

IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 17<sup>TH</sup> DAY OF AUGUST, 2022

BEFORE

THE HON'BLE MR. JUSTICE V. SRISHANANDA

**R.F.A.No.1229/2012(DEC/INJ)**

BETWEEN

SRI N MOHANDAS  
S/O LATE N.NARAYANAPPA  
NO.16, 11<sup>TH</sup> MAIN, KALANAGAR,  
BANGALORE-560 015

...APPELLANT

(BY SRI V VISWANATH, ADVOCATE)

AND

SRI KRISHNAIAH @ KRISHNA REDDY  
NO.27, 10<sup>TH</sup> MAIN,  
KALANAGAR,  
K.G.HALLI,  
BANGALORE-560 015

...RESPONDENT

(SERVED)

THIS RFA IS FILED UNDER ORDER 41 RULE 1 R/W  
SECTION 96 OF CPC, AGAINST THE JUDGMENT AND DECREE  
DATED 22.02.2012 PASSED IN O.S.NO.4224/2007 ON THE  
FILE OF III ADDITIONAL CITY CIVIL AND SESSIONS JUDGE,  
BANGALORE CITY, DISMISSING THE SUIT FILED FOR  
DECLARATION, PERMANENT INJUNCTION, POSSESSION.

THIS APPEAL COMING ON FOR HEARING, THIS DAY,  
THE COURT DELIVERED THE FOLLOWING:

**JUDGMENT**

Heard Sri.V.Viswanath, learned counsel for appellant. There is no representation on behalf of the respondent.

2. The unsuccessful plaintiff in O.S.No.4224/2007 has preferred this appeal challenging the Judgment and decree passed by the trial court in the said suit dated 22.02.2012.

3. Brief facts of the case are as under:

The plaintiff filed a suit for declaration that he is one of the co-owners of 'B' schedule property and to recover the possession of the same from the defendant and another declaration stating that defendant has encroached 'B' schedule property illegally and also sought for directing the defendant to remove the encroachment over 'B' schedule property within a

month along with the consolidated compensation of Rs.1,07,500/- with interest at 18% p.a. and consequential relief of permanent injunction restraining the defendant from interfering with the peaceful possession and enjoyment of schedule 'A' property.

The schedule of the suit reads as under:

'A' Schedule

Site Nos.15 and 16 (60x41) in Sy.No.52, Kalanagar 11<sup>th</sup> Main, K.G.Halli, Bengaluru -15 measuring bounded on:

North by : Road,  
South by : Site Nos.26 and 27  
East by : Site No.17 and  
West by : Site No.14

'B' Schedule

An extent of 1'.7"x12' feet along with the bifurcating compound wall of 4 inch thickness of 5 feet height and 18 ½ feet length which is beyond 40 feet demarcation from the southern side of the site No.27 located in the south western side of the site No.15 in the schedule A property.

4. Plaintiff averments further reveal that plaintiff is one of the family members and co-owner in 'A' schedule property from November, 1991 and having constructed a sheet roofed house in site No.15 and another house at site No.16 and defendant constructed the sheet roofed house on the south western corner of 'A' schedule property in September 2003 and started further construction towards 'A' schedule property after removing fencing and thereby encroached 1.7'x12' feet space to put up construction of 4 feet concrete block. Same was objected to and defendant agreed to remove the encroachment whenever the plaintiff directs to do so. Thereafter plaintiff did not take any action and defendant started deriving income from 01.05.2004 after completion of the construction work and defendant went to the extent of assaulting plaintiff when he was asked to remove encroached portion on 11.04.2004 resulting in criminal complaint being filed before the

jurisdictional Magistrate and being adjudicated in C.C.No.15926/2004. Apart from the physical and material losses, plaintiff also suffered loss of reputation, mental agony and harassment due to illegal action of defendant and therefore sought appropriate relief in the suit.

5. In pursuance to the suit summons defendant appeared personally on 07.09.2007 but thereafter did not engage counsel nor contested the suit.

6. The plaintiff in order to prove his case filed an affidavit in lieu of examination in chief reiterating the plaint averments and relied on 10 documents which are marked as Ex.P-1- copy of legal notice, Ex.P-2- certificate of posting, Ex.P-3- RPAD receipt, Ex.P-4- Postal cover, Ex.P-5- legal notice, Ex.P-6- Postal acknowledgement, Ex.P-7- Certified copy of the copy application, Ex.P-8- Certified copy of the X-ray report,

Ex.P-9- Certified copy of wound certificate, Ex.P-10- Certified copy of the receipt and requisition.

7. Thereafter learned trial Judge heard the plaintiff and raised following points for consideration:

- 1. Whether plaintiff establishes that he is one of the absolute owners of the suit schedule site property and it measures 60x40 feet?*
- 2. Whether the plaintiff establishes that he has been in lawful possession and enjoyment of the B-schedule property and it is the portion of A-schedule property?*
- 3. Whether the plaintiff establishes that the defendant encroached and illegally interfered into B-schedule property?*
- 4. Whether the plaintiff establishes that he is entitled to get the relief of declaration of B-schedule property?*

*5. Whether plaintiff is entitled to get the possession of B-schedule property?*

*6. Whether plaintiff is entitled to get permanent injunction against defendant?*

*7. Whether the plaintiff is entitled to get the consolidated compensation as claimed?*

*8. What order or decree?"*

After hearing the arguments learned trial Judge held all points in the negative and dismissed the suit of the plaintiff.

8. Being aggrieved by the same, the plaintiff has preferred this appeal on the following grounds:

- *The learned Judge of the Trial Court has erred in failing to see that the plaintiff in support of his case has made specific averments in the plaint, inspite of service of summons the respondent, who entered appearance has not filed the written statement by denying the case of the appellant*

*nor adduced any evidence and that the Trial Court ought to have accepted the case of the appellant and should have decreed the same as prayed for instead of dismissing the suit*

- *The learned Judge of the Trial Court has erred in failing to see that as per the specific averments made in the plaint, it is the appellant, who is the co-owner in joint possession of the suit property along with his family members from the year November 1991 onwards, which is not disputed by the respondent and that the Trial Court could have taken in to consideration of this aspect while rendering the Judgment*
- *The learned Judge of the Trial Court has erred in failing to see that the appellant in support of his case has been examined himself as PW1 and got marked Ex P1 to Ex P10 among them there is a copy of the legal notice issued by him at Ex P5, which is duly served on the respondent, so far as it concerned to the notice sent Under Certificate of Posting inspite of receipt of the same, the respondent has neither replied nor complied with the just and legal demand of the appellant, which shows that the respondent is a encroacher/tress*



*passer in to the 'B' schedule property and that he is required to be directed to vacate and hand over the vacant possession by demolishing the illegal structure thereon by granting a mandatory injunction, but the court below has not taken in to consideration this aspect while rendering the judgment*

- *The learned Judge of the Trial Court has completely erred in failing to see that the appellant, who has been examined as PW1 has filed a sworn evidence affidavit, but the same has not been challenged by the respondent by cross-examining the PW1 and that the Trial Court ought to have accepted the evidence affidavit as it is and could have been granted a decree in favour of the appellant as prayed for as there is nothing to disprove the case of the appellant and the respondent has not placed any such material.*
- *The learned Judge of the Trial Court even though framed in all seven points while answering to the same has not considered the case of the appellant, so also his evidence and documents produced thereon in a proper and perspective manner.*

- *The learned Judge of the Trial Court has erred in failing to see that only on the basis of specific averments regarding his title in the plaint, which is not traversed /denied by the respondent would be enough to hold that the appellant is entitled for a decree. The reasons assigned by the learned Judge of the Trial Court to dismiss the suit are all untenable and against to the law and facts.*
- *The Judgment and Decree passed by the Trial Court is not sustainable either in law or on facts, hence the Judgment and Decree is liable to be set aside by this Hon'ble Court*
- *The learned judge of the trial court has failed to draw statutory presumption against the respondent as the respondent has failed to file the written statement to controvert the case of the specific averments made in the plaint regarding the aspects relating to encroachment and all other interconnected matters.*
- *The judgment and decree of the lower court is otherwise opposed to law, facts and probabilities*

*of the case. The appreciation of intrinsic evidence available on record is not proper.*

- *The learned judge of the trial court has culled out a case it favour of the respondent who has not at all filed the written statement, and has failed to take into consideration, the just and tenable grounds available on record in favour of the appellant.*
- *The impugned judgment is contrary to the principles of natural justice.*
- *Viewed from any angle, the judgment and decree passed by the trial court is not maintainable either in law or on facts and the same is liable to be set aside by this Hon'ble Court*
- *The appellant craves the leave of this Hon'ble Court to urge any more grounds at the time of addressing the argument."*

9. Reiterating the grounds urged in the appeal memorandum Sri.V.Viswanath, learned counsel for appellant vehemently contended that the suit of the

plaintiff was not properly conducted and necessary documents were not placed before the trial court and there was no sketch filed along with the suit and for mistake of the counsel, valuable rights of the appellant could not be put to jeopardy and thus sought for allowing the appeal.

10. He also pointed out in this appeal, application is filed under Order 41 Rule 27 CPC to place additional evidence on record and sought for allowing the application and as well as appeal and sought for remand of the matter to the trial court for fresh consideration in accordance with law.

11. In this appeal also, respondent though served remained absent. In the absence of respondent, this court perused the material on record meticulously in the light of the arguments put forth on behalf of the appellant.

12. On such perusal it is seen that plaintiff is claiming his right over the property by way of agreement to sell. It is settled principles of law that by virtue of agreement of sale, no right, title or interest would pass on to the parties and at the most physical possession held by the party in such agreement can be protected from interference. To establish the case of plaintiff no proper documents were filed before the trial court. Therefore, trial court held that plaintiff failed to establish the ownership over the property and therefore denied the plaint relief.

13. On re-appreciation of the material on record this court is of the considered opinion that plaintiff has not made out any case to seek declaration in as much as there is no legal right pleaded and proved by plaintiff as admittedly he claims himself that he is one of the co-owners along with the defendant. Other family members of the plaintiff are not made parties.

14. Assuming that the plaintiff is one of the co-owners, the suit is also bad for non-impleading other co-owners of the property either as defendant or plaintiff. Further immediately after the encroachment took place plaintiff did not take any action and the plaint averments itself reveal that the defendant promised that he would remove the encroachment and therefore he did not take any action.

15. These aspects of the matter has been rightly appreciated by the trial Judge and dismissed the suit of the plaintiff. Suffice to say material on record would not make out a case for the plaintiff even if the application filed under Order 41 Rule 27 read with Section 151 of CPC by the appellant/plaintiff is allowed and additional documents are taken on record it would not improve the case of the plaintiff in as much as what is sought to be produced is agreement of sale and there is no sale deed.

16. Accordingly, this court is of the considered opinion that appellant/plaintiff has not made out any case to interfere with the impugned Judgment. Hence, the following:

**ORDER**

I.A.1/2018 is hereby dismissed. Appeal is also dismissed. No order as to costs.

Original documents filed by the appellant/plaintiff along with the application is ordered to be returned to plaintiff/appellant under due identification.

**Sd/-  
JUDGE**

SBN