



IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 20TH DAY OF FEBRUARY, 2026

BEFORE

THE HON'BLE MR. JUSTICE RAVI V HOSMANI

REGULAR SECOND APPEAL NO. 1503 OF 2025 (INJ)

BETWEEN:

SRI INNAYATHULLA,
S/O LATE ABDUL SHUKOOR,
AGED ABOUT 54 YEARS,
R/A KOMBAGUDDE,
MALLAR VILLAGE AND POST,
UDUPI TALUK,
UDUPI DISTRICT - 576 101.

...APPELLANT

[BY SRI PRADEEP KUMAR R H., ADVOCATE (PH)]

AND:

1. SRI SHAMEEM AHMED,
S/O SABU SAHEB,
AGED ABOUT 54 YEARS,
R/A KOMBAGUDDE,
MALLAR VILLAGE AND POST,
UDUPI TALUK,
UDUPI DISTRICT - 576 101.

LATE AMEER ADAM,
(SINCE DECEASED IS REP BY LRs FROM 2 TO 7)

2. SMT. NOORUNISSA,
AGED ABOUT 62 YEARS,
3. SRI PARVEZ,
AGED ABOUT 43 YEARS,

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GEETHAKUMARI
PARLATTAYA S
Location: High
Court of
Karnataka



4. SRI FAZILATH,
AGED ABOUT 41 YEARS,
5. SMT. FARIYAL BANU,
AGED ABOUT 36 YEARS,
6. SMT. FAMIA BANU,
AGED ABOUT 39 YEARS,
7. SRI MOHAMMED FAZIL,
AGED ABOUT 32 YEARS,

NO. 2 TO 7 ARE R/A AA MANZIL,
NEAR KOMBAGUDDE MAZID,
MALLAR VILLAGE,
KAUP TALUK,
UDUPI DISTRICT - 576 101.

...RESPONDENTS

THIS RSA IS FILED U/S. 100 OF CPC AGAINST THE JUDGMENT
AND DECREE DATED 26.06.2025 PASSED IN RA NO.48/2024 ON THE
FILE OF THE II ADDITIONAL SENIOR CIVIL JUDGE AND ACJM,
UDUPI, DISMISSING THE APPEAL AND CONFIRMING THE JUDGMENT
AND DECREE DATED 28.06.2024 PASSED IN OS NO.412/2015 ON
THE FILE OF THE PRINCIPAL CIVIL JUDGE AND JMFC, UDUPI.

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

CORAM: HON'BLE MR. JUSTICE RAVI V HOSMANI



ORAL JUDGMENT

Challenging judgment and decree dated 26.06.2025 passed by II Additional Senior Civil Judge and ACJM, Udupi, in RA no.48/2024 and judgment and decree dated 28.06.2024 passed by Principal Civil Judge and JMFC, Udupi, in OS no.412/2015, this second appeal is filed.

2. Sri RH Pradeep Kumar, learned counsel for appellant submitted, appeal was by plaintiff in OS no.412/2015 filed for mandatory injunction directing defendant no.1 to surrender vacant possession of North-Eastern portion of plaint 'A' schedule property ('**suit property**', for short) by removing encroachment and construction made thereon within time to be fixed by Court etc.

3. It was submitted, in plaint, it was stated, suit property originally belonged to Rathnakar Shetty of Mallaru village and plaintiff purchased it from him under registered Sale Deed dated 18.08.2005 and after obtaining building licence, plaintiff constructed house bearing Door no.2-56 in it and was in lawful possession. It was further stated, on South-Western



side of suit property, there existed PWD road running from Kaup to Shirva. And defendant no.1 had purchased property through defendant no.2 on North-Eastern side of suit property, behind plaintiff's house, who had knowledge about existence of 4 cents of property of plaintiff and yet assisted him in putting up compound wall. Thereafter, defendant no.1 had constructed a house on North-Eastern side of suit property without leaving any set-back on four sides as prescribed and in course of same had encroached on plaintiff extent of 4 cents on North-Eastern side of plaint 'A' schedule property.

4. And when defendant no.1 was questioned on encroachment, same was denied. Therefore, plaintiff got measured his property through Surveyor, which revealed encroachment of 4 cents belonging to plaintiff. Despite demand to demolish construction on encroached portion, defendant no.1 failed to comply. On other hand, defendant erected PVC pipe connection on South-Eastern side of his house for draining rainwater and caused water to fall upon wall/premises of plaintiff causing inconvenience and damage. A representation was submitted before PDO, Mallaru Panchayat seeking action,



but no steps were taken. Hence, stating that cause of action arose on 03.07.2015 and subsequently, when defendant no.1 refused to remove alleged encroachment, suit was filed.

5. On appearance, defendants filed written statement denying plaint averments. Defendant no.1 stated, that he was *bonafide* purchaser of 'B' schedule property and disputed correctness of description and boundaries of suit property. He asserted that he had validly purchased property under registered Sale Deed from defendant no.2 and was put in possession and was in peaceful possession and enjoyment of same without interference, since then. He denied encroachment on plaintiff's property and stated that before commencement of construction he had got his property measured and put up compound wall. It was stated that construction of house was within extent owned/possessed by defendant no.1.

6. Defendant no.1 also denied allegation about construction without set-back and stated, it was accordance with law. He also denied allegation that defendant no.2 assisted him in encroachment. Denying erection of PVC pipes and



causing rainwater to fall upon plaintiff's property, it was stated drainage arrangement was within his property without causing damage or inconvenience to plaintiff. Alleging suit was false and vexatious, sought for its dismissal.

7. In his separate written statement, defendant no.2 admitting extent of 62 cents in Sy.no.23/4-P4 situated at Mallaru village, Udupi Taluk, situated on North-Eastern side of plaintiff's house was sold to defendant no.1 under registered Sale Deed. He also admitted existence of Kaup to Shirva PWD road on South-Western side of suit property.

8. Defendant no.2 denied allegation about assisting defendant no.1 in encroaching plaintiff's property. He stated title and possession of property as per boundaries and extent mentioned in Sale Deed was conveyed and possession delivered and he had no knowledge of any encroachment or dispute between plaintiff and defendant no.1.

9. Based on pleadings, trial Court framed following:

ISSUES

1. *Whether the plaintiff proves that, defendant had constructed the residential building*



without leaving a set back on the four side of the building as prescribed by the Panchayath norms?

- 2. Whether the plaintiff further proves after measuring the property he found that defendant No.1 has encroached the 4 cents of land on the north eastern side of the plaint 'A' schedule property?*
- 3. Whether the plaintiff further proves that defendant No.1 had erected a water PVC pipe connection on the south-eastern side of his house to enable the water to go out from his property?*
- 4. Whether the plaintiff is entitled for the relief of Mandatory Injunction as prayed for?*
- 5. What order or decree?*

Addl. Issue framed on 10-08-2021:

- 1. Whether the plaintiff is entitled for vacant possession as prayed?*

10. In trial, plaintiff examined himself and two others as PWs.1 to 3 and got marked Exhibits P1 to P9. On behalf of defendants, defendant no.1 examined himself as DW.1 and got marked License issued by Mallar Gram Panchayat as Exhibit-D1.



11. On consideration, trial Court answered issues no.1 to 4 and additional issue no.1 in negative and issue no.5 by dismissing suit with cost.

12. Aggrieved, plaintiff filed RA.no.48/2024 on various grounds, based on which first appellate Court framed following:

POINTS

- 1. Whether the Appellant prove that defendant had constructed the residential building without leaving a set back by encroaching 4 cents of land on the north eastern side of the plaint 'A' schedule property and also put up PVC pipe connection on the south-eastern side of his house to enable the water to go out from his property?*
- 2. Whether the judgment and decree requires to be interference by this Court?*
- 3. What order or decree?*

13. On consideration, first appellate Court answered points no.1 and 2 in negative and point no.3 by dismissing appeal and confirming judgment and decree passed by trial Court. Aggrieved thereby, plaintiff had filed this appeal.

14. At outset, learned counsel submitted, both Courts failed to properly appreciate pleadings oral and documentary



evidence. It was submitted, both Courts erred in discarding Court Commissioner's Report and Sketch in violation of Order XXVI Rules 9 and 10 of CPC, by relying on decision of this Court in **Shadaksharappa v. Kumari Vijayalaxmi** reported in **2023:KHC-K:494**, wherein it was held when objections are filed to Commissioner's Report, Court is required either to examine Commissioner or appoint fresh commission. Reliance was also placed on decision in **Mohammed Abdulla v. R. Mune Gowda** reported in **2024:KHC:2102** for proposition that once brought on record, Report submitted under Order XXVI Rule 9 CPC constitutes substantive evidence.

15. It was further submitted, first appellate Court failed to re-appreciate evidence and record independent findings. It was stated, first appellate Court merely reproduced abstract principles under Sections 58 and 101 to 103 of Evidence Act without assigning clear reasons in violation of mandate of Order XLI Rule 31 CPC as held by Hon'ble Supreme Court in **Santosh Hazari v. Purushottam Tiwari** reported in **(2001) 3 SCC 179** and **H. Siddiqui v. A. Ramalingam** reported in **(2011) 4 SCC 240**.



16. It was submitted, both Courts erred in dismissing suit merely on ground that plaint alleged encroachment of 4 cents whereas Commissioner's Report found encroachment of only 1.75 cents, without examining possibility of moulding of relief to extent of encroachment proved, which was in violation of ratio laid down by Hon'ble Supreme Court in **Ganesh Trading Co. v. Moji Ram** reported in **(1978) 2 SCC 91** and **Ramesh Chand Ardawatiya v. Anil Pajwani** reported in **(2003) 7 SCC 350**, wherein it was held relief may be moulded based on evidence available.

17. Reliance was also placed on decision in case of **Hero Vinoth v. Seshammal** reported in **(2006) 5 SCC 545** to contend that perversity and misapplication of legal principles warrant interference in second appeal.

18. It was submitted, reliance on decision in case of **Dorab Cawasji Warden v. Coomi Sorab Warden** reported in **(1990) 2 SCC 117**, by trial Court established mis-application of law as said decision is authority for proposition about grant



of interim mandatory injunction while adjudicating final relief after trial.

19. Reliance was also placed on decision in case of **Sri Biswanath Banik v. Sulanga Bose** reported in **(2022) 7 SCC 731**, wherein it was held that in cases of encroachment and injunction, cause of action arises upon disturbance to possession.

20. In light of above grounds, learned counsel submitted following substantial questions of law would arise and prayed for allowing appeal by answering same in favour of appellant.

"SUBSTANTIAL QUESTIONS OF LAW:

- a) *Whether both Courts failing to properly appreciate evidentiary value of Court Commissioner's Report, rendering their findings perverse?*
- b) *Whether first appellate Court failed to follow mandate under Order XLI rule 31 of CPC as held in **Santosh Hazari's** case?*
- c) *Whether both Courts erred in dismissing suit in entirety instead of moulding relief to extent of 1.75 cents?*



21. Heard learned counsel, perused impugned judgment and decree passed by both Courts.

22. As noted above, this appeal under Section 100 of CPC is by unsuccessful plaintiff against concurrent findings in suit for mandatory injunction.

23. Plaintiff's case before trial Court was that he was owner of 18 cents of land in Sy.no.23/4P4 of Malluru village having purchased it under Ex.P3 - registered sale deed. He stated that he had constructed house therein leaving 4 cents vacant on North-Eastern side. He further stated, defendant no.1 purchased 62 cents of land in Sy.no.23/4P4 on North-Eastern side of plaintiff's property. He further stated that said purchase was facilitated by defendant no.2, who was aware of 4 cents of vacant land of plaintiff, but alleges that defendant no.2 assisted defendant no.1 in putting up compound wall including plaintiff's 4 cents vacant land. It was further stated that defendant no.1 put up construction by encroaching on 4 cents of plaintiff's land, without leaving any set-back. Thereafter he installed PVC pipe-line for discharging rainwater



on plaintiff's wall/property which would cause damage and inconvenience to plaintiff and as defendant no.1 refused to remove encroachment, he filed suit.

24. Suit was opposed by defendant no.1 denying existence of 4 cents vacant land belonging to plaintiff on North-Eastern side of suit property and also denying encroachment. Boundary description of suit property was disputed as incorrect. Defendant no.1 claimed to have purchased 62 cents of land in Sy.no.23/4P4 of Mallaru village, obtained building license and put-up construction within confines of his property. Defendant no.2 denied not only knowledge of existence of 4 cents of plaintiff's property but also denied assisting defendant no.1 in encroachment.

25. Thus from pleadings, it is evident that there is no dispute between parties about purchase of land by respective parties and their title over same. Dispute was mainly whether defendant no.1 had encroached on 4 cents of plaintiff's property on its North-Eastern side, whether defendant had put-



up construction therein and whether plaintiff was entitled for vacant possession of same.

26. It is seen that in trial, plaintiff examined himself and another as PWs.2 and 3. He got marked title deed as Ex.P3, building license, Record of Rights, complaint for removal of encroachment and photographs as Exs.P4 to P9. Defendants however led only documentary evidence, producing building license as Ex.D1.

27. While passing impugned judgment and decree, trial Court adverted to oral and documentary evidence. It noted, assertion by plaintiff in plaint para 2 that there existed PWD road on South-West side of property and defendant no.1 purchased property existing on back side of plaintiff's house. Referring to allegation of erection of PVC pipes on South-Eastern side to drain rainwater on plaintiff's wall and plaintiff's property, it observed, plaintiff's allegation was about encroachment on North-Eastern side and interference on South-Eastern side.



28. It observes, admission by plaintiff (as PW.2) that at time of purchase of property, he did not enquire about boundaries of property and that he was not physically present at time of possession. It also refers to admission about extent of encroachment by defendant no.1 was 1.75 cents and not 4 cents as stated in plaint. Trial Court further referred to admission that he was not aware when his property was encroached and that he did not have any documents to establish that defendant encroached on 4 cents of his land. It also referred to inconsistencies in deposition of PW.3 about extent of encroachment as well as when it was encroached.

29. It also refers to report of Court Commissioner, which showed encroachment of $1\frac{3}{4}$ th cent of plaint schedule 'A' land by defendant no.1. It however noted objections of plaintiff against Commissioner's report and referring to decision in **Shadaksharappa's** case (supra), concluded that there was no compulsion to examine Commissioner and holding that only if it was dissatisfied with report, it may direct further enquiry. On said conclusion, it answered issue no.1 in negative. While answering issues no.2 and 3, it noted that unlike plaintiff's



claim that on private survey, he found defendant had encroached 4 cents of his land, plaintiff failed to produce such report. It also noted, admission about construction having begun in year 2005 and putting up of sheets in year 2008 without any objection. On noting absence of objections as well as failure to establish encroachment of 4 cents, it answered, issues no.2 and 3 in negative. As a consequence, it answered additional issue no.1 regarding entitlement of plaintiff for vacant possession of suit property in negative and dismissed suit.

30. First appellate Court, on independent re-appreciation by extracting and referring to admissions, concurred with trial Court findings. Referring to various decisions of this Court, it held burden lie on party seeking reliance on Commissioner's report to establish its correctness, endorsed overlooking of report and by concluding failure on part of plaintiff to establish encroachment of 4 cents of plaintiff's land, dismissed appeal. Thus, while passing impugned judgment, both Courts have adverted to entire material on record and arrived at concurrent finding of fact about failure of



plaintiff to establish encroachment of 4 cents of his land by defendant no.1.

31. Though learned counsel for plaintiff vehemently contended that both Courts erred in not moulding relief to extent of 1.75 cents encroachment reported by Court Commissioner, it is seen that plaintiff himself filed objections against Commissioner's report and did not seek for examining Commissioner as witness. Moreover, there is failure to seek for amendment of plaint even after receipt of Commissioner's report. Thus, plaintiff having continued to assert extent of encroachment by defendant no.1 at 4 cents and having failed to establish same, findings would be in accordance with law.

32. As no substantial questions of law would arise for consideration, no grounds to admit appeal. It is ***dismissed***.

Sd/-
(RAVI V HOSMANI)
JUDGE

GRD/AV