



IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 19TH DAY OF DECEMBER, 2025

BEFORE

THE HON'BLE MRS. JUSTICE M G UMA

REGULAR SECOND APPEAL NO. 1329 OF 2009 (DEC/INJ)

BETWEEN:

NAGARAJA
AGED ABOUT 59 YEARS
S/O LATE RAMACHAR,
AYYANNANAPETE ROAD,
AYYANNANAPETE,
CHITRADURGA TOWN

...APPELLANT

(BY SRI. C.N. SATYANARAYANA SHASTRI, ADVOCATE)

AND:

1. S RAMESH
SINCE DECEASED BY L.RS.,
 - A) SMT. LAKSHMI RAMESH @ RATHNA,
AGED ABOUT 67 YEARS,
WIFE OF LATE RAMESH .S.,
 - B) KUM. SHILPA,
AGED ABOUT 39 YEARS,
DAUGHTER OF LATE RAMESH S.
 - C) SANTOSH,
AGED ABOUT 37 YEARS,
SON OF LATE RAMESH S.

ALL ARE RESIDING AT
DHARMASHALA ROAD,
AYYANNANAPETE ROAD,
CHITRADURGA TOWN

2. S. MOHAN,
AGED ABOUT 52 YEARS,



SON OF LATE SHESHAPPA,
RESIDING AT DHARMASHALA ROAD,
AYYANNANAPETE ROAD,
CHITRADURGA TOWN

...RESPONDENTS

(BY SRI. B.M. SIDDAPPA, ADVOCATE FOR
FOR LR'S OF R1 I.E., R1 (A TO C) & R2)

THIS RSA IS FILED U/S 100 OF CPC., AGAINST THE
JUDGMENT AND DECREE DATED 28.2.2009 PASSED IN R.A.NO.
71/2007 ON THE FILE OF THE I ADDL. CIVIL JUDGE (SR.DN) & III
ADDL. MACT, CHITRADURGA, DISMISSING THE APPEAL AND
CONFIRMING THE JUDGMENT AND DECREE DATED:18.6.2007
PASSED IN O.S.234/2002 ON THE FILE OF THE PRL. CIVIL JUDGE
(JR.DN) & JMFC., CHITRADURGA.

THIS RSA, COMING ON FOR FURTHER HEARING, THIS DAY,
JUDGMENT WAS DELIVERED THEREIN AS UNDER:

CORAM: HON'BLE MRS. JUSTICE M G UMA

ORAL JUDGMENT

Defendant No.1 in OS.No.234/2002 on the file of the
learned Principal Civil Judge (Jr.Dn.) and JMFC, Chitradurga
(hereinafter referred to as 'the Trial Court') is impugning the
judgment and decree dated 18.06.2007, decreeing the suit of
the plaintiffs and declaring that they are the owners of the
property as shown in Ex.C4 sketch as 'ABCDEFGF' and directing
the defendants to demolish the building and bathroom
constructed as shown in Ex.C4 sketch and handover the



possession of the same to the plaintiffs within six months, which was confirmed in RA No.71/2007 on the file of the learned First Additional Civil Judge (Sr.Dn.) and III Additional MACT, Chitradurga (hereinafter referred to as 'the First Appellate Court) vide judgment dated 28.02.2009.

2. For the sake of convenience, the parties shall be referred to as per their rank and status before the Trial Court.

3. The facts of the case in brief are that plaintiff Nos.1 and 2 have filed the suit OS.No.234/2002 against defendant Nos.1 and 2 before the Trial Court seeking declaration that the land shown as 'ABCD' and 'CEFG' in the rough sketch are encroached by the defendants, that they have constructed the building and also converted a portion of the land into a passage; to declare that the plaintiffs are the owners of said encroached land and for grant of mandatory injunction against the defendants to clear the said area and to hand over the same to the plaintiffs.

4. It is contented by the plaintiffs that the property described as Municipal Door No.1255, which is the subject



matter of the suit, is a 3 Ankana tiled house attached with a front yard, with the boundaries mentioned therein and also the backyard measuring East - West 23 feet, North - South 9 Feet, with the boundaries mentioned therein, totally measuring North - South 52 feet and East to West 23 Feet situated at Ayyannapette of Chitradurga Town (hereinafter referred to as the 'schedule property').

5. It is contented by the plaintiffs that the suit scheduled property was purchased by the father of the plaintiff on 02.04.1951 from its earlier owner M.Rama Rao under the registered sale deed. Since then the scheduled property was in the possession and enjoyment of the father of the plaintiffs and after his death, the plaintiffs are in possession and enjoyment of the same.

6. It is contended that, the property belonging to the defendants is situated on the southern side of the plaintiff schedule property. The house belonging to the plaintiffs, which is situated in the scheduled property, measures East -West : 23 Feet, North - South : 43 Feet, with backyard measuring 9 Feet. The front yard measures North - South : 12 1/2 feet and East -



West : 23 Feet. The said property is shown in the rough sketch attached to the plaint.

7. It is contended that the defendants by high handed acts encroached over the land shown in the 'ABCD' in the rough sketch measuring East - West 23 Feet, North - South 7 feet and 10 angula and constructed a room. They have also encroached the area shown as 'CEFG' East - West 16 ½ Feet, North - South : 4 Feet and converted it as a passage with an entry and exit to the road. About two months earlier to filing of the suit, when the plaintiff requested the defendants to clear the encroachment, they have not heeded to such request. They have completed the construction. The plaintiffs complained to the town municipality, who suggested the plaintiffs to approach the Civil Court. Therefore, the plaintiffs sought for declaration that they are the absolute owners in respect of the property shown as 'ABCD' and 'CEFG' and that the defendants have encroached over the same and made construction. Thus, the plaintiffs are entitled for mandatory injunction directing the defendants to remove the encroachment and to handover vacant possession of the same to the plaintiffs.



8. Defendants have appeared before the Trial Court and filed the written statement denying all the contentions taken by the plaintiffs. It is contended that the property bearing Door No.1251 was originally belonging to the grandfather of the defendants by name Madhvarayachar. The said Madhvarayachar and his son Sri C.Ramachar i.e., the father of the defendants, sold northern portion of the property consisting of a house and a vacant space measuring East - West : 23 Feet, North - South : 43 Feet with the boundaries mentioned in the written statement in favour of M. Rama Rao, i.e, the vendor of the plaintiffs' father, under a registered sale deed dated 23.05.1948. A sketch is attached to the written statement to show the property that was sold by the grandfather of the defendants in favour of M.Ram Rao. Since from the date of said sale deed, M.Ram Rao was in possession and enjoyment of only the said portion of the land and later sold it in favour of the father of the plaintiffs. Therefore, it is contended that only the portion described above and shown in the sketch attached to the written statement was purchased by



the father of the plaintiffs and they are in possession of the same.

9. The defendants admitted that the father of the plaintiffs died on 03.06.1993. But denied the contention that after his death, the property stood in the name of the mother of the plaintiffs. It is admitted that the mother of the plaintiffs died on 30.01.2000. But denied the contention that the plaintiffs are in actual possession and enjoyment of the scheduled property.

10. It is contended by the defendants that towards south of the plaintiffs' house, there existed a vacant space belonging to the plaintiffs and towards further south, there existed the house of the defendants. The sketch attached to the plaint is disputed as the same do not depict the actual position of the properties held by the plaintiffs and defendants.

11. It is denied that the defendants about two months earlier to filing of the suit, encroached the area shown as 'ABCD' in the plaint sketch, measuring East - West : 23 feet, North - South 7.10 Feet and constructed a room. It is also



denied that in the Southern side, the plaintiffs have the land measuring East - West 16.6 Feet, North to South 4 feet shown as 'CEFG' in the plaint sketch and converted it into the passage or that the defendants have no right whatsoever over the same.

12. Defendants contended that a residential asbestos sheet house and vacant space situated towards its north totally measuring East- West 19 ½ and North - South : 50 feet with the boundaries mentioned therein is the ancestral property of the defendants. The defendants after obtaining commencement certificate from the Urban Development Authority, Chitradurga and license from the City Municipality, Chitradurga and after getting the plan approved, demolished the old building and constructed the new one strictly in accordance with the approved plan.

13. It is contented that even at the time of the filing written statement, the old wall was in existence between the property of the plaintiffs and newly constructed house of the defendants. It is contented that the plaintiffs were jealous about the defendants as they have constructed the house and



filed a false suit. Therefore, it is contented that the plaintiffs are not entitled for any relief as sought.

14. On the basis of these pleadings, the following issues were came to be framed.

- a. Whether the plaintiffs prove that they are the owners of the suit properties as pleaded in the plaint?*
- b. Whether the plaintiffs prove that the defendants have encroached upon the suit property as pleaded in the plaint?*
- c. Whether the plaintiffs are entitled for the relief of declaration as prayed for?*
- d. Whether the plaintiffs are entitled for the relief of mandatory injunction as prayed for?*
- e. What order or decree?*

15. Plaintiff No.1 examined himself as PW1 got marked Exs.P1 to P12 in support of his contention. Defendant No.1 examined himself as DW1 and got marked Exs.D1 to D13 in support of its defence. The Court Commissioner appointed by the Trial Court is examined as CW1. Exs.C1 to C4 were marked



through him. After taking into consideration all these materials on records, the Trial Court answered Issue Nos.1 to 4 in the affirmative and decreed the suit of the plaintiff with cost, declaring that the plaintiffs are the owners of the property shown in Ex.C4 - sketch described as 'ABCDEFGH'. Defendants were directed to demolish the building and the bathroom constructed by them as shown in Ex.C4 - sketch described as 'ABCDEFGH' and handover the possession of the same to the plaintiffs within six months.

16. Being aggrieved by the same, the defendants have approached the First Appellate Court. The First Appellate Court on re-appreciation of the materials on record, dismissed the appeal while confirming the judgment and decree passed by the Trial Court. Being aggrieved by the same, the defendants are before this Court.

17. This Court vide order dated 28.05.2012 formulated the following substantial question of law for consideration.

a. In the face of Ex.D6, commencement certificate issued by the Municipal authority on 28.12.2001, suit filed on 28.08.2002 for permanent injunction and subsequently amended to one for



mandatory injunction, without seeking the relief of possession is maintainable?

On hearing the learned counsels for both the parties and on going through the original records, the substantial question of law stating that suit filed on 28.08.2002 for permanent injunction and subsequently amended to one for mandatory injunction without seeking the relief of possession" is factually incorrect as initially, plaintiff filed the suit for declaration of his title over 'ABCD' and 'CEFG' shown in the sketch and that the defendants have encroached and made construction over the same and therefore, sought for mandatory injunction to clear the encroachment by demolishing the buildings and to handover vacant possession in favour of the plaintiffs. Therefore, the substantial questions of law that was framed on 28.05.2012 is substituted by the following substantial questions of law for consideration with the consent of both the learned counsels.

1. Whether the plaintiffs are entitled for declaration of their title and for mandatory injunction against the defendants and also for possession as sought in the plaint when admittedly



the defendants have already constructed and completed the construction of the building, without any objection by the plaintiff, by the time the suit came to be filed?

2. Whether the Trial Court and the First Appellate Court were right in decreeing the suit of the plaintiff and directing the defendant to demolish the portion of the building and handover the possession of the property to the plaintiff when infact the Court Commissioner has not shown any portion in Ex.C4 as the portion encroached by the defendants?

18. Heard Sri. C.N.Sathyanarayana Shastri, learned counsel for the appellants and Sri. B.M.Siddppa, learned counsel for legal representatives of respondent No.1 i.e, respondent Nos.1(A to C) and respondent No.2. Perused the materials on record.

19. Learned counsel for the defendants/appellants contended that Ex.P5 is the registered sale deed executed by Rama Rao in favour of father of the plaintiffs. Ex.P1/Ex.D2 is



the copy of the registered sale deed of the year 1948 executed by the grandfather of the defendants in favour of Rama Rao. As per Ex.P1/Ex.D2, Rama Rao had purchased only the land measuring 23 X 43 feet with a house with the front yard. The very same property was sold by Rama Rao in favour of the father of the plaintiffs under Ex.P5, in the year 1951. The remaining property measuring 15 X 19 ½ feet was in possession of the grandfather of the defendants along with the building standing therein. After demise of the grandfather, the father of the defendants and after his death, the defendants are in possession and enjoyment of the same.

20. During 2001, defendants wanted to demolish the old building and put up a new construction. They obtained the commencement certificate from Chitradurga Urban Development Authority, dated 28.12.2001 as per Ex.D6. They have obtained the license and sanction plan from Chitradurga Town Municipality on 08.01.2002, produced as per Ex.D7. Immediately thereafter, demolished the old building and constructed the new one, strictly in accordance with Ex.D7. After completing the house, the house warming ceremony was



held on 11.08.2002. But the suit was came to be filed on 28.08.2002, i.e., after the defendants occupied the newly constructed building.

21. Learned counsel for the defendants has drawn the attention of the Court to Ex.D3 the assessment register extract for the year 1974-1975 according to which, Sl.No.1932 with respect to the Property No.1819/1337 is owned by Ramachar son of Madhvachar.

22. Learned counsel contended that the description of the property in Ex.P1/Ex.D2 discloses that only area measuring East - West 23 feet, North - South 43 feet was sold retaining an area measuring East - West : 23 feet, North - South : 9 Feet and also Ex.D5. Therefore, it is contented that Ram Rao under the sale deed Ex.P1/D2 purchased 43 X 23 feet but not 52 X 23 feet as contented.

23. Learned counsel referring to the rough sketch attached to the written statement contended that on the northern side there was a backyard, behind the house of the plaintiffs and there was a front yard as well attached to the land belonging to the defendants. The backyard with the house



of the plaintiff and the front yard together measure only 43 feet from North - South. The property that was held by the defendant measures North - South : 50 Feet. The old wall demarcating the land belonging to the plaintiffs and defendants was in existence and the same was admitted by PW1 during cross-examination. The land beyond the old wall demarcating the property of the plaintiffs with the defendants, is shown by the plaintiffs as the encroached portion of the disputed land and now claimed by them.

24. Learned counsel contended that the commencement certificate issued authorising the defendants to construct the building is dated 28.12.2001 produced as per Ex.D6. The suit came to be filed on 28.08.2002. Therefore, it is clear that the plaintiffs have filed this suit only after completion of the building and the defendants occupying the same. There is absolutely no reasonable ground urged by the plaintiffs as to why they have not raised objections when the defendants started constructing the building, if at all there was any encroachment.



25. Learned counsel drawing the attention of the Court to the cross-examination of PW1 contended that PW1 in categorical terms stated that there is an old wall on the southern side of the plaintiffs' property and that they have never objected for the plaintiffs' right to construct the building and occupy the same. Under such circumstances the plaintiffs are not entitled for any relief.

26. Learned counsel also contended that an advocate commissioner was appointed by the Trial Court, who visited the spot and drew the sketch as per Exs.C3 and 4. Ex.C3 is the rough sketch drawn by the Commissioner at the spot and Ex.C4 is the neat sketch. Commissioner has not submitted any report. As per Ex.C4, there is no encroachment by the defendants. The plaintiffs admit 1948 and 1951 sale deeds marked as Ex.P1 and Ex.P5 or Ex.D1 and Ex.D2. When admittedly there existed a wall separating the property belonging to the plaintiff and defendants, and when the Court Commissioner has not shown any portion as encroachment by the defendants, the Trial Court and the First Appellate Court committed an error in decreeing the suit of the plaintiffs. When admittedly, the possession of



the property was with the defendants, the plaintiffs were not entitled for a declaration, mandatory injunction and also for possession.

27. Learned counsel contended that the Trial Court decreed the suit for mandatory injunction without describing the exact measurement of the building, which is to be demolished or the land that is to be handed over to the plaintiffs. Under such circumstances, the impugned judgment and decree passed by the Trial Court, as well as by the First Appellate Court are liable to be set aside. Accordingly, prays for allowing the appeal.

28. *Per contra*, learned counsel for the plaintiffs /respondents opposing the appeal submitted that the land that was purchased under Ex.P1 is, East - West 23 Feet and North to South 9 Feet. As per plaint sketch, on the northernmost portion is the backyard of the plaintiffs' house, measuring 23 X 9 Feet. Thereafter, the house of the plaintiffs, which measures 23 X 43 Feet, along with a portion of it being the front yard for the plaintiff. Thereafter, to the south is the vacant space belonging to the plaintiffs, which measures 23 X 5 feet. It is



only thereafter to the southern side, the property belonging to the defendant is situated, which measures 45 X 23 feet. The portion shown in the red shaded area as 'ABCDEFGGC' in plaintiff sketch is the encroached portion. Ex.P1 is the sale deed of the year 1948. Ex.P5 is the sale deed executed of the year 1951, where under the property was purchased by the plaintiffs from Ram Rao. As per the description of the property purchased under Ex.P5, there was front yard with a house measuring 3 Ankana and there was a backyard. The boundaries of the property is also shown. Admittedly, the land belonging to the defendants is on the southern side of the plaintiffs' property.

29. Plaintiffs have also produced Ex.P3 - the mortgage deed executed in favour of one K.R. Prakash Kumar, which is dated 28.08.1972. The description of the property shown in the schedule refers to a tiled house with Door No.1255 with front yard and back yard totally measuring East - West 23 Feet, North - South 52 feet. The said house referred to therein measuring 23 X 43 feet is still in possession of the plaintiffs. But the backyard was encroached by the defendants by constructing the house.



30. Learned counsel contended that neither the plaintiffs nor the defendants have filed any objection to the Commissioner's Report. Ex.C4 is the sketch prepared by the Commissioner, which is the basis for passing the judgment and decree by the Trial Court and also by the First Appellate Court. The Court Commissioner is examined as CW1. Nothing has been elicited from this witness. Under such circumstances, the appellants cannot seek any relief.

31. Learned counsel contended that the plaintiffs have prayed for declaration of their title, for mandatory injunction and also for possession of the property. Only on technicalities, the suit of the plaintiffs cannot be dismissed at this length of time. The defence taken by the defendants in the written statement is not proved. When Ex.P1 and Ex.P5 are the admitted sale deeds of the years 1948 and 1951 respectively, the defendants cannot contend otherwise. The measurement of the properties that are sold in favour of the plaintiffs and their vendors is categorically shown in these documents as 52 X 23 feet.



32. Learned counsel contended that the plaintiffs and defendants have filed the memo of instructions with the Court Commissioner. Even though the reply by the Court Commissioner to the memo of instructions of the plaintiffs and defendants are found in the Trial Court records, the same were never referred to the Court Commissioner during his examination or cross-examination and the same were not taken into consideration either by the Trial Court or by the First Appellate Court.

33. Learned counsel contended that taking into consideration the admitted documents Ex.P1 and Ex.P5, the Trial Court formed an opinion that the plaintiffs have purchased the property under Ex.P5. Ex.P5 is the house measuring 23 x 43 feet and backyard measuring 23 x 9 feet. Therefore, the defendants are estopped from contending that their grandfather had sold only 23 x 43 feet and not the remaining 23 x 9 feet. Ex.P3 the registered mortgage deed of the year 1972, which makes it clear that the property of the plaintiffs measures 23 X 52 feet. The contentions taken by the defendants, which is contrary to the registered sale deeds and



the registered mortgage deed, which are all admitted documents, cannot be accepted.

34. Learned counsel for the plaintiffs contended that when the plaintiffs are successful in proving their contention, the Trial Court decreed the suit of the plaintiffs based on the commissioner's sketch marked as Ex.C4 and declared that the plaintiffs are owners of the property shown as 'ABCDEFGH' and directed the defendants to demolish the building and the bathroom within that area - 'ABCDEFGH' shown in Ex.C4 and also to handover the vacant possession to the plaintiffs, there is no illegality or perversity in the said judgment and decree. The First Appellate Court also concurred with the Trial Court. When there are concurrent findings recorded by the Trial Court as well as by the First Appellate Court, the present appeal is liable to be dismissed.

35. Learned counsel contended that the defendants before the Trial Court have understood the contention taken by the plaintiffs and the prayer made by them. Therefore, the defendants at this stage, before this Court, cannot contend that the plaintiffs have not sought for possession of the properties.



Even though in the revenue documents, the name of the plaintiffs is not shown as owners, they cannot be considered as the documents of title to dismiss the suit of the plaintiffs. The registered sale deeds and the mortgage deed marked as Ex.P1, Ex.P5 and Ex.P3 respectively support the contention of plaintiffs and therefore, the appeal is liable to be dismissed accordingly, prays for dismissal of the appeal.

36. Learned counsel for the respondent contended that this appeal is filed under Section 100 of CPC. Therefore, Court will have a limited scope to interfere with the concurrent findings of the Courts below. When the Trial Court and the First Appellate Court concurred with the facts and circumstances of the case, the appellants have not made out any ground to interfere with the impugned judgment and decree, unless it is shown that the judgment and decree passed by the Trial Court and the First Appellate Court are perverse or against the materials that are placed before the Court or against the settled position of law. In support of such contentions, learned counsel placed reliance on the decisions in ***Kondiba Dagadu Kadam Vs.***



Savitribai Sopama Gujar and others¹, and in ***Subhaga and others Vs. Shobha and others²***, where the Hon'ble Apex court held that factual re-appreciation of evidence in the second appeal is impermissible under Section 100 of CPC unless there is a clearly substantiated question of law, and that, the same has been reiterated by this Court in ***Saraswathi Dhulappa Vs. Sidamma and others³***.

37. Considered the rival contentions of the parties in the light of the substantial questions of law and the Trial Court records. It is the specific contention of the plaintiffs that the defendants, who are owning the property on the southern side of their property have encroached upon a portion measuring 11.10 feet on the western side, 7.10 feet on the Eastern side, 23 feet on the Southern side as per the plaint sketch. But the measurement of the encroached construction on the northern side is not shown even in the plaint sketch.

38. It is the contention of the plaintiffs that they have purchased the house property measuring 23 X 43 Feet along

¹ 1999 AIR SCW 2240 Civil Appeal No.2329/1999

² (2006) 5 SCC 466 Civil Appeal No.2836/2006

³ 2024 (1) AKR 763 RSA No.7180/2011



with the backyard measuring 23 X 9 Feet under the registered said deed dated 02.04.1951 marked as Ex.P5. It is also their contention that their vendor Sri.Rama Rao had purchased the very same property i.e., the house along with the backyard from one Ramachar and Madhvarayachar under Ex.P1 dated 23.05.1948. It is stated that the said Madhvarayachar is the grandfather of the defendant, whereas Ramachar is the father of the defendant. Execution of the sale deed as per Ex.P1 and Ex.P5 are not in dispute. The defendants contend that after selling a portion of the land along with the building under Ex.P1 - Registered sale deed 23.05.1948, their father had retained the remaining extent of the land on the southern side. It is the contention of the plaintiffs that before filing the suit the defendants have encroached on their northern side and to the southern side of the plaintiffs' property and constructed a building along with a bathroom. Therefore, plaintiffs approached the Trial Court for declaration of their title, for mandatory injunction to demolish the building constructed over the encroached portion and for possession of the same. Both the parties have led in their evidence and got marked various documents.



39. It is pertinent to note that a Court Commissioner is appointed at the instance of the plaintiffs and he visited the spot and submitted the sketch as per Ex.C4. The Trial Court record refers to the Commissioner's report as Ex.C1. But in fact, there is no Commissioner's report. The document marked as Ex.C1 is only a memo submitted by the Court Commissioner to the effect that he is appointed as a Court Commissioner, collected the Commissioner's warrant and the memo of instructions filed by the plaintiffs and the defendants, issued notices to the parties, visited the spot on 08.01.2006, held the spot inspection, prepared a mahazar and a rough sketch in the presence of both the parties, obtained their signatures, and returned the Commissioner's warrant after completing the work. This cannot be considered as a Commissioner's report by any stretch of imagination. Ex.C2 is the mahazar drawn at the spot by the Court Commissioner. Ex.C3 is the rough sketch drawn by the Commissioner at the spot. Ex.C4 is the neat sketch filed by the Commissioner.

40. It is pertinent to note that in Ex.C1, the Commissioner specifically refers that he visited the spot on



08.01.2006 at 11.00 a.m., and inspected the spot, drawn a mahazar and a rough sketch in the presence of both the parties. Later their signatures were obtained. It is interesting to note that the Commissioner had never stated that he measured the property in question. But in Ex.C4, the Court Commissioner refers to various measurements.

41. The Court Commissioner is examined as a CW1. Interestingly, even though chief examination of this witness is held by the learned counsel for the plaintiffs, nothing has been elicited from the witness to state that he had measured the property or that the defendant had encroached on any portion of the land belonging to the plaintiff. During cross examination, by the learned counsel for the defendants, the witness categorically states as under "*I have shown the boundaries of the defendant's house in my sketch as mentioned in the sale deed of the defendant*". The witness also states "*I have mentioned in my sketch the measurements of the defendant's house as per the measurements mentioned in the sale deed of the defendants and not actually measuring.*" Therefore, it is clear that the court commissioner had never measured the



properties of both the parties, nor even the construction made by the defendants, which is said to be on the encroached portion of the land belonging to the plaintiffs.

42. The plaintiffs have filed a rough sketch along with the plaint. According to them, red shaded area in the rough sketch shown as 'ABDCEFG' is the encroached portion, whereupon the defendants had constructed the building. The Commissioner had also marked this portion as 'CGFEABD'. Interestingly, the Court Commissioner either in the sketch Ex.C4 or in his evidence when he deposed as CW1, has never stated that this portion is encroached by the defendants.

43. Learned counsel for the respondent/plaintiff during the course of the argument contended that both the parties have filed their memo of instructions to the Court Commissioner and the Court Commissioner had answered the points that are mentioned in the memo of instructions. Strangely, when the Court Commissioner is examined as CW1, there was no reference to such memo of instruction or the Court Commissioner answering the same. Even though Exs.C1 to C3 were marked, such answer given by the Court



Commissioner was never marked for the reasons best known to the plaintiffs. However, in the Trial Court records, I find the memo of instructions filed by the plaintiffs and the defendants. The reply given by the Court Commissioner to the said memo of instructions is also found in the records.

44. As per point number 6 raised in the memo of instructions given on behalf of the plaintiff, the following point was required to be noted.

"6. ಪ್ರತಿವಾದಿಯರ ರೂಂನ ಗೋಡೆಗೆ ಲಗತ್ತಾಗಿ ಏನನ್ನು ಕಟ್ಟಿದ್ದಾರೆ ಎಂಬುದನ್ನು ನಮೂದಿಸತಕ್ಕದ್ದು ಮತ್ತು ಅಂಗಳದ ಜಾಗದಲ್ಲಿ ಎಷ್ಟು ಜಾಗವನ್ನು ಒತ್ತುವರಿ ಮಾಡಿ ಕಟ್ಟಿರುತ್ತಾರೆ ಎಂಬುದನ್ನು ಅಳತೆ ಮಾಡಿ ನಮೂದಿಸತಕ್ಕದ್ದು".

The court commissioner while answering the memo of instructions answered point number 6 as under:

"ವಾದಿಯ ಸೂಚನಾವಳಿ ಆರರ ಪ್ರಕಾರ ಪರಿಶೀಲಿಸಿದಾಗ ಪ್ರತಿವಾದಿಯರು, ರೂಂನ ಗೋಡೆಗೆ ಲಗತ್ತಾಗಿ ಬಜ್ಜೆಲು ಮನೆಯನ್ನು ಕಟ್ಟಿದ್ದಾರೆ ಅದನ್ನು ಅಂಗಳದ ಜಾಗದಲ್ಲಿ ಒತ್ತುವರಿ ಮಾಡಿ ಪೂರ್ವ-ಪಶ್ಚಿಮಾಭಿಮುಖವಾಗಿ 11.5 ಹಾಗೂ 10.7 ಹಾಗೂ ಉತ್ತರ-ದಕ್ಷಿಣಾಭಿಮುಖವಾಗಿ 4.8 ಹಾಗೂ 4.9 ಅಡಿಯನ್ನು ಕಟ್ಟಿರುತ್ತಾರೆ. ಇದನ್ನು ನಕ್ಷೆಯಲ್ಲಿ ನಮೂದಿಸಲಾಗಿದೆ."

45. Therefore it is clear that, as per the Court Commissioner, only the portion measuring East - West : 11.5 X 10.7 and North to South : 4.8 and 4.9 feet is constructed by encroaching the land. However, in the Commissioner's Sketch



marked as Ex.C4, this portion is marked as 'ಬಜ್ಜಲು ಮನೆ' which is the portion shown in the plaint sketch as 'CEFG' and in the Commissioner's report as EABD. Unfortunately, there is no reference to such encroachment said to have been made by the defendant elicited from CW1 in the chief examination by the learned counsel for the plaintiff.

46. Interestingly, as per the plaint sketch, the larger extent of land shown in the red shaded area in the plaint sketch as 'ABDCEFG' is the portion of the land which was encroached by the defendants. This contention of plaintiff did not get support from the Commissioner's sketch Ex.C4 nor from the evidence of the Court Commissioner -CW1. Even if the reply of the Court Commissioner to the memo of instruction of the plaintiff at Sl.No.6 is to be taken into consideration, only the portion shown in Ex.C4 as EABD measuring North - south : 4.8 and 4.9, East - West 11.5 and 10.7 is said to be encroached portion. Therefore, there is no material to substantiate the contention of the plaintiff that the portion shown as ABDCG in the red shaded area in the plaint sketch is the encroached portion by the defendant.



47. The plaintiffs rely on Ex.P1 and Ex.P5 the sale deeds which are the admitted documents. Even if the schedule mentioned in these sales deeds are to be taken into consideration, the contention of the plaintiff is not supported by the Court Commissioner, who visited the spot and submitted Ex.C4. There is absolutely no reason as to why the plaintiff has not examined the Commissioner with regard to the encroachment over the entire 'ABDCEFG' area shown in the plaint sketch.

48. It is not in dispute that the plaintiff has never filed any objections to the replies given by the Court Commissioner to the memo of instructions filed by them. Under such circumstances, granting the relief of declaration and the relief of mandatory injunction, which is purely discretionary cannot find any support.

49. As per the plaint averments, the defendants encroached the area mentioned in the plaint sketch and constructed a pakka building with a bathroom. The defendants have produced Ex.D6 -the commencement certificate issued by Chitradurga Urban Development Authority, which is dated



28.12.2001, sanction plan dated 08.01.2002 issued by Chitradurga town municipality marked as Ex.D7. It is the contention of the defendants that they have obtained the permission and the sanction plan and constructed the buildings strictly in accordance with the sanction plan, completed the same and even occupied the house before filing the suit by the plaintiffs. The suit was came to be filed only on 28.08.2002. Even according to the plaintiffs, the construction made by the defendants was complete when they filed the suit. It is not the contention of the plaintiffs that the defendants could complete the disputed construction overnight. There is absolutely no explanation from the plaintiffs, as to why they have not approached the Court immediately when the defendants have made preparations for encroaching and making construction. Admittedly, the plaintiffs and the defendants are the adjoining owners and the disputed construction came up and was completed under the nose of the plaintiffs. Inspite of that, the plaintiffs were mute spectators of the construction being done by the defendants, till the same was completed. Therefore, it is a classic case of not only delay and laches, but also acquiescence by the plaintiffs.



50. I may refer to the decision of this Court in '*The Golden valley Educational Trust Oorgam, Kolar District Vs. The Vokkligra Sangha, Bangalore*⁴' where the Division Bench of this Court has held in paragraph No.43 as under:

"xxx

Prompt action is essential if a mandatory Injunction is the desired remedy. Where a plaintiff has not brought his suit or applied for an Injunction at the earliest opportunity, but has waited till the act complained of by him has been completed, and then asks for a mandatory Injunction, such an Injunction will not in general be granted. The Court will seldom interfere to pull down a building which has been erected without complaint. A landlord should not have a mandatory Injunction for demolition of a building unless he has not only objected to such building but has also taken legal steps to prevent it.

xxx".

51. Section 39 of the Specific Relief Act, 1963, speaks of mandatory injunctions only to prevent the breach of an obligation or to compel the performance of certain acts. It is the settled position of law that the grant of mandatory injunction is purely a discretionary relief. Section 40 of the Specific Relief Act deals with damages in lieu of or in addition to

⁴ ILR 2016 KAR 2899



injunction which refers both Sections 38 and 39 of the Act, i.e., both for perpetual injunction and mandatory injunction. Subsection (2) of Section 40 mandates the Court not to grant relief for damages unless the plaintiff has claimed such relief in his plaint.

52. In the present case, the plaintiffs have never claimed damages in lieu of grant of mandatory injunction. Even though by the time the suit came to be filed by the plaintiffs, the disputed construction was completed and the defendants have occupied the house. The plaintiffs' contended that about two months earlier to filing of the suit, the defendants have encroached over ABCD portion and constructed a room measuring 23 X 7.10 Feet and thereafter, they encroached the portion shown as CEFG and constructed a bathroom and they converted another portion on the eastern side into a passage. But in the evidence of either plaintiffs or defendants or for that matter in the evidence of the Court Commissioner -CW1, there is no reference to this passage. According to the plaintiff, who is examined as PW1, this portion is shown in the plaint sketch as a CEFG, where the defendants have constructed a bathroom.



Even according to the Court Commissioner, the said portion is the bathroom which is the only portion that was encroached by the defendants.

53. Granting the relief of mandatory injunction will have a very serious consequence, that too, when the defendant had invested money and materials to complete the structure. When the plaintiffs kept silent without objecting for such encroachment and construction, they cannot be held entitled for the discretionary relief of mandatory injunction directing the defendants to demolish the entire portion of the building.

54. In the present case, there are no strong materials to show as to what is the actual extent of the land that was encroached for construction of a pakka building. The Commissioner's sketch Ex.C4 and his evidence as CW1 do not support the contention of the plaintiff with regard to encroachment by the defendants on the red shaded area marked as 'ABDCEFG' in the plaint sketch. Under such circumstances, I am of the opinion that the plaintiffs are not entitled for any relief.



55. I have gone through the impugned judgment and decree passed by the Trial Court. It has proceeded to decree the suit referring to Ex.C1 as the report of the Commissioner. While in fact there is no report submitted by the Court Commissioner. It has granted the relief of mandatory injunction directing the defendants to demolish the building and the bathroom as shown in Ex.C4 - sketch by the letters 'ABCDEFGH'. The Commissioner's Sketch Ex.C4 never shows this ABCDEFGH portion as the encroached portion.

56. On the other hand, The Court Commissioner in his evidence categorically states that he has shown this portion with measurements as referred to in the sale deed executed in favour of the plaintiffs. At the cost of repetition, I must say that even as per the reply to the memo of instruction given by the plaintiff, it is only the portion shown with the letters 'ABDE' is the encroached portion measuring East - West : 11.5 and 10.7 and North - South 4.9 and 4.8. Under such circumstances, the Trial Court committed a serious error in decreeing the suit, declaring the ownership of the property on the basis of Ex.C4 sketch and granting mandatory injunction directing the



defendants to demolish the building and the bathroom without any strong reasons. The First Appellate Court blindly accepted the reasoning given in the judgment and decree passed by the Trial Court and proceeded to dismiss the appeal. Therefore, I must opinion that the impugned judgment and decree passed by the Trial Court and the First Appellate Court, even though recording concurrent findings, the same are against the materials that are placed on record and hence, are liable to be set aside.

57. In view of the above, the substantial questions of law are answered in favour of the appellant and against the respondents/plaintiffs and I proceed to pass the following:

ORDER

- i. Appeal is ***allowed with costs.***
- ii. The judgment and decree dated 28.02.2009 passed in RA.No.71/2007 on the file of the learned I Additional Civil Judge (Sr.Dn.) and III Additional MACT, Chitradurga is hereby set aside.



- iii. Consequently, the suit of the plaintiff in O.S.No.234/2002 dated 18.06.2007, on the file of the learned Prl.Civil Judge (Jr.Dn.) and JMFC, Chitradurga, is dismissed with costs.
- iv. Draw decree accordingly.

Registry is directed to send back the records along with copy of this Judgment and decree.

Sd/-
(M G UMA)
JUDGE

BH
List No.: 1 Sl No.: 1