IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 16TH DAY OF DECEMBER, 2025

BEFORE

THE HON'BLE MR. JUSTICE RAJESH RAI K

REGULAR SECOND APPEAL NO. 314 OF 2019 (DEC/INJ)

BETWEEN:

SMT. SHAMBHAVI
W/O LATE SESAPPA HINDU,
AGED ABOUT 78 YEARS
R/AT D NO 3-17-1519
NEAR ST JOSEPH'S HIGHER
PRIMARY SCHOOL
NANTHOOR PADAVU MANGALORE

...APPELLANT

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Location: HIGH COURT OF KARNATAKA

(BY SRI. Y. RAJENDRA PRASAD SHETTY, ADVOCATE)

AND:

DIOCESE OF MANGALORE
REPRESENTED BY BISHOP
REV DR. ALOYSIUS P D'SOUZA,
RESIDENT OF BISHOP'S HOUSE,
MANGALORE
REPRESENTED BY HIS DULY

CONSTITUTED ATTORNEY REV
FR. CLIFFORD D'SOUZA,
S/O LATE LIGOURY D SOUZA,
AGED ABOUT 87 YEARS
PROCURATOR OF DIOCESE OF
MANGALORE, BISHOP'S HOUSE,
KODIALBAIL, MANGALORE - 575 003

…RESPONDENT

(BY SRI. CYRIL PRASAD PAIS, ADVOCATE)

THIS RSA IS FILED UNDER SEC.100 OF CPC, AGAINST THE JUDGMENT AND DECREE DTD 31.10.2018 PASSED IN RA.NO.60/2007, ON THE FILE OF THE IST ADDL.SENIOR CIVIL JUDGE, MANGALORE D.K. DISMISSING THE APPEAL AND CONFIRMING THE JUDGMENT AND DECREE DATED 26.02.2007 PASSED IN OS.NO.241/1998 ON THE FILE OF I ADDL.CIVIL JUDGE (JR. DN) MANGALORE,D.K.

THIS APPEAL HAVING BEEN RESERVED FOR JUDGMENT ON 12.12.2025 COMING ON FOR PRONOUNCEMENT THIS DAY, THE COURT DELIVERED THE FOLLOWING:

CORAM: HON'BLE MR. JUSTICE RAJESH RAI K

CAV JUDGMENT

1. This is defendant's second appeal.

2. The plaintiff has filed the suit for declaration that the plaintiff has got right of 12 feet wide road way to reach the suit schedule property from main road through the property of the defendant comprised in Sy.No.98/18 shown as 'RRR' in the annexed plaint plan in red colour by way of easement (for brevity, "RRR road") and also for consequential relief of permanent prohibitory injunction restraining the defendant from in any way blocking or constructing or interfering with or reducing the width or in any way obstructing the user of said road to reach the suit schedule property from the public road.

3. According to the plaintiff, she is the absolute owner in possession of the suit schedule property. She purchased the same vide Sale Deed dated 04.11.1938. The schedule property contains a school building which was constructed by the vendor's of the plaintiff. After purchase, she continued to run the school. The said school is known as

'St.Joseph's Higher Primary School having classes from I to VII standard. The suit schedule property is situated at about 150 feet away from the main public road. The said public road is running from south to north direction and in between the schedule property and the public road, there is defendant's property. To reach the schedule property from the main road, there is RRR road way at the southern edge of the defendant's property. Apart from the plaintiff, all the students, staff members and the visitors of the school have been using the RRR road without any interruption since time immemorial.

4. Things stood thus, the defendant, obstructed the usage of RRR road by blocking the same. On enquiry, the plaintiff came to know the defendant highhandedly and forcibly tried to interfere with the RRR road. As such, the suit was filed by Catholic Board of Education which was entrusted with the running of the school for the time being in O.S.No.63/1995 for injunction. However, the said suit was dismissed by the Trial Court for non-prosecution. It is

the further case of the plaintiff that on 06.04.1998, all of a sudden, the defendant with the help of her henchmen dug the ground on the eastern edge of the RRR road to block the same, however, the plaintiffs managed to protest the same. Hence, the plaintiff filed the present suit.

5. On service of the suit summons, the defendant appeared through her counsel and filed the written statement by denying the plaint averments. It is stated in the written statement that the suit is not maintainable on the ground of *res judicata* since the earlier suit filed for the similar cause of action was dismissed for non-prosecution.

6. It is also contended that since 1938 onwards, the School was having an approach from the Nanthur Road and there was no approach of whatsoever nature to the said School through the property of the defendant. On either side of the School, the properties of the Catholic School are situated and the School has two approach roads. In such circumstance, to grab the property of the defendant, the present suit is filed.

7. Upon perusal of the rival pleadings, the Trail Court has framed the relevant issues and on assessment of oral and documentary evidence, decreed the suit.

8. On appeal, the First Appellate Court has also affirmed the judgment and decree passed by the Trial Court by dismissing the appeal. Hence, the defendant is before this Court.

9. I have heard Sri. Y. Rajendra Prasad Shetty, learned counsel for the appellant and Sri Cyril Prasad Pais, learned counsel for the respondent.

10. The primary contention of the learned counsel for the appellant is that the suit is liable to be dismissed at the threshold in view of the absence of proper description of suit schedule property i.e. RRR road in the plaint. The Trial Court and the First Appellate Court have grossly erred without appreciating this aspect though there is clear violation of Order VII Rule 3 of CPC. According to the learned counsel, when the subject matter of the suit is

immovable property, the plaint shall contain a description of the property sufficient to identify by mentioning the boundaries or numbers as per the record of settlement or survey numbers. In the case on hand, the plaint does not disclose any such schedule as much as defendant's property where the subject road exists. Mere production of a plan or sketch itself is not sufficient to comply with the provisions under Order VII Rule 3 of CPC.

11. He further contended that when the suit is filed for easementary right on behalf of the public at large under Order I Rule 8 of CPC, the plaintiff shall seek permission of the Court to sue or be sued, or may defend such suit, on behalf of, or for the benefit of, all persons so interested. According to the counsel, there is clear admission on the part of the plaintiff that the suit is filed on behalf of the School and other publics for usage of the RRR road. In such circumstance, for claiming an easement of necessity, the plaintiff has to plead that his dominant tenement and the defendant’s servient tenement originally constituted a

single tenement and the ownership thereof vested in the same person and that there has been a severance of such ownership and that without the easementary right claim, the dominant tenement cannot be used. According to the learned counsel, in the instant suit, there is no such pleading in respect of easement of necessity or easement by grant in view of the admission of the plaintiff that there is a road existing for the new building through the main road.

12. He further contended that there is no issue framed in respect of easementary right under Section 15 of the Indian Easements Act, 1882 since the right of way claimed to be in respect of public and right had acquired by way of custom and not by prescription or by necessity. Additionally, he contended that the suit is barred under Order IX Rule 9 of CPC in view of dismissal of earlier suit in O.S.No.63/1995. The said suit, which was filed by the School for the relief of injunction, was dismissed for non-prosecution and miscellaneous appeal filed against the

same was also dismissed. In such circumstance, the plaintiff shall be precluded from brining a fresh suit in respect of the same cause of action. With these submissions, he prays to allow the appeal.

13. Refuting the above submissions, learned counsel for the respondent contended that in the instant case *res judicata* does not apply for the reason that O.S.No.63/1995 was filed by Catholic Board of Education which was entrusted with running of the School for the time being in the year 1995. The said suit was for injunction and the same was dismissed for non-prosecution and the said suit could not be considered as a formal suit, which has been heard on merits and finally decided by the Court of competent jurisdiction. Moreover, the present suit filed for the relief of declaration by the plaintiff is totally a third party suit. He also contended that there is a categorical admission by DW.1 in her cross-examination that the RRR road is situated on the eastern side of her property and the same connects to the

plaintiff's property. Further, without RRR road, there is no access available to ingress and egress the plaintiff's property. The said evidence is also supported by the evidence of CW.1 - Court Commissioner and his report - Ex.C1 and sketch - Ex.C1A.

14. He further contended that the contention of the learned counsel for the appellant that there is no suit schedule cannot be accepted for the reason that the prayer in the plaint clearly depicts about the suit property and in the schedule, it is also mentioned that the schedule is morefully shown in yellow colour in the annexed eye sketch. Further, the sketch clearly reveals the RRR road. According to him, there is no necessity of mentioning the defendant's property in the suit schedule.

15. He also contended that there is no pleading whatsoever in the written statement in respect of Order IX Rule 8 of CPC or in respect of Section 15 of the Indian Easements Act, 1882 and for the first time, the defendant is raising such a contention. It is settled principle of law

that any such submission without pleading and evidence does not arise for consideration.

16. He also contended that the suit is not filed on behalf of the general public and it is specifically averred in the plaint that for the usage of plaintiff to access the School, there is no alternative road exists, as such, the suit has been filed. Hence, the suit is not barred under Order I Rule 8 of CPC.

17. He also contended that PWs.2 and 3 themselves have admitted that from several decades the RRR road exists to access the School. In such circumstance, the Trail Court and the First Appellate Court have rightly decreed the suit. Accordingly, he prays to dismiss the appeal.

18. Upon hearing the learned counsel for the parties and on perusal of the evidence and documents, the following substantial questions of law would arise for consideration:

i. Whether the Trial Court and First Appellate Court are justified in

decreeing the suit without examining the fact, whether there is an alternative way to access the plaintiff's School?

ii. Whether the suit is barred under Order IX Rule 9 of CPC or barred under the doctrine of *res judicata* in view of the dismissal of earlier suit in O.S.No.63/1995?

19. As could be gathered from records, the existence of RRR road way from the main road on the southern side edge of the defendant's property which connects the plaintiff's property, though disputed by the defendant, it is his specific contention that after obtaining of temporary injunction, the plaintiff formed the RRR road. On careful examination of the evidence of PW.1, he has categorically stated that in between the public road and schedule property, there exists a property belonging to the defendant and also exists RRR road. According to him, the said road way has been used by the teachers, parents and

other visitors to the School. The evidence of PW.1 supported by the evidence of other witnesses i.e., PWs.2 to 4. Amongst these witnesses, PW.4 deposed that he was the student of the said School and studied upto 7th standard and the School students were making use of the RRR road situated at the property belongs to the defendant. Further, PW.5, the independent witness also supported the case of the plaintiff and deposed about the existence of the RRR road. At this juncture, it is pertinent to mention the evidence of CW.1 – Court Commissioner and Ex.C1 – report and Ex.C1A – sketch which clearly depicts the existence of the RRR road and also that there is no other way to reach the suit schedule property except the 'RRR' road. The same further reveals that the suit schedule property is covered by the compound wall and the only gate is existing on western side is 'RRR' road. Ex.C1A survey sketch also depicts the existence of 'RRR' road. The further report of the Commissioner also reveals that the 'RRR' road is formed on the southern edge of the

house site of the defendant. Nevertheless, in the evidence of DW.1, she has categorically admitted that on the eastern side of her property, there exists the public road and except the 'RRR' road, there is no access available to the plaintiff's property. She also admitted that the other road which was available to the plaintiff's property was closed and as such, except the 'RRR' road, there exists no other road.

20. Further, Ex.P4 - the grant order and Ex.P5 - *adangal* register in respect of the property belongs to the defendant were in existence since 1930. On careful perusal of the same, since 1930 the existence of the RRR road in the property of the defendant is forthcoming. As such, the contention of the learned counsel for the defendant that the RRR road was formed after obtaining temporary injunction does not hold good.

21. Further, the contention of the learned counsel for the appellant that no issues would arise in respect of customary easement of the road to access the plaintiff's

property also cannot be accepted for the simple reason that the Trial Court has specifically framed issue Nos.1 to 3 in respect of existence of the RRR road and its usage peacefully without interruption since time immemorial and as such, the plaintiff acquired the right of prescription over the said pathway.

22. In view of the above observations, in my considered view, the existence of 'RRR' road on the southern side edge of the defendant's property is proved and it is also proved that it is the only access to connect to the plaintiff's property. Accordingly, I answer the first substantive question of law in favour of the plaintiff.

23. It is vehemently contended by the learned counsel for the appellant/defendant that the suit is barred under Order IX Rule 9 of CPC in view of dismissal of earlier suit in O.S.No.63/1995, since the same was dismissed for non-prosecution. As such, the decree against the plaintiff by default bars a fresh suit. According to him, where a suit is wholly or partly dismissed under Order I Rule 8 of CPC,

the plaintiff shall be precluded from bringing a fresh suit in respect of same cause of action. This contention of the appellant cannot be accepted for two reasons. At the outset, the defendant has not pleaded this aspect in his written statement filed before the Trial Court or in the evidence while cross- examining the plaintiff's witnesses. It is settled principle of law that any such submission without pleading and evidence does not arise for consideration. Even otherwise, on perusal of the earlier suit, the same is filed by the Catholic Board of Education claiming right over the alleged pathway. As such, the original suit in O.S.No.63/1995 was instituted on earlier occasion by the third party against the defendant, as such, the present suit is not barred under Order IX Rule 9 of CPC or under Section 11 of CPC. As far as Section 11 is concerned, since the previously instituted suit dismissed for non-prosecution, the same cannot be considered as "former suit" which has been heard and finally decided by the Court of competent jurisdiction having jurisdiction to

decide as per the definition of doctrine *res judicata*. Accordingly, I answer the second substantive question of law also in favour of the plaintiff.

24. The other contention raised by the learned counsel for the appellant/defendant that the present suit is not maintainable since the plaintiff failed to obtain any permission from the Court to file suit on behalf of several persons as contemplated under Order I Rule 8 of CPC does not hold much water for the simple reason that the defendant is urging the said contention for the first time before this Court without any such pleading in the written statement or adducing evidence or cross-examining the witnesses to that effect. Nevertheless, the plaintiff has categorically stated in his evidence that 'RRR' road is primary access to the School i.e., for the plaintiff, teachers, parents and students of the School. In such circumstance, the plaintiff should be considered as one entity, as such, there is no requirement for obtaining

permission by the plaintiff as provided under Order I Rule 8 of CPC.

25. In view of the above discussion, the judgments cited by the defendant are not apposite to the facts and circumstances of this case. Accordingly, I find no good grounds to interfere with the impugned judgments passed by the Trial Court and the First Appellate Court. Accordingly, appeal lacks merit and the same is ***dismissed***.

SD/-
(RAJESH RAI K)
JUDGE

PKS
List No.: 2 Sl No.: 1