



IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 2ND DAY OF JULY, 2026

BEFORE

THE HON'BLE MR. JUSTICE V SRISHANANDA

REGULAR SECOND APPEAL NO.410 OF 2020 (INJ)

BETWEEN:

SMT DIANA D SOUZA
AGED 61 YEARS,
W/O MAXIM D SOUZA
R/AT KANAPADAG HOUSE RED BUILDING LANE,
KANKANADY POST,
MANGALORE-575002
PRESENTLY R/AT NO.4,
WINTERRGARDEN TORONTO M1C 3E7
CANADA
REPRESENTED BY HER GPA HOLDER
KIRAN FERNANDES
S/O CHARLES FERNANDES
AGED ABOUT 42 YEAR,
R/AT NADUMANE HOUSE KUDUPU POST
MANGALURU TALUK, DK

...APPELLANT

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signed by
MALATESH
K C

(BY SRI CHINMAY C. KAROSHI FOR SRI RAJASHEKAR.S,
ADVOCATES)

Location:
HIGH
COURT OF
KARNATAKA

AND:

1. MRS HELEN FERNANDES
W/O LATE RICHARD FERNANDES
AGED ABOUT 61 YEARS
2. MR RAYAN FERNANDES
S/O LATE RICHARD FERNANDES
AGED ABOUT 26 YEARS
3. RENITA FERNANDES



S/O LATE RICHARD FERNANDES
AGED ABOUT 22 YEARS

ALL ARE R/AT KANAPADAG HOUSE,
RED BUILDING LANE
KANKANADY POST
MANGALORE-575 002

...RESPONDENTS

THIS RSA IS FILED UNDER SECTION 100 OF CIVIL PROCEDURE, AGAINST THE JUDGMENT AND DECREE DATED 31.10.2019 PASSED IN R.A.No.64/2018 ON THE FILE OF THE PRINCIPAL SENIOR CIVIL JUDGE AND CJM., AT MANGALURU D.K. DISMISSING THE APPEAL AND CONFIRMING THE JUDGMENT AND DECREE DATED 02.06.2018 PASSED IN OS No.392/2008 ON THE FILE OF THE PRINCIPAL CIVIL JUDGE MANGALURU, D.K.

THIS APPEAL, COMING ON FOR ADMISSION, THIS DAY, JUDGMENT WAS DELIVERED THEREIN AS UNDER:

CORAM: HON'BLE MR. JUSTICE V SRISHANANDA

ORAL JUDGMENT

Heard Sri Chinmay C. Karoshi, learned counsel appearing on behalf of Sri Rajasekhar S, counsel for the appellant. None appears for the respondents, though served with the notice of the appeal.

2. It is also noted that appeal stood abated as against respondent No.2 for not taking appropriate steps.



3. Plaintiff's second appeal challenging the dismissal of the suit in OS No.392/2008, dated 02.06.2018, on the file of Principal Civil Judge, Mangaluru, Dakshina Kannada, confirmed in R.A.No.64/2018, dated 31.10.2019, on the file of Principal Senior Civil Judge and CJM., Mangaluru, Dakshina Kannada.

4. Facts which are utmost necessary for disposal of the present appeal are as under:

5. A suit for permanent injunction and mandatory injunction was filed in respect of the following immovable property (hereinafter referred to as 'suit property' in O.S.No.392/2008):

"SCHEDULE"

The immovable properties situated at kankanady "B" of Mangaluru Taluk comprised in:-

<i>S.No.</i>	<i>Extent</i>
	<i>A-C</i>
<i>28/1C</i>	<i>0-08</i>

With all easementary rights

Boundaries:

<i>East :</i>	<i>Property of the defendant</i>
<i>North :</i>	<i>Property of Mary D'Cunha</i>
<i>South :</i>	<i>Same S.No.</i>
<i>West :</i>	<i>Property of Thomas D'Cunha."</i>



6. In the plaint, it is contended that suit property was acquired by mother of the plaintiff by name Theresa D'Souza at a family partition on 14.03.1988 and after death of her mother, plaintiff is in lawful possession and enjoyment of the suit property as absolute owner.

7. Plaintiff started residing in Canada and she used to visit India whenever the time permitted once in two or three years and used to visit the suit property as well. She had also executed a General Power of Attorney in favour of Kiran Fernandes who used to supervise the suit property.

8. Plaint averment further reveal that the defendant being the neighbour of the plaintiff occupying the land in Sy.No.28/1 which has got a road approach from Northern side. Defendant's property is situated abutting to the plaintiff's property on the Eastern side.

9. Property of the plaintiff measures eight cents and by the Western side of the suit property, property of Sri Thomas D'Cunha is situated. It is Thomas D'Cunha who informed the plaintiff that defendant had encroached upon four feet of the suit property and formed a kachha road to have ingress and egress to his property situated in Sy.No.28/1



instead of using the regular road way and therefore she had to file the suit against the defendant seeking aforesaid prayer.

10. Pursuant to the service of suit summons, defendant entered appearance and filed detailed written statement denying the plaint averments in *toto*.

11. Defendant further contended that the entire plaint averments is nothing but a concocted story and therefore sought for dismissal of the suit.

12. There is a categorical and specific denial as to the alleged encroachment of four feet and constructing the kachha road to reach the property of the defendant situated in Sy.No.28/1 and thus sought for dismissal of the suit.

13. Learned Trial Judge after raising necessary issues recorded the evidence of the parties.

14. A court commissioner was also appointed to visit the spot and find out the factual aspects.

15. Court Commissioner after visiting the spot, filed a report which contained that there is no encroachment as alleged by the plaintiff and there is no kachha road formed on the property of the plaintiff.



16. Thereafter, learned Trial Judge heard the arguments of the parties and noted that as per the Commissioner's report since there is no encroachment found, suit came to be dismissed.

17. Being aggrieved by the same, plaintiff filed an appeal before the First Appellate Court in R.A.No.64/2018.

18. Learned judge in the First Appellate Court after securing the records, heard the arguments of the parties and after re-appreciation of the material on record dismissed the appeal *inter alia* holding in paragraphs 19 and 20 as under.

"19. The conversion order of the learned Deputy Commissioner got marked as Ex.D6 and the sketch annexed to the said order is marked as Ex.D6(a). The certified copy of the mulgeni chit dt: 18-08-1926 is got marked as Ex.D5. This document is executed in favour of Catherine Costa Bai relating to 37 cents. The land bearing Sy.No.28/1 situated at Kankanady Village is the subject matter in this document. The eastern boundary is mentioned in this document as 12ft width road. This type of recital has no relevance since the plaint schedule property is situated on the western side of the defendant's property. RTC is got marked as Ex.D4. Certified copy of the WILL is got marked as Ex.D3. Certified copy of the decree passed in O.S.NO.3/1996 is got marked as Ex.D2. The defendant herein is 4th



defendant in O.S.No.3/1996 as evident from Ex.D2. The prime contention of the plaintiff is that there is road on the northern side of the defendant's property. The defendant has access to their land through the said road. But they are making illegal attempt to form a new road. The defendant has encroached the plaint schedule property by the eastern side to form 4ft width kaccha pathway in the plaint schedule property and and to use the same for ingress and egress to his house situated in Sy.No.28/1.

20. It is necessary to note here that the plaintiff produced Ex.P2 to prove that her mother has acquired the plaint schedule property. It is relevant to note here that the property described in 'C' schedule therein(Ex.P2) fallen to the share of the plaintiff's mother. Southern boundary is mentioned in Ex.P2 as 'road'. This type of description establishes that there is a road on southern side of the plaint schedule property, whereas southern boundary is mentioned in the plaint schedule as 'remaining land' in the same survey number. The description of the southern boundary in the plaint is contradictory to the southern boundary mentioned in her own document (Ex.P2). Ex.P2 falsifies the contention of the plaintiff about the existence of the property on the southern side of the plaint schedule property. The court commissioner in his report specifically mentioned the existence of the pathway and specifically mentioned that there is no encroachment and he has specifically mentioned the existence of 4 to 5ft width pathway and specifically mentioned that the



said pathway leads to the defendant's house and except this pathway no other pathway to the defendant's property. As I already discussed supra, PW1 in his evidence at page 6 specifically admitted that there is road on the southern side of the plaint schedule property, whereas southern boundary is mentioned in the plaint schedule as 'remaining land' in the same survey number. This type of description is quite contradictory to the evidence of PW1."

19. Being further aggrieved by the same, plaintiff has filed the present appeal before this Court on the following grounds:

- *The impugned Judgment and Decree passed by the courts below are unsustainable both at law and on points of facts.*
- *The courts below have not applied correct principles of law to the facts of the case.*
- *The impugned Judgment and Decree is illegal, perverse and unsustainable both on question of law as well as on facts.*
- *The courts below have failed to appreciate the simple fact that the defendants are the owners in respect of property bearing Sy.no.28/1 and said property has got approach road from the northern side of Sy.No.28/1, whereas the property of the defendant situated abutting the Eastern side of the property of the plaintiff. Apart from the same, at the southern end of the plaint schedule property width is 20 feet and towards the western side abutting the plaint schedule property, the property of Thomas D'Cunha is*



situated. The width of southern end of the property of Mr.Thomas D'Cunha is 30 feet. By the western side of the property of Mr.Thomas D'Cunha, there is a Thodu. Mr. Thomas D'Cunha has acquired the said property in the very same partition, in which plaintiff's mother had acquired the schedule property. In spite of the same, the defendants have encroached upon the property of the plaintiff and formed a pathway contrary to the recitals of Ex.D1. The courts below have misinterpreted contents of the documents and have mechanically proceeded to pass the impugned judgment and decree, which requires to be interfered by this Hon'ble Court.

- *The trial court has committed an error by placing reliance on the report of the Commissioner, especially when the defendants have admitted that the report is contrary to the factual aspects involved in the matter. The courts below have not justified in placing reliance on Ex.D1 and coming to the conclusion that there exists a public road. Admittedly, plaintiff is not a party to Ex.D1 and the said document came to be entered into between the family of the defendants. The said document has no binding on the plaintiff. In that view of the matter, the reasons assigned by the courts below is not correct and the same needs to be set aside by this Hon'ble Court.*
- *The courts below failed to consider the Ex.P2, the partition deed in its proper perspective. The document at Ex.D1 under which the defendants claim right has shown that on the southern side there exists a road. The courts below have ignored the admission of the defendants that they have got 6 feet approach road to their property from the*



southern side of their property. The trial court is not justified in dismissing the suit holding that in the partition deed dated 30.4.1999, towards the western side of the property of the defendants, it is mentioned that there exists 4 feet roadway and the same is for the use of Michael Fernandes and defendant is not correct. The reasons assigned by the court below that in the property of the defendants they have given right of pathway to Michael Fernandes is not correct. The courts below have not justified in placing reliance on Ex.D1 and D3. The recitals of the said document cannot be contrary to their parent document. They can only transfer the rights what they have or what they get at the time of their acquisition of the property. Merely because they mention something in the registered document, for which the plaintiff is not a party, the same is not binding on the plaintiff. In that view of the matter, the reasons assigned by the courts below is not correct and as such the judgement and decree passed by the courts below requires to be set aside by this Hon'ble Court.

- *The courts below have misread the report of the court commissioner. The reasons assigned by the courts below are contrary to records and evidence on record. The First Appellate Court has not re-appreciated the evidence on record. The First Appellate Court has totally misunderstood the facts. The dispute is with regard to the encroachment of the property on the eastern side of the plaintiff, whereas the First Appellate Court has proceeded on the ground that there exists a road on the southern side. It is the specific case of the plaintiff that on the southern side of the*



property of the defendants, they have got approach road. The First Appellate Court without appreciating this aspect of the matter, has proceeded on the footing that the boundary mentioned in the plaint is different than that of Ex.P2 and has wrongly come to the conclusion that the evidence is contradictory to the plaint averments. It is the specific case of the plaintiff that the property of the defendants has got the approach road from the southern side and not from the eastern side. In spite of that, the First Appellate Court by wrongly placing reliance of Ex.D1 has mechanically dismissed the appeal.

- *The reasons assigned by the First Appellate Court that the C-Schedule of Ex.P2 had fallen to the share of mother of the plaintiff and the southern boundary is shown as road itself establishes the fact that the First Appellate Court has totally misunderstood the facts. C-Schedule of Ex.P2 has nothing to do with the property of the plaintiff. The specific case of the plaintiff is that he has been allotted with 6 cents of land in the partition deed and towards eastern side of his property, there exists the property of the defendant and the property of the defendants has got the approach road from the southern side of their property. The defendants by encroaching property of the plaintiff have formed a pathway on the eastern side of her property and shown the same as pathway in their partition deed. This aspect of the matter has not been considered by the First Appellate Court. Hence, the same requires to be set aside by this Hon'ble Court.*



- *The impugned Judgment and Decree passed by the courts below are even otherwise not in accordance with law and as such it is liable to be set aside by this Hon'ble court.*

20. Sri Chinmay C Karoshi, learned counsel for the appellant reiterating the grounds urged in the appeal memorandum would contend that both the Courts have not properly appreciated the material evidence on record and wrongly dismissed the suit of the plaintiff and sought for admitting the appeal on the following substantial questions of law:

- *Whether the courts below have justified in not considering the Ex.P1 in its proper perspective?*
- *Whether the courts below have justified in placing reliance on Ex.D1 and dismissing the suit?*
- *Whether the courts below have justified in placing reliance on the report of the court commissioner, especially when the defendants have admitted in evidence that the report is contrary to the factual aspects involved in the matter?*
- *Whether the courts below have justified in ignoring the documentary and oral evidence on record?*

21. Having heard the arguments of the counsel for appellant, this Court perused the material on record meticulously.



22. On such perusal of the material on record, it is crystal clear that defendant is the neighbour of the plaintiff.

23. Admittedly, plaintiff is staying at Canada. She has executed the General Power of Attorney in favour of Sri Kiran Fernandes.

24. Even according to the plaintiff, said Kiran Fernandes was supervising the suit property. But plaintiff averments would reveal that it is not Kiran Fernandes who has intimated the plaintiff about the alleged encroachment, but it is the another neighbour on the Western side namely, Thomas D'Cunha, who intimated the plaintiff about the preparations made by the defendant in encroaching four feet into the plaintiff's property and kachha road has been formed which was also sought to be made as pakka road. It is at that juncture, suit came to be filed.

25. Admittedly, the ownership of the defendant who is the neighbour of the plaintiff is not in dispute. With regard to the oral and documentary evidence placed on record, each of the parties have stated about their title and the conversion order passed by the Deputy Commissioner converting the land of the defendant.



26. While so passing the order of conversion, spot inspection has been taken place and learned Court Commissioner who visited the spot, as per the memo of instructions given by the parties noted the fact that there is no encroachment made by the defendant into the plaintiff's property for the purpose of laying the road.

27. Thus, the learned Trial Judge dismissing the suit of the plaintiff for permanent injunction and mandatory injunction is just and proper which has been rightly re-appreciated by the learned Judge in the First Appellate Court by not only accepting the reasons assigned by the learned Trial Judge, but also supplementing additional reasons to uphold the judgment of the Trial Court.

28. Since both the Courts on factual aspects have recorded a categorical finding that there is no encroachment, this Court having regard to the scope of Section 100 of Code of Civil Procedure, does not find merit in any of one of the substantial questions of law raised in the appeal as referred to supra.



29. Accordingly, the following:

ORDER

- (i) Admission is declined.
- (ii) Appeal is dismissed.

Sd/-
(V SRISHANANDA)
JUDGE

MR
List No.: 1 SI No.: 63