the Sale-deed dated 24.07.1947/Exp60.*

13.01. *As per the contentions of the Defendant, he is claiming flow of the land bearing Sy No 109/1, as measuring 10 Acres- 13 Gts from Haji Dastagirsab Galagali. And as observed supra that, Haji*

Dastagirsab Galagali was allotted 06 Acres- 03 Gts out of Sy No 109, which was numbered as Sy No 109/1. The same is evident from

a) Property Registered Extract/Exp58, wherein it is shown that the land bearing Sy No 109 totally measures 12 Acres- 02 Gts (exclusive of 0-03 Gts p.k);

b) Registered Sale-deed dated 20.06.1928/Exp61, which speaks that Shamshoddin the brother of Haji Galagali on taking his share in the land bearing Sy No 109, has sold the same to Fareedsab Dastagirsab Jalegar.

c) ME No 60 dated 01.08.1929/Exp19, which speaks that Shamshoddin has sold an area measuring 06 Acres- 01 Gts (exclusive of 0-01 Gt p.k) to Fareedsab Dastagirsab Jalegar, under the registered sale-deed dated 20.06.1928, which was numbered as Sy No 109/2; and Haji Galagali was retained with the land measuring 06 Acres-01 Gts (exclusive of 0-02 Gts p.k), which was numbered as Sy No 109/1.

13.02. So, as per these materials, it is shown that Haji Galagali had got retained only 06 Acres-01 Gts (exclusive of 0-02 gts p.k) and not 10 Acres- 13 Gts, as contended by the Defendant.

When Haji Galagali was not having 10 Acres- 13 Gts, then after his death, his son/Gaibu S/o: Haji Galagali cannot succeed morethan 06 Acres-01 Gts (exclusive of 0-02 Gts p.k) under ME No 69 dated 04.10.1930/Exp23.

Inturn, Imamsab S/O: Peersab Kambagi cannot receive morethan 06 Acres-01 Gts (exclusive of 0-02 Gts p.k) under ME No 111 dated 08.03.1935/Exp24.

Further Imamsab S/O: Peersab Kambagi cannot sale morethan 06 Acres-01 Gts (exclusive of 0-02 Gts p.k) to Ameensab Davalsab Bijapur, under the Registered Sale-deed dated 18.04.1941/Exp28; and inturn Ameensab Davalsab Bijapur cannot sale morethan 06 Acres-01 Gts (exclusive of 0-02 Gts p.k) to Mallappa Gurupadappa Budihal under the Registered Sale-deed dated 24.07.1947/Exp60.

And further the Defendant cannot succeed morethan 06 Acres-01 Gts (exclusive of 0-02 Gts p.k) from his father Mallappa Gurupadappa Budhihal under ME No 469 dated 28.09.1953/Exp26 and ME No 836.

13.03. *It is a trite principle of law enshrine in Sec 8 of Transfer of Property Act, narrated with a Maxim which reads as under: ‘Nemo Dat quod Non-habet’, meaning thereby ‘no one can deliver better title, then what he himself doesnot possess’.*

13.04. *Thus it can be concluded that the measurements i.e., extent of land bearing Sy No 109/1 as 10 Acres- 13 gts shown in the Sale-deeds/Exp28 and Exp60 are wrongly shown; and neither Imamsab can receive the land measuring 10 Acres- 13 Gts, nor he can deliver the same to Ameensab under the Sale-deed/Exp28, nor Ameensab can receive such extent of land, nor he can deliver the said extent of land to*

Mallappa- the father of the Defendant under Sale-deed/Exp60.

14. *Further the Learned Counsel for the Appellants would content that Original Defendant and now his legal heirs are in possession of the land bearing Sy No 109/1, measuring 10 Acres- 13 Gts.*

14.01. *As observed supra, that as per ME No 60/Exp19, wherein it is shown that Shamshoddin had received half portion of the land bearing Sy No 109, i.e., measuring 06 acre- 01 Gts, which was renumbered as Sy No 109/2; and he sold the said land to Fareedsab under the Registered Sale-deed dated 20.06.1928/Exp61. Even this document evidences that the purchaser was put into possession of the purchased land i.e., 06 Acres- 01 Gts of the land. So right from 20.06.1928, Fareedsab Dastagirsab Jalegar is shown to be in possession of the land bearing Sy No 109/2, measuring 06 Acres- 01 Gts.*

14.02. *Thus in the presence of such material evidence and in the absence of any materials, it is hard to believe that either the Defendant, or his father/Mallappa, or their erstwhile owners were in possession of the land bearing Sy No 109/ 1, measuring 10 Acre- 13 Gts.*

15. *The Learned Counsel for the Appellants would contend that the Appellants intend to produce the PT sheet pertaining to the land bearing Sy No 109 of Tiganibidari village; and he would further contend that the said document speaks the true existing facts.*

15.01. *The Appellants have filed an application at IA No 2/2025 U/Or 41 R 25 of CPC, praying to permit them to produce the PT Sheet pertaining to the land bearing Sy No 109 of Tiganibidari village, as additional evidence, contending the said document is essential for the just decision of the case.*

15.02. *The Respondent has filed objections to the said application contending that the said document is neither relevant, nor necessary for adjudication of the lis on hand.*

15.03. *On careful perusal of the PT Sheet proposed to be produced by the Appellants as Additional evidence, it neither speaks that the land bearing Sy No 109/1, measures 10 Acres-13 Gts, nor it speaks that the Defendant or his legal heirs are in possession of the land bearing Sy No 109/1, measuring 10 acres- 13 Gts.*

So the said document is neither relevant, nor necessary for the adjudication of the dispute inbetween the parties, nor the said document is required for the just decision of the case.

15.04. *As the decision of **the Hon'ble Apex Court in the case of Karnataka Board Wakf V/s Govt. Indi and others reported in (2004) 10 SCC 779**, wherein it is observed in Para 6, as under;*

“The scope of Order XLI, Rule 27, CPC is very clear to the effect that the parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary, unless they have shown that in spite of due diligence, they could not produce such documents and such documents are required to enable the court to pronounce proper judgment.”

15.05. *It is a trite principle of law that, in order to permit the party in an Appeal to lead Additional evidence U/Or. 41 Rule 27 of CPC, such party has to show that the oral or documentary evidence proposed to have been placed in the Appeal, inspite of due diligence could not produce or place it on record, before the Trial Court; and such ocular or documentary evidence is required, which will enable the Court of Appeal to pronounce proper Judgment.*

15.06. *Thus the Defendant/Appellant, inturn his legal heirs has/have failed to show sufficient grounds as required U/Or 41 R 27 of CPC to permit him to produce the documents sought to be produced under IA No 2/2025.*

Hence, I am constrained to answer **Point No 6 in the Negative.**

16. Thus it can be concluded that, in the presence of such ocular evidence and the documentary evidence in the form of Property Register Extract/Ex.P-58, Registered Sale Deed dated 20.6.1928/Ex.P-61 and M.E.No.60/Ex.P-19; and in the absence of any materials to suggest retention of the land by Hajisab Dastagirsab Galagali to an extent of 10 Acres 13 Guntas in Sy.No.109, it is hard to believe the contentions raised by the Defendant in Para-4 of his Written Statement.

Hence, I am constrained to answer **Point No 1 in the Affirmative and Point No 2 in the Negative.**

17. Point No 3:

The Defendant has specifically contended in Para No 18 of his Written Statement that he and his erstwhile

owners were in possession of the land bearing Sy No 109/1, measuring 10 Acres-13 Gts.

Further the learned Counsel for the Appellants would contend that the Defendant and his erstwhile owners were in possession of the land bearing Sy No 109/1, measuring 10 Acres-13 Gts; the same is evident from the Sale-deed dated 18.04.1941/Exp28 and Sale-deed dated 24.07.1947/Exp60, with full knowledge of the Plaintiff; and thus they have perfected their title over the Petition Schedule Properties, by way of Adverse Possession.

Percontra, the Learned Counsel for the Respondent would contend that, when the Defendant is claiming to be the owner of the land bearing Sy No 109/1, measuring 10 Acres- 13 Gts, then he cannot claim to be the owner of the Suit Schedule Property by way of Adverse Possession. He has placed his reliance on below mentioned decisions viz.,

a) 1992 AIR Kar 270;

b) 2013(5) KCCR 4160; and

c) 2020 SAR(Civil) 300.

17.01. When the Defendant is claiming to be the owner having perfected his title by way of Adverse Possession over the Suit Schedule Properties, then he must prove that his possession is “**nec vi, nec clam, nec precario**”, it means peaceful, open and continuous. Further the Defendant must show that his possession is adequate in continuity; in publicity; and in extent to show that their possession is adverse to the true owner.

Therefore the Defendant should show

- a) On what date he, or his ancestor, or their erstwhile owners have come into possession;
- b) What was the nature of their possession;
- c) Whether the factum of their possession was known to the Decree Holders and the Judgment Debtors, or to their ancestors;
- d) How long their possession is continued; and
- e) Whether their possession was open and undisturbed.

It is only on proof of all these ingredients, the claim of the Defendants on having perfected his title by way

of Adverse Possession, can be said to be established and justified.

17.02. *It is a trite principle of law that the person claiming to have perfected his title by way of Adverse Possession has no equities in his favour, since on he claiming, he will be trying to defeat the rights of the true owner; and set up his title over the properties.*

17.03. *So, it is for the Defendant to clearly establish all the facts necessary to establish perfection of their title by way of Adverse Possession. I find force to my above view as per the decision of **the Hon'ble High Court of Karnataka in case of Baswanthrao, since deceased by his LRs V/s Rajkumar, reported in ILR 2009 KAR 1099**, wherein it is observed in Para Nos.12 to 14, as under:*

“12. Possession is one of the few phenomena considered to be the most complex in the legal labyrinth and it becomes all the more abstruse when the term is prefixed by the epithet ‘adverse’ and nobody finds it simple to understand which is by

nature adverse. The most outstanding feature of the complexity of the concept is that the claimant placing his foot on the plea of adverse possession claims his own title to a property to which the title of another is not disputed. The concept of adverse possession involves three elements, namely,

(1) property, the subject of adverse possession;

(2) possession of that property by a person having no right to its possession (Animus possidendi); and

(3) the possession being adverse to the true owner.

13. *Adverse possession is a question of fact and in a claim of adverse possession, the title is not disputed; what is alleged is only its extinction. A plea of adverse possession being based on facts which have to be raised to that effect, is not necessarily a legal plea. The plea of adverse possession raises a mixed question of law and fact. Where a person wants to base his title on it, he should specifically set up the plea. Unless the plea is raised, it cannot be entertained. A plea must be raised and it must be shown when possession becomes adverse, so that the starting point of limitation against the party affected can be found. The prayer clause may not be taken as a substitute for a plea. A person acquires title by way of adverse possession when he is in continuous, uninterrupted, hostile possession over a period of 12 years. In order to calculate 12 years period there should be a starting point. Therefore, the law mandates that the Plaintiff who seeks a declaration that he has perfected his title by way of adverse possession should specifically plead the date from which his possession becomes adverse to that of the Defendant. It is from that date if the Plaintiff shows continuous, uninterrupted possession for a period of 12 years, then the right of the Defendant to the property stands extinguished and the Plaintiff would acquire title by way of adverse possession.*

14. In so far as proof of adverse possession is concerned, it is a well-settled principle that a party claiming adverse possession must prove that his possession is “nec vi, nec clam, nec precario”, that is, peaceful, open and continuous. The possession must be adequate in continuity, in publicity and in extent to show that their possession is adverse to the true owner. Therefore, a person who claims adverse possession should show:

- (a) On what date he came into possession,
- (b) What was the nature of his possession,
- (c) Whether the factum of possession was known to the other party;
- (d) How long his possession has continued, and
- (e) His possession was open and undisturbed.

It is only on proof of all these ingredients the case of adverse possession is said to have been established. A person pleading adverse possession has no equities in his favour, since he is trying to defeat the rights of the true owner, it is for him to clearly plead and establish all facts necessary to establish is adverse possession.”

17.04. When the Defendant contends that he is the owner in possession of the land bearing Sy no 109/1, measuring 10 acrs- 13 Gts, then such pleading of Adverse Possession takenup in Para No 18 of the Written Statement runs contrary to the said contention of the Defendant.

17.05. One of the important ingredients of Adverse Possession is that the person claiming title having perfected by way of Adverse Possession must plead and admit that the said property did not belong to him, but it belongs to some other persons, against whom said right is claimed.

17.06. Thus it can be concluded that the Appellants have failed to prove that they have perfected the title by way of Adverse Possession, as contended in Para No 18 of the Written Statement.

Hence, I am constrained to answer **Point No 3 in the Negative.**

18. Point No 4:

The Defendant has contended that the Suit of the Plaintiff is barred by law of limitation, as the Mutation entries were passed longback and they were well within the knowledge of the Plaintiff.

18.01. As per the decision of **the Hon'ble High Court of Karnataka in the case of Ishwar Vs Kallappa reported in 2019 (3) KCCR 2903**, wherein it is observed in Para No.18 as under;

18. The burden to prove the issue with regard to the limitation is on the defendant. The defendant has not led any cogent evidence in respect of the defence of limitation. The defendant has also failed to elicit anything from plaintiff in his cross-examination. The plaintiff has specifically contended that the cause of action to file the suit had arisen only on 01.07.2014 on which day the defendant for the first time began to assert his title over the suit land by denying exclusive title of the plaintiff over the suit land. It is the case of the defendant that the mutation and revenue record shows his name from the year 2004 and the plaintiff was aware of the same. Mere, existence of an adverse entry in the revenue records would not give rise cause of action. But, only when the rights asserted is infringed or there is threat to infringe the right, the cause of action arises. In the case on hand, the plaintiff has categorically stated that cause of action arose only in the year 2014. To rebut the same, the defendant has not led any cogent evidence. In the absence of any evidence in support of the defence of limitation by the defendant the trial Court has rightly held the issue No.5 which is with regard to limitation negatively.”

So, it is for the Defendant to prove as to how the Suit of the Plaintiff is barred by limitation.

18.02. *On careful perusal of the documentary evidence placed on record, it is seen that,*

a) as per ME No 1117 dated 08.06.1967/Exp27, the measurements of the lands bearing Sy Nos 109/1 and 109/2 were rectified.

b) on the basis of the said rectified measurements, it is shown that Fareedsab Moulasab Jalegar has relinquished 2 Acres of land out of 6 Acres- 01 Gts infavour of his son Mohammad Yasin Jalegar/Plaintiff, which is evident as per MR no H31/2013-14 dated 03.01.2014/Exp54.

c) Then again the Defendant filed a wardi and got rectified the measurements of the lands bearing Sy No 109/1 measuring 06 Acres- 01 Gt and 109/2 measuring 6 Acres- 02 Gts, wherein land bearing Sy No 109/1 was shown to be measuring 10 Acres- 15 Gts, inclusive of 2 Acres and 2 Acres 12 Gts in it and land bearing Sy No 109/2 was shown to be measuring 1

Acre- 29 Gts. This is evident from MR No T218/2013-14 dated 01.05.2014/Exp55.

And further the lands measuring 2 Acres and 2Acres 12 gts shown to be inclusive of Sy No 109/1 where renumbered as Sy No 109/3 and Sy No 109/4, by showing the land bearing Sy No 109/1, measuring as 10 Acres- 15 Gts. This is evident from MR No T53/2015-16 dated 08.12.2015/Exp53.

Though the measurements of the lands are shown to be again rectified, but the Defendant has not placed any materials on record to suggest, as to on what basis such measurements were got rectified; whether the same was made with the knowledge of the Plaintiff and his father/Fareedsab Jalegar; whether both of them participated in the mutation proceedings.

So also it is seen that, though the measurements were rectified, but there is no corresponding change in the Akarband of the lands bearing Sy Nos 109/1 and 109/2; and even PT Sheet sought to be produced by the Appellant/s as Addl Evidence under IA No 2/2025 also

do not disclose that corresponding changes have been taken place in the Survey Settlement records pertaining to the said lands.

Yet for another reason, it can be said that the certification of mutation entries seen at ExP55 and ExP53 suggest that the said mutations were made on brushing away the longstanding mutation entry bearing ME No 1117 dated 08.06.1967/ExP27.

So, the contention takenup from the side of the Appellant/s as to starting point of limitation to file the suit by the Plaintiff starts from certification of mutation entries, will hold no water, as the Appellants have failed to show that certification of mutation entries viz., at ExP55 and ExP53 are done with the knowledge of the Plaintiff and his father.

18.03. *As per the decision of the Hon'ble High Court of Karnataka in the case of Ishwar Vs Kallappa reported in 2019 (3) KCCR 2903, wherein it is observed in Para No.16 as under;*

“16. It is the definite case of the plaintiff that the suit land is with the defendant on crop sharing basis and defendant is in permissive possession. Only in the year 2014 it came to the knowledge of the plaintiff with regard to the entry of defendant's name in the mutation. The defendant has failed to rebut the said statement and the evidence of the plaintiff. With regard to the limitation the burden is on the defendant. The P.W.1 in his evidence has specifically stated that entering the name of defendant was not within his knowledge till the year 2014 and to that aspect the defendant has failed to elicit anything in his cross-examination. On the other hand, D.W.1 in his cross-examination has admitted that the change of name in the record of rights has come to the knowledge of the plaintiff only in the year 2014. Further, it is to be seen that since the suit of the plaintiff is for declaration of title and for injunction, as such Article 65 of the Limitation Act would be applicable, wherein the limitation prescribed is 12 years. Assuming that the plaintiff had knowledge in the year 2004 he had time till the year 2016 to file the suit, whereas the suit is filed in the year 2014 which is well within the time.”

18.04. *It is a trite principle of law that, cause of action will not arise only on the basis of certification of Revenue Entries; unless it is proved that certification of such Revenue Entries were at the instance of the Plaintiff or his ascendants/Fareedsab, or certification of such entries are well within the knowledge of the Plaintiff or his ascendant/Fareedsab.*

Defendant has failed to prove both these aspects.

So even on this count, it cannot be held that the Suit of the Plaintiffs is barred by law of limitation.

*Hence, I am constrained to answer **Point No 4 in the Negative.***

19. Point Nos 5 & 7:

Since both these Points are interconnected with eachother, so they are taken for joint discussion, inorder to have brevity in the discussion

The Learned Counsel for the Appellant/s would contend that, when the Plaintiff is not in possession of the Suit Schedule Property, mere claiming the relief of Declaration without claiming the relief of Possession, the suit is not maintainable. He has placed his reliance on two decisions viz.,

*a) of **the Hon'ble High Court of Karnataka in the case of Shri Bharatesh Balasaheb Kuppanatte & Other Vs Shri Noorbabasab Peeraso***

Mantooorkar & Other, reported in (2018) 3 KCCR

2175, wherein it is held in Para No 10 as under:

“when the Plaintiff is out of possession of the Property and doesnot seek relief of Possession, a mere suit for Declaration is not maintainable.”

b) of the Hon’ble Apex Court in the case of Union of India Vs Ibrahim Uddin and Another, reported in 2013(4) KCCR SN 308 (SC), wherein it is held that,

“It is not permissible to claim the relief of Declaration, without seeking the consequential relief of Possession, when the Plaintiff is shown to be out of possession; and the said relief is barred under Proviso to Sec 34 of Specific Relief Act.”

19.01. As per the decisions of the Hon’ble Apex Court,

a) in the case of Venkataraja & Ors Vs Vidyane Doureradjaperumal (D) through Lrs, reported in 2013(5) KCCR SN 471(SC), wherein it is held that,

“Suit for Declaration without consequential relief of Possession is not maintainable as it defeats Sec 34 proviso and Or 2 R 2 of CPC.”

b) in the case of Union of India Vs Ibrahim Uddin and Another, reported in 2013(4) KCCR SN 308(SC), wherein it is held that,

“It is not permissible to claim the relief of Declaration without seeking consequential relief. Suit for Declaration of title is not maintainable without claiming possession, when he is not in possession of the Suit Schedule Property, is not maintainable.”

c) in the case of Anathula Sudhakar Rao V/s P.Buccha Reddy, reported in AIR 2008 SC 2088), wherein it is held in Para No.17 as under:

“17. To summarize, the position in regard to suits for prohibitory injunction relating to immovable property, is as under :

(a) Where a cloud is raised over plaintiff's title and he does not have possession, a suit for declaration and possession, with or without a consequential injunction, is the remedy. Where the plaintiff's title is not in dispute or under a cloud, but he is out of possession, he has to sue for possession with a consequential injunction. Where there is merely an interference with plaintiff's lawful possession or threat of dispossession, it is sufficient to sue for an injunction simpliciter.

(b) As a suit for injunction simpliciter is concerned only with possession, normally the issue of title will not be directly and substantially in issue. The prayer for injunction will be decided with reference to the finding on possession. But

in cases where de jure possession has to be established on the basis of title to the property, as in the case of vacant sites, the issue of title may directly and substantially arise for consideration, as without a finding thereon, it will not be possible to decide the issue of possession.

(c) But a finding on title cannot be recorded in a suit for injunction, unless there are necessary pleadings and appropriate issue regarding title [either specific, or implied as noticed in Annaimuthu Thevar (supra)]. Where the averments regarding title are absent in a plaint and where there is no issue relating to title, the court will not investigate or examine or render a finding on a question of title, in a suit for injunction. Even where there are necessary pleadings and issue, if the matter involves complicated questions of fact and law relating to title, the court will relegate the parties to the remedy by way of comprehensive suit for declaration of title, instead of deciding the issue in a suit for mere injunction.

(d) Where there are necessary pleadings regarding title, and appropriate issue relating to title on which parties lead evidence, if the matter involved is simple and straight-forward, the court may decide upon the issue regarding title, even in a suit for injunction. But such cases, are the exception to the normal rule that question of title will not be decided in suits for injunction. But persons having clear title and possession suing for injunction, should not be driven to the costlier and more cumbersome remedy of a suit for declaration, merely because some meddler vexatiously or wrongfully makes a claim or tries to encroach upon his property. The court should use its discretion carefully to identify cases where it will enquire into title and cases where it will refer to plaintiff to a more comprehensive

declaratory suit, depending upon the facts of the case.”

19.02. So, it was for the Defendant to show that he was in possession of 10 Acres-13 Gts, including the Suit Schedule Property; and the Plaintiff was not in possession of the Suit Schedule Property, which the Defendant has failed to show.

So under such circumstances, claiming the consequential relief of Possession would not arise for the Plaintiff.

And when the Plaintiff has alleged interference of the Defendant over his peaceful possession and enjoyment over the Suit Schedule Property, the appropriate consequential relief would be Injunction, which the Plaintiff has claimed.

19.03. When the Plaintiff has shown that the erstwhile owner of his father Fareedsab Dastagirsab Jalegar has received possession of the land bearing Sy No 109/2, measuring 06 Acre- 01 Gts from

Shamshoddin under the rEgistered Sale-deed dated 20.06.1928/ExP61; and when the Plaintiff has contended and shown that the Defendant by getting false certification of Mutation entries changing the extent of the land behind his back and without his knowledge is trying to obstruction him in his peaceful possession over the Suit land, then it can be said that Plaintiff has proved the interference, said to have been caused by the Defendant, as required by law.

*Since the act to be apprehended by the Plaintiff and intended by the Defendant, must be such that, if completed, give a ground for action. There must be a foundation for the exercise of jurisdiction. Hence, I am of the firm opinion that Plaintiff has proved that, there exist a prospect or apprehension and belief, coupled with intention of the Defendant, sought to be exhibited, if completed, will give rise to a cause of inflicting injury or receiving injury, to the Plaintiff. Hence, Plaintiff has proved the interference. I find support to my above view, as per the decision of **the Hon'ble High Court of***

Karnataka reported in ILR 1978 Page 1560; in the case of Gopal M Hegde & Ors Vs U F M Narasimha Ganap Bhat & Ors, wherein it is held that,

“When the Plaintiff proves the intention on the part of the defendants, to do an act or existence of the act, which in the opinion of the Court, if completed, give ground of action, there is foundation for the exercise of jurisdiction”.

Thus, Plaintiff have proved the interference as pleaded by them, in the suit plaint.

Therefore the Plaintiff will be entitle for the main relief of Declaration to get him declared as the owner of the Suit Schedule Property; and as a consequential relief of Injunction.

Hence, I am constrained to answer Point Nos. 5 and 7 in the AFFIRMATIVE.

20. Point No 8:

I have carefully gone through the Judgment and Decree passed by the Trial Court, which is under challenge in this Appeal.

20.01. *The Trial Court has rightly considered the flow of title to the lands bearing Sy Nos 109/1 and 109/2, with there respective measurements in Para Nos 15 to 20 of its Judgment and in Para No 21 it has rightly opined that the extent of the property purchased by Ameensab is wrongly mentioned as 10 Acres- 13 Gts instead of 06 Acres- 03 Gts; and a mistake has been crept in the Sale-deed/Exp60 withregard to the extent of the land bearing Sy No 109/1.*

20.02. *Further the Trial Court has right observed and held in Para Nos 19 & 20 that, rectification of extent of the lands were got done as per ME No 111 dated 08.06.1967/Exp27; and that form a corroborative piece of evidence to hold that the land bearing Sy No 109/1 was measuring 06 Acres- 03 Gts and the land measuring 109/2 was measuring 06 Acres- 01 Gts.*

20.03. *Further the Trial Court in Para No 16 of its Judgment has considered the defence taken up by the Defendant in Para No 4 of his Written Statement and in Para No 18 of its Judgment has rightly shifted the onus to prove the said defence on the Defendant, in accordance with Sec 103 of Indian Evidence Act.*

20.04. *Further the Trial Court in Para No 21 of its Judgment has considered the contention of the Defendant that the suit of the Plaintiff without seeking the relief of Possession is not maintainable as incorrect; and has rightly held that the Defendant has failed to show his possession over the land measuring 10 acres-13 Gts in sy No 109, as contended by the Defendant.*

20.05. *Further the Trial Court ought have framed the Issue with regard to Adverse Possession, as pleaded by the Defendant in Para No 18 of his Written Statement, but the same was not framed. This Court has raised the same as Point No 3 supra and answered in the Negative.*

Further the Trial Court ought have framed the Issue with regard to the point of Limitation, as pleaded by the Defendant in Para No 19(A) of his Written Statement, but the same was not framed. This Court has raised the same as Point No 4 supra and answered in the Negative.

Further these aspects will not form the criteria to remand the matter for fresh Trial, but they can be considered by this Appellate Court exercising the power vested U/Or 41 R 33 of CPC.

21. *With utmost responsibility it can be said that, this Court being the First Appellate Court, the Court of last fact finding, is duty bound to re-evaluate the Evidence produced by the parties before the Trial Court; and to consider the said Evidence in the Appeal. I find force to my above view as per the decisions:*

a) *of **the Hon'ble Apex Court in the case of H.Siddiqui (Dead) by L.Rs V/s A.Ramalingam,***

reported in (2011) SCCR 368, wherein it is observed

in Para Nos.18 and 19 as under:

“18. The said provisions provide guidelines for the appellate court as to how the court has to proceed and decide the case. The provisions should be read in such a way as to require that the various particulars mentioned therein should be taken into consideration. Thus, it must be evident from the judgment of the appellate court that the court has properly appreciated the facts/evidence, applied its mind and decided the case considering the material on record. It would amount to substantial compliance of the said provisions if the appellate court's judgment is based on the independent assessment of the relevant evidence on all important aspect of the matter and the findings of the appellate court are well founded and quite convincing. It is mandatory for the appellate court to independently assess the evidence of the parties and consider the relevant points which arise for adjudication and the bearing of the evidence on those points. Being the final court of fact, the first appellate court must not record mere general expression of concurrence with the trial court judgment rather it must give reasons for its decision on each point independently to that of the trial court. Thus, the entire evidence must be considered and discussed in detail. Such exercise should be done after formulating the points for consideration in terms of the said provisions and the court must proceed in adherence to the requirements of the said statutory provisions. (Vide: Thakur Sukhpal Singh v. Thakur Kalyan Singh & Anr., AIR 1963 SC 146; Girijanandini Devi & Ors. v. Bijendra Narain Choudhary, AIR 1967 SC 1124; G. Amalorpavam & Ors. v. R.C. Diocese of Madurai & Ors., (2006) 3 SCC 224; Shiv Kumar Sharma v. Santosh Kumari, (2007) 8 SCC 600; and Gannmani Anasuya & Ors. v. Parvatini Amarendra Chowdhary & Ors., AIR 2007 SC 2380)

19. In *B.V. Nagesh & Anr. v. H.V. Sreenivasa Murthy*, JT (2010) 10 SCC 551, while dealing with the issue, this Court held as under:

*"The appellate Court has jurisdiction to reverse or affirm the findings of the trial Court. The first appeal is a valuable right of the parties and unless restricted by law, the whole case therein is open for re-hearing both on questions of fact and law. The judgment of the appellate Court must, therefore, reflect its conscious application of mind and record findings supported by reasons, on all the issues arising along with the contentions put forth and pressed by the parties for decision of the appellate Court. Sitting as a court of appeal, it was the duty of the High Court to deal with all the issues and the evidence led by the parties before recording its findings. The first appeal is a valuable right and the parties have a right to be heard both on questions of law and on facts and the judgment in the first appeal must address itself to all the issues of law and fact and decide it by giving reasons in support of the findings. [Vide *Santosh Hazari vs. Purushottam Tiwari*, (2001) 3 SCC 179 and *Madhukar and Others vs. Sangram and Others*, (2001) 4 SCC 756]"*

b) of the Hon'ble Apex Court in the case of *Giani Ram and others V/s Ramji Lal and others*, reported in AIR 1969 SC 1144, wherein it is observed in Para No.8 and 9, are as under:

"8. Order 41, Rule 33 of the Code of Civil Procedure was enacted to meet a situation of the nature arising in this case. In so far as it is material the rule provides:

“The Appellate Court shall have power to pass any decree and make any order which ought to have been passed or made and to pass or make such further or other decree or order as the case may require, and this power may be exercised by the Court notwithstanding that the Appeal is as to part only of the decree and may be exercised infavour of all or any of the Respondents or parties, although such Respondents or parties may not have filed any Appeal or Objection.” The expression “which ought to have been passed’ means “which ought in law to have been passed”. If the appellate Court is of the view that any decree which ought in law to have been passed, but was in fact not passed by the Sub-ordinate Court, it may pass or make which further or other decree or order as the justice of the case may require.

9. *If the claim of the Respondents to retain any part of the property after the death of Jwala is negatived it would be perpetrating grave injustice to deny to the widow and the two daughters there share in the property to which they are in law entitled. In our view, the case was one in which the power under Order 41, Rule 33 Code of Civil Procedure ought to have been exercised and the claim not only of the three sons but also of the widow and the two daughters ought to have been decreed.*

21.01. *No any infirmity can be attached to the observations and conclusions arrived at by the Trial Court, to decree the suit of Plaintiff, declaring him as the owner in possession of the Suit Schedule Property and to award consequential relief of Injunction against the Defendant.*

21.02. Thus, no any infirmity can be attached to the Judgment and Decree passed by the Trial Court, decreeing the Suit of the Plaintiff.

21.03. The Appellant/s has/have failed to show/s that, the Judgment and Decree passed by the Trial Court is, either incorrect; or illegal; or perverse to law and thereby calls for interference of this Court. Under such circumstances, this Court declines to interfere with the Judgment and Decree passed by the Trial Court.

Necessarily, the Appellant/s fail/s in this Appeal.

Hence, I am constrained to answer **Point No.8 in the Negative.**

22. Point No.9:

For having answered Point Nos.1, 5 & 7 in the Affirmative; and Point Nos 2, 3, 4, 6 & 8 in the Negative, I proceed to pass the following:

ORDER

IA No.2/2025 filed by the Appellant/Ori Defendant and continued by his legal heirs U/Or. 41 R 27 of CPC is hereby Rejected.

Acting U/Or. 41 Rule 33 of C.P.C., the Appeal preferred by the Appellant/Ori Defendant and continued by his legal heirs U/Sec 96(1) of C.P.C. is hereby Dismissed.

It is needless to mention that, the Judgment and Decree passed by the Learned III Addl. Senior Civil Judge and JMFC, Vijayapura in OS No 80/2019 dated 01.07.2025, is hereby Confirmed.

Resultantly, the Suit of the Plaintiff is decreed, with costs throughout.

The Plaintiff is declared as owner in possession of the Suit Schedule Property; and the Defendant inturn his legal heirs are hereby restrained by an Order of Permanent Injunction from interefering

with the peaceful possession and enjoyment of the Plaintiff over the Suit Schedule Property.

Draw Decree Accordingly.

Registry is requested to remit the Trial Court Records to the Trial Court, on obtaining necessary acknowledgment from it, alongwith the True copy of this Judgment and Decree, for its reference.

[Typed by me in the Home office, script corrected and signed by me and then Judgment pronounced by me, in the Open Court on this the 16th day of June, 2026].

***[Abdul-Rahiman. A. Nandgadi]
II Addl. District & Sessions and Spl.
Judge, Vijayapura.***