



IN THE HIGH COURT OF KARNATAKA, AT DHARWAD
DATED THIS THE 4TH DAY OF FEBRUARY, 2026
BEFORE
THE HON'BLE MR. JUSTICE HANCHATE SANJEEVKUMAR
REGULAR SECOND APPEAL NO. 811 OF 2007 (INJ)
C/W
REGULAR SECOND APPEAL NO. 5579 OF 2009

IN RSA NO.811 OF 2007

BETWEEN:

1. JUJEMARI NIKALANV FERNANDES
DEAD, APPELLANT NO.2 IS LEGAL HEIR
OF APPELLANT NO.1.
2. ANTHON NIKALANV FERNANDES,
AGE: 54 YEARS,
R/O. AGASEBAGIL VILLAGE, SIRSI TALUK,
UTTARA KANNADA DISTRICT-581401.

...APPELLANTS

(BY SRI SANGRAM KULKARNI, ADVOCATE)

AND:

ANDRU KAITAN D'SOUZA,
SINCE DECEASED BY
LEGAL REPRESENTATIVES.

1. ESTELL W/O. ANDRU D'SOUZA,
SINCE DECEASED BY LR'S,
DEAD RESPONDENT NO.1 AND R2 TO R7
ARE LEGAL HEIRS OF R1).
2. SOBINA W/O. PETER RUZARIO,
AGE 65 YEARS.





NC: 2026:KHC-D:1716
RSA No. 811 of 2007
C/W RSA No. 5579 of 2009

3. KHAITAN S/O. ANDRU D'SOUZA,
SINCE DECEASED BY HIS LRS
R2 & R4 TO R7).
4. INTRU S/O. ANDRU D'SOUZA,
AGE 55 YEARS.
5. NATALIA W/O. PIAS GHAM,
AGE 51 YEARS.
6. ANTON ANDRU D'SOUZA,
AGE 49 YEARS.
7. NELSON S/O. ANDRU D'SOUZA,
AGE 41 YEARS,
ALL ARE R/O. NILEKANI VILLAGE,
SIRSI TALUKA,
UTTARA KANNADA DISTRICT-581401.

...RESPONDENTS

(BY SRI HEDGE, NEERALAGI AND PATIL, ADVS. FOR R1 AND R6;
SRI. VISHWANATH HEGDE AND
SMT. TANUJA HEGDE, ADVOCATES FOR R2, R4, R5 & R7;
VIDE ORDER DATED 09.10.2025, APPEAL AGAINST R3-ABATED)

THIS REGULAR SECOND APPEAL IS FILED UNDER SECTION 100 OF THE CODE OF CIVIL PROCEDURE, PRAYING TO CALL FOR THE RECORDS OF THE CASE R.A.NO.16/1996 ON THE FILE OF THE COURT OF THE CIVIL JUDGE (SR. DVN.) AS WELL AS O.S. NO.156/1986 ON THE FILE OF THE COURT OF THE ADDITIONAL MUNSIFF AT: SIRSI AND AFTER LOOKING INTO THE LEGALITY AND VALIDITY OF THE JUDGMENT AND DECREE DATED 23.12.2006 IN R.A.NO.16/1996, REVERSING THE JUDGMENT AND DECREE DATED 31.01.1996 IN O.S.NO.156/1986 BE PLEASED TO QUASH AND SET ASIDE THAT OF THE LOWER APPELLATE COURT, AND RESTORE THAT OF THE TRIAL COURT, IN THE INTEREST OF JUSTICE AND EQUITY.



IN RSA NO.5579/2009

BETWEEN:

1. JUJEMARI NIKALANV FERNANDES
DEAD, APPELLANT NO.2 IS LEGAL HEIR
OF APPELLANT NO.1.
2. ANTHON NIKALANV FERNANDES,
AGE: 54 YEARS,
R/O. AGASEBAGIL VILLAGE, SIRSI TALUK,
UTTARA KANNADA DISTRICT-581401.

...APPELLANTS

(BY SRI SANGRAM KULKARNI, ADV. FOR
SRI V. P. KULKARNI, ADVOCATES)

AND:

ANDRU KAITAN D'SOUZA,
SINCE DECEASED BY
LEGAL REPRESENTATIVES.

1. ESTELL W/O. ANDRU D'SOUZA,
SINCE DECEASED BY LR'S,
DEAD RESPONDENT NO.1 AND R2 TO R7
ARE LEGAL HEIRS OF R1).
2. SOBINA W/O. PETER RUZARIO,
AGE 65 YEARS.
3. KHAITAN S/O. ANDRU D'SOUZA,
SINCE DECEASED BY HIS LRS
R2 & R4 TO R7).
4. INTRU S/O. ANDRU D'SOUZA,
AGE 55 YEARS.
5. NATALIA W/O. PIAS GHAM,
AGE 51 YEARS.



NC: 2026:KHC-D:1716
RSA No. 811 of 2007
C/W RSA No. 5579 of 2009

6. ANTON ANDRU D'SOUZA,
AGE 49 YEARS.
7. NELSON S/O. ANDRU D'SOUZA,
AGE 41 YEARS,
ALL ARE R/O. NILEKANI VILLAGE,
SIRSI TALUKA,
UTTARA KANNADA DISTRICT-581401.

...RESPONDENTS

(BY SRI HEDGE, NEERALAGI AND PATIL, ADVS. FOR R4 AND R6;
NOTICE TO R2, R5 AND R7 ARE SERVED;
APPEAL AGAINST R3-ABATED)

THIS REGULAR SECOND APPEAL IS FILED UNDER SECTION 100 OF THE CODE OF CIVIL PROCEDURE, PRAYING TO CALL FOR THE RECORDS OF THE CASE R.A.NO.15/1996 ON THE FILE OF THE COURT OF THE CIVIL JUDGE (SR. DVN.) SIRSI AS WELL AS O.S.NO.102/1987 ON THE FILE OF THE COURT OF THE ADDITIONAL MUNSIF AT: SIRSI AND AFTER LOOKING INTO THE LEGALITY AND VALIDITY OF THE JUDGMENT AND DECREE DATED 01.08.2009 IN R.A.NO.15/1996, REVERSING THE JUDGMENT AND DECREE DATED 31.01.1996 IN O.S.NO.102/1987 BE PLEASED TO QUASH AND SET ASIDE THAT OF THE LOWER APPELLATE COURT, AND RESTORE THAT OF THE TRIAL COURT, IN THE INTEREST OF JUSTICE AND EQUITY.

THESE APPEALS COMING ON FOR DICTATION OF JUDGMENT, THIS DAY JUDGMENT WAS DELIVERED THEREIN AS UNDER:



ORAL JUDGMENT

(PER: THE HON'BLE MR. JUSTICE HANCHATE SANJEEVKUMAR)

The Regular Second Appeal No.811/2007 is filed by Defendants in O.S.No.156/1986, calling in question the judgment and decree dated 23.12.2006 in R.A.No.16/1996 passed by the Civil Judge (Sr.Dn.), Sirsi¹, reversing the judgment and decree dated 31.01.1996 in O.S. No.156/1986 passed by the Additional Munsiff, Sirsi², whereby the suit filed by the plaintiff was decreed.

2. The Regular Second Appeal No.5579/2009 is filed by Defendants in O.S. No.102/1987, calling in question the judgment and decree dated 01.08.2009 in R.A. No.15/1996 passed by the Civil Judge (Sr.Dn.), Sirsi, reversing the judgment and decree dated 31.01.1996 in O.S. No.102/1987 passed by the Additional Munsiff, Sirsi, whereby the suit filed by the plaintiff was decreed.

¹ Hereinafter referred to as "First Appellate Court"

² Hereinafter referred to as "Trial Court"



3. O.S.No.156/1986 was filed by the plaintiff for possession and injunction, and O.S.No.102/1987 was filed for declaration and injunction regarding the pathway.

4. The trial Court dismissed both suits. Being aggrieved by the same, the plaintiff preferred two appeals before the First Appellate Court. The First Appellate Court allowed both appeals and granted decrees as prayed for.

5. Being aggrieved by the judgment and decree passed by the First Appellate Court, the defendants have preferred these two Regular Second Appeals, raising various grounds and substantial questions of law.

6. These two appeals pertain to the same property, between the same parties, and the reliefs claimed are interconnected. O.S.No.156/1986 was filed for possession and injunction, and O.S.No.102/1987 was filed for declaration and injunction regarding the pathway. As common questions of fact and law arise for consideration, both appeals are taken up together for common disposal.



7. It is the case of the plaintiff in both suits that he is the owner and in possession of the suit schedule property bearing CTS No.2504 A1-E, and that the defendants are the owners of property bearing CTS No.2504 A1-D. The plaintiff alleges that the defendants have encroached a portion of CTS No.2504 A1-E to an extent of 40 feet East-West and 5-6 feet North-South. The encroachment consists of stone walls roofed with Mangalore tiles. The plaintiff produced a hand sketch map prepared by the City Surveyor, wherein the encroached portion is shown as 'MNOP'. Accordingly, O.S. No.102/1987 was filed for declaration and injunction in respect of the encroached area 'MNOP', and O.S. No.156/1986 was filed for possession and injunction.

8. In both suits, the defendants filed written statements admitting that they are the owners of CTS No.2504 A1-D and that the plaintiff is the owner of CTS No.2504 A1-E. However, they contended that they have acquired rights over the alleged encroached area by



adverse possession and have perfected their title accordingly. Accordingly prayed for dismissal of the suits.

9. The trial Court, upon appreciation of the evidence, dismissed the suits, holding that the plaintiff failed to prove lawful possession of the suit schedule property and failed to prove the alleged encroachment. The trial Court further held that the defendants had perfected title over the area marked 'MNOP' by adverse possession with the knowledge of the plaintiff.

10. Being aggrieved thereby, the plaintiff preferred Regular Appeals before the First Appellate Court. The First Appellate Court reversed the findings of the trial Court and held that the plaintiff is the owner of the suit schedule property, including the encroached portion 'MNOP' in CTS No.2504 A1-E, and directed removal of the encroachment.

11. The First Appellate Court assigned reasons, holding that although the defendants pleaded adverse possession, they failed to substantiate the same with proper pleadings and evidence. Mere admission of encroachment



does not establish title by adverse possession. Therefore, the judgment and decree of the trial Court were reversed, and the suits are decreed as prayed for.

12. This Court, while admitting RSA No.811/2007 on 14.06.2007, framed the following substantial question of law:

- i) Whether the lower appellate Court was justified in granting a decree for mandatory injunction when the plaintiff did not seek for declaration of the property where these constructions are put up?*

13. This Court, while admitting the appeal in RSA No.5579/2009 on 06.03.2014 framed the following substantial questions of law:

- i) Whether the first Appellate Court has committed a serious error in granting the relief of declaration in the absence of specific pleading regarding easementary right by way of prescription or necessity or customary right as per Sections 13 and 15 of the Indian Easements Act?*



ii) Whether the first Appellate Court, while reassessing the evidence has committed a serious error in ignoring the material evidence on record, more particularly, without appointing a Commissioner to visit the spot and submit a report?

14. Learned counsel for the appellants/defendants submitted that the trial Court was correct in dismissing the suits, as there is no report of the Court Commissioner. If there is any encroachment, the report of the Commissioner is important; however, no such report was obtained before the trial Court. Therefore, the plaintiff failed to prove the alleged encroachment by the defendants.

15. It was further submitted that the first Appellate Court erroneously re-appreciated the evidence on record and wrongly held that the plaintiff is the owner of the suit property comprising the encroached area 'MNOP', without there being any report from the Court Commissioner. Therefore, the findings of the first Appellate Court are incorrect.



16. It was also contended that there is no evidence to show the extent of the encroachment, and unless there is an exact measurement of the encroached area, a decree for removal of encroachment cannot be granted. Hence, prayed that the matter be remanded and a Court Commissioner be appointed to determine whether there is any encroachment and, if so, the extent of such encroachment. Accordingly, prays to allow the appeals.

17. On the other hand, learned counsel for the respondent/plaintiff submitted that the defendants have admitted in their written statement the encroachment of the area described as 'MNOP', and hence there is no necessity for the plaintiff to prove his title. Therefore submitted that the judgment and decree passed by the first Appellate Court are justified.

18. It was further submitted that the first Appellate Court, upon correct appreciation of the evidence on record, rightly reversed the judgment and decree passed by the trial Court and directed the defendants to surrender vacant



possession of 'MNOP'. Therefore, prays to dismiss the appeal.

19. Upon considering the pleadings of the parties and the evidence on record, it is not disputed that the plaintiff is the owner of property bearing CTS No.2504 A1-E and that the defendants are the owners of CTS No.2504 A1-D. It is also undisputed that both properties are adjacent to each other.

20. The grievance of the plaintiff is that the defendants have encroached upon a portion of property bearing CTS No.2504 A1-E on the northern side, more fully described as 'MNOP' in the plaint schedule.

21. From the written statement of the defendants, it is seen that they have admitted that more than 35 years ago they put up construction with Mangalore tiles and roofing and claimed to have perfected title over property bearing CTS No.2504 A1-E by way of adverse possession, with the knowledge of the plaintiff. Therefore, the defendants have admitted that the alleged encroached area



'MNOP' is constructed on property bearing CTS No.2504 A1-E. Therefore the defendant admitted that plaintiff is owner of encroached portion "MNOP".

22. In view of this admission, no further evidence is required from the plaintiff to prove that the encroached portion belongs to him and is situated in CTS No. 2504 A1-E.

23. It is the case of the defendants that they have acquired title by way of adverse possession. However, there must be specific pleadings regarding adverse possession. In the written statement, there are no specific pleadings to substantiate this aspect. In the absence of such pleadings, the trial Court's finding that the defendants proved title by adverse possession is perverse.

24. The defendants have admitted in their pleadings and evidence that they have encroached upon property 'MNOP' long ago. However, such pleading is not sufficient to establish title by adverse possession. In this regard, the



first Appellate Court has correctly appreciated the evidence on record.

25. Furthermore, Ex.P28 is the city survey map which shows that a portion of CTS No. 2504 A1-E measuring 323 sq. yards has been encroached by the defendants. Therefore, Ex.P28 establishes that the defendants have encroached a portion of property bearing CTS No.2504 A1-E. The first Appellate Court has correctly appreciated this evidence. The trial Court erred in its appreciation of the evidence on record.

26. Therefore, the error committed by the trial Court has been correctly noticed by the first Appellate Court. There is no need to interfere with the order passed by the First Appellate Court holding that the plaintiff is the owner of property described as 'MNOP', which has been encroached by the defendants, and directing removal of the said encroachment. The order is just, proper, sound and correct.



27. Since the defendants have admitted the plaintiff's title, there is no necessity for a separate suit for declaration. Even without seeking declaration, a mandatory injunction can be granted where ownership of property is admitted by the defendants. However, the plaintiff has also filed O.S.No.102/1987 for declaration; therefore, the ground pleaded by the defendants is adequately addressed.

28. There is no merit found in the appeals. Accordingly, the substantial question of law in RSA No. 811/2007 is answered in the ***affirmative***, and the substantial questions of law in RSA No.5579/2009 are answered in the ***negative***.

29. Learned counsel for the appellants/defendants submitted that although the plaintiff has filed a hand sketch showing the encroached area 'MNOP', there is no exact measurement of the encroached area. Therefore, in the absence of determination of the exact area of encroachment, the mandatory injunction cannot be implemented. Hence, liberty is sought to file an application



before the Executing Court in Ex.P.No.21/2024 for measurement of the encroached area.

30. Therefore, if such application is filed for finding out the measurement of the encroached area the same shall be considered in accordance with law and pass appropriate orders.

31. Hence, I pass the following.

ORDER

- i) Both Regular Second Appeals are ***dismissed***.
- ii) The judgment and decree dated 23.12.2006 in RA No.16/1996 passed by the Civil Judge (Sr.Dn) Sirsi, reversing the judgment and decree dated 31.01.1996 in O.S.No.156/1986 passed by the Additional Munsiff, Sirsi, is confirmed.
- iii) The judgment and decree dated 01.08.2009 in R.A.No.15/1996 passed by the Civil Judge (Sr. Dn.), Sirsi, reversing the judgment and decree dated 31.01.1996 in O.S.No.102/1987 passed by the Additional Munsiff, Sirsi, is confirmed.



- iv) Liberty is reserved to the defendants to file appropriate application before the Executing Court for measurement of encroached area. Upon finding of the extent of encroached area, the executing Court shall pass necessary orders in execution case, as per law.
- v) Registry is directed to transmit the records along with copy of this judgment to the trial Courts forthwith.
- vi) No order as to costs.

Sd/-
(HANCHATE SANJEEVKUMAR)
JUDGE

ASN
List No.: 1 Sl No.: 1