HC-KAR

NC: 2026:KHC:60609
RSA No. 1033 of 2014

CNR: KAHC010290762014

IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 30TH DAY OF OCTOBER, 2026

BEFORE

THE HON'BLE MR. JUSTICE S.R.KRISHNA KUMAR

REGULAR SECOND APPEAL NO. 1033 OF 2014 (INJ)

BETWEEN:

G BASAVARAJU
S/O GANDAPPA
AGED ABOUT 57 YEARS
SHANTHANAHALLI
KASABA HOBLI, TIPTUR TQ
TUMKUR DISTRICT – 577 002.

…APPELLANT

(BY SRI. VINAYA KEERTHY M, ADVOCATE)

AND:

1. KATHYAYINI
   W/O SHADAKSHARI
   AGED ABOUT 52 YEARS

2. VIJAYA KUMAR
   S/O SHADAKSHARI
   AGED ABOUT 34 YEARS

3. ASHOK KUMAR
   S/O SHADAKSHARI
   AGED ABOUT 32 YEARS

   ALL ARE R/O SHANTHANAHALLI
   KASABA HOBLI, TIPTUR TALUK
   TUMAKUR DISTRICT.

…RESPONDENTS

(BY SRI. VIJAYKUMAR, FOR
SRI. B.R. RAGHAVENDRA, ADVOCATES FOR R-3
R-1 & R-2 SERVED)

THIS RSA IS FILED U/S. 100 R/W ORDER 42 OF CPC AGAINST THE JUDGEMENT & DECREE DTD 21.06.2014 PASSED IN R.A.NO.15/2009 ON THE FILE OF THE SENIOR CIVIL JUDGE & JMFC., TIPTUR, ALLOWING THE APPEAL AND SETTING ASIDE THE JUDGEMENT AND DECREE

Digitally signed by VANDANA S
Location: High Court of Karnataka

DTD 13.02.2009 PASSED IN OS.NO.93/2007 ON THE FILE OF THE PRINCIPAL CIVIL JUDGE (JR.DN.) & JMFC., TIPTUR.

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

CORAM: HON'BLE MR. JUSTICE S.R.KRISHNA KUMAR

ORAL JUDGMENT

This appeal by the respondent in R.A.No.15/2009 (defendant in O.S.No.93/2007) filed before the Senior Civil Judge and JMFC, Tiptur (for short "the First Appellate Court"), whereby the said appeal filed by the respondent herein (plaintiff) was allowed by the First Appellate Court vide judgment and decree dated 21.06.2014 by setting aside the judgment and decree dated 13.02.2009 passed in O.S.No.93/2007 by the Civil Judge (Jr.Dn.) and JMFC, Tiptur (for short "the Trial Court"), wherein the said suit filed by respondent herein (plaintiff) was dismissed by the Trial Court.

2. The appellant was the defendant in O.S.No.93/2007 filed by the original plaintiff, viz., Shadakshari, for permanent injunction and other reliefs in respect of the suit schedule property. The respondents herein are the wife and children of the original plaintiff, Shadakshari. The suit schedule property was described as

land bearing Sy.No.29/5 measuring 2 acres 18 guntas of dry land situated at Shathanahalli, Kasaba Holbi, Tiptur Taluk, bounded on the east by the land of Shivaiah, now Kumaraswamy, west by the land of Siddalingappa and Hulliyappa, north by Land of Basavaraju (appellant herein) and Thammaiah and south by main road. According to the plaintiff, he was absolute owner in lawful and peaceful possession and enjoyment of the suit schedule immovable property, which was bounded on the south by a government road which runs between Aralaguppe and Kondalighatta. It was also contended that to the north of the suit schedule property, the property of the defendant was situated, who was using the western portion on the western side of the suit schedule property to access the main road situated to the south of the suit schedule property. It was contended that despite using the road situated to the west of the suit schedule property for the purpose of access to the main road situated to the south of the suit schedule property, the appellant-defendant attempted to interfere with the plaintiff's possession and enjoyment and tried to form a road in the middle in the middle/centre of the suit schedule property, as a result of which the respondent-plaintiff instituted the

aforesaid suit before the Trial Court for permanent injunction and other reliefs against the appellant-defendant in respect of the suit schedule property.

3. The appellant-defendant filed his written statement disputing and denying the various allegations and claim made by the plaintiff *inter alia* contending that there was no road situated to the west of the suit schedule property and instead, there was a road in existence on the eastern side of the suit schedule property which was being made use of by the appellant-defendant to access the main road situated to the south of the suit schedule property. It was further contended that since the said road situated on the eastern side of the suit schedule property was a kharab land which was being used by the appellant-defendant as Right of Way to access the main road situated to the south of the suit schedule property and since the plaintiff obstructed the same, the defendant started using the road situated to the east of the suit schedule property. The appellant-defendant produced a sketch along with the written statement depicting the topography of the suit schedule

property and the disputed pathway and sought for dismissal of the suit.

4. Based on the aforesaid pleadings following issues were framed by the Trial Court:

> *"1. Whether the plaintiff proves that plaintiff is in actual exclusive possession and enjoyment of the suit schedule property as on date of filing of the suit?*
> *2. Whether the plaintiff proves that defendant herein is interfering with the plaintiff's peaceful and enjoyment of the suit schedule property as contended in the plaint?*
> *3. Whether the plaintiff is entitled for the relief claimed?*
> *4. What order or decree?"*

5. The plaintiff examined himself as PW-1 and got examined four witnesses as PWs.2 to 5 and got marked documentary evidence at Exs.P-1 to 9 on his behalf. On the other hand, the defendant examined himself as DW-1 and got examined three witnesses as DWs.2 to 4 and got marked documentary evidence at Exs.D-1 to 19 on his behalf.

6. After hearing the parties, the Trial Court came to the conclusion that the plaintiff had failed to establish he was entitled to a decree for permanent injunction by holding as under:

"17. As a rebuttal evidence, the defendant and the witnesses examined on his behalf deposed that since, long time pathway is situated in the suit land which leads from Shanthanahalli to Peddehalli. The defendant in support of oral evidence placed reliance upon Ex.D.1 kharabu nakalu, Ex.D.11 sketch of Sy. No. 29/5, I have perused the same which dearly reveals that two cart roads are in existence in LJNO.29/5 which leads from Shanthanahalli and Eachanuru village. At this stage, I have gone through the Ex.P.7 which is the certified copy of village map produced by the plaintiff. On perusal of the same, it indicates that two cart roads are in existence in the land Sv. No. 29 of Shanthanahalli vilage. The Ex. P.6 produced by the plaintiff which indicates that out of 2 acres and 18 quntas of land 0-04 quntas of land has been treated as kharab for the purpose of pathway. The Ex.P.6 and P.7 produced by the plaintiff from his custody, clearly reveals that the pathway is in existence in land Sy. No. 29/5. is an admitted fact that at the southern side of the suit property, the Government property is situated and at the northern side of suit land, the defendant's land is situated. From the evidence produced by the parties, the pathway situated in land Sy. No.29 connects the Government road situated at the southern side of suit schedule property.

18. From the perusal of materials produced by the plaintiff, reveals that prior to filing the instant suit the plaintiff had filed suit for permanent injunction bearing O.S.No.40/07 against this defendant in the Hon'ble Vacation Court,

Tumkur, on 02.05.2007 which is evident from Ex.D.13 certified copy of order sheet in said original suit and Ex.D.14 certified copy of plaint in the said suit. The said suit has been sent to the Regular court and that has been re-numbered as O.S.No.82/07. The Ex.D.15 produced by the defendant which is the certified copy of memo filed by the plaintiff of that suit and prayed for dismissal of said suit as settled out of court. Accordingly, that suit was dismissed as settled out of court. Further, it reveals that the present plaintiff filed this suit in this court on 18.06.2007. The Ex.D.2 notice dated 06.02.2007 issued by Village Accountant, Kotanayakanahally, Ex.D.12 panchanama prepared by the surveyor sur who was examined in this case as Dw.4 and the oral evidence produced by the parties clearly spokes that prior to filing of this suit by the plaintiff, the defendant had approached to the revenue authorities and set out his grievance in respect of road situated in land Sy. No.29 of Shanthanahalli village. The materials further discloses that the revenue authorities have been taken their steps to resolve the disputes among the parties to the suit. It is clear from the evidence produced by the parties that, the present plaintiff has filed this suit subsequent to the revenue proceedings. This shows the intention of the plaintiff that he has filed the instant suit in order to restrain indirectly the revenue authorities from exercising their powers. The photographs produced by the plaintiff and the defendant which were marked at Ex. P.9 to P.17 and Ex.D.6 to D.10, apparently they shows that the plaintiff might have got fenced his land recently in order to grab the pathway

situated in land Sy. No.29. But, it is surprise to note that the witnesses examined on behalf of the plaintiff were deposed that about 20 years back the land of the plaintiff gotq fenced. The said piece of evidence is unreliable because, I have already stated that bare perusal of photographs by necked eyes one can come to conclusion that the suit property has been recently fenced by erecting stone poles and with a new barbed wire. Thus, the evidence produced by the parties to the suit clearly spokes that the plaintiff has approached to this court by suppressing the material facts. Therefore, in my opinion the plaintiff is not fair and honest. The relief sought by him is not based on principle of equity. I am of the view that law does not protect the property grabbers. The village map Ex.P.7 produced by the plaintiff itself shows that the pathways are situated in the land Sy.No.29. Under the circumstances, plaintiff is not entitled for the discretionary relief of injunction which is absolutely meant for administration of justice. The plaintiff has not made out probable and fit case to grant the relief as he sought for. The dictum laid down in the top-noted decision is not applicable to the case on hand as in the present case on hand, the plaintiff not at all produced any evidence to show that the Tahsildar, Tiptur has already passed any order in respect of alleged pathway. I am of the firm opinion that the plaintiff is not entitled for the discretionary relief of permanent injunction as I have already held that the plaintiff has filed this suit by suppressing the facts actually prevail. I have rejected the entire evidence produced by the plaintiff.

Accordingly, I proceed to answer issues No.1 to 3 in Negative.

*19. **Issue No.4:**- For the foregoing findings on issues No.1 to 3, I proceed to pass the following:*

ORDER

The suit filed by the plaintiff is hereby dismissed. No order as to costs."

7. Aggrieved by the judgment and decree of the Trial Court, the respondent-plaintiff preferred an appeal before the First Appellate Court, which framed the following points for consideration and set aside the judgment and decree of the Trial Court and allowed the appeal filed by the respondent-plaintiff and decreed the suit filed by the respondent-plaintiff by holding as under:

" 12. Now the following points will arise for my consideration and determination:-

POINTS

1) Whether the trial Court judgment is not based on evidence, facts and law?

2) Whether the appellant prove that the judgment and decree passed by the Trial Court is capricious?

3) Whether the judgment and decree of the trial Court requires for interference?

4) What order?

13. My findings on the above said points are as under:-

Point No.1 - In the Affirmative
Point No.2 - In the Affirmative
Point No.3 - In the Affirmative
Point No.4 - As per final order, for the following:

: REASONS:

14. Point No.1 to 3 *:- These points are inter-linked with each other, hence, I have taken these points together for discussion to avoid repetition of facts and evidence.*

The plaintiff filed the suit in O.S. 93/07 before the trial court for the relief of permanent injunction to restrain the defendant or any person on behalf of him from making any type of loss and damages to the suit property illegally by removing the fence, forming the road and any other means which is in exclusive possession of plaintiff. Perused the pleadings of the both parties and oral and documentary evidence and also judgment of the trial court. The specific case of the plaintiff is that, the land bearing Sy.No.29/5 measuring 2-18 guntas dry land situated at shantanahalli, Kasaba hobli, Tiptur taluk belongs to plaintiff who possessed the same by virtue of partition had in his family. That the property has fence and that of bunds. That towards the southern portion of property there is road which touches Aralaguppe and that of Kondlighatta i.e. Government road. Abutting to this main road the suit schedule property is in existence. The plaintiff had availed several loans and also making attempt to plant coconut sapless and it is very fertile land and very near to the village. Further plaintiff taken the specific contention that, towards northern portion of the

property stated to be belongs to defendant. The defendant is making use of path way which is existing western portion of suit property. That the said access is in existence since several decades. That from the main road to the defendant land, the defendant and other persons are making use of the same. Further plaintiff contended that, the defendant tried to making road in the suit schedule property towards eastern side by forcefully.

15. The defendant specifically denying the fact that, the defendant admitted the ownership of the plaintiff over the suit schedule property. In the suit schedule property measuring 2-18 guntas, 0-04 guntas of kharab exclusively for the purpose of path way in the middle portion of the suit land. The defendant and others owned the properties towards north of the suit land. From the beginning defendant and other persons uses the said path way. The plaintiff had requested the defendant and others to gain access in the suit schedule property. In the eastern side in order to avoid the division of suit property into the portion by the kharab used in the middle of the suit property for which the defendant an others have consulted for the plaintiffs request. The plaintiff himself in the moth of January 2007 had attempted to obstruct the defendant from passing in the schedule property in eastern side path way and also defendant furnished the rough sketch along with his written statement.

16. The pw1 plaintiff denying the fact that, existence of path way in his land as stated by the defendant, but he admitted as per his pleadings there is a pathway is existed in

the western portion of his land which runs south to north. There is no path way existed in the eastern portion of the suit land as stated by the defendant and he admitted the fact that, he obstructed to made road or path way towards the eastern side of his land. In support of his evidence he also examined the pw2 to 5 witnesses, they are also deposed that in their evidence there is no path way exist towards the eastern side of the suit property as stated by the defendant Dw1.

17. On perusing the Ex.pl RTC. As per the said RTC the land in Sy.No.29/5 measuring 5-00 acre in total. In the said 5-00 acre 0-04 guntas shown as kharab and also as per the column No.9 of the said RTC one the plaintiff having 2-18 guntas land and H. Siddalingaiah and Huliyappa having 2-18 guntas. The plaintiff himself admitted that out of 2-18 guntas which belongs to him the 0-04 guntas left for kharab. In respect of the ownership, there is no dispute between the parties.

18. As per the Ex.p5 the sketch issued by the village accountant regarding the boundary of the suit schedule 'property: As per the said sketch towards the eastern side, the land of one Kumaraswamy is there, towards the west, land of Siddalingaiah and towards the north, the land of defendant i.e. Basavaraju, towards the south, a public road is there. As per the Dagpleadings of the plaintiff there is a pathway is exist in the western portion of the suit land to reach the defendant land which is situated in the northern side of the suit land. But, defendant claiming that, the said pathway is run in the middle of the suit land, for the convenience the plaintiff himself left

the said pathway towards the eastern side. But, now he resisted the defendant to make use of the said pathway, which is existed towards the eastern side. As per the Ex.p6 the revenue document issued by the Tahsildar regarding the kharab land in Sy.No.29/5, 0-04 guntas land left for the cart way and footpath in the said Sy.No. But in the said document not clearly discloses whether the said phot kharab include the land belongs to the plaintiff or Siddalingaiah one who having the land in the same Sy.No. towards the western side of the plaintiff land. The plaintiff also produced the Ex.p7 the village map of Shanthanahalli, Tiptur taluk. As per the said village map the land in Sy.No.29, the two cart way passed. One towards the Peddihalli, another road commence from the Eachanur and join the said Peddihalli road. The said road passed in the western portion of the said entire land in Sy.No.29 and run towards the northern eastern side. As per the said map there is no pathway existed in the said Sy.No. and also there is no footpath existed towards the eastern side of the said Sy.No. The plaintiff also produced photographs Ex.p9 to 17. The said photographs shows that, there is a tar road existed towards southern side of the suit land and also installing the stone pillar around the plaintiff land. And one Kumaraswamy who having the land towards the eastern side of the plaintiff land fixing the barbed fence for his land. The plaintiff admitted in his pleading itself he has not restrain the defendant to make use of the footpath which is existed towards the western portion of his land to reach the defendant land from south to north.

19. The defendants also examined themselves as Dwl and other witnesses examined as Dw2 to 4. They have also deposed in their evidence that, they claim the road towards the eastern side of the suit land, but regarding the existence of the footpath towards the eastern side of the plaintiff land there is no documents. As per their evidence even Tahsildar and Surveyor not attend to clear the road as shown in the revenue sketch issued by them, which is existed towards the western side and run towards the northern side. The claim of the plaintiff is also clear that, he prayed for restrain the defendant, his men and his representatives not to form the road illegally and forcefully by damaging the property of the plaintiff and by making loss to the plaintiff. Plaintiff not filed the suit to restrain the defendant, his men and representatives to make use of the footpath to reach their land through the footpath existed in the western portion of the suit land is runs south to north and admittedly the land of defendant is existed in the northern side of the plaintiff land. The Dw4 the Taluk Surveyor also deposed in his evidence that there is a foot path existed in the land in Sy No.29/5 runs from south to east and one cart way is ako existed which runs from western side to northern side. Further, he deposed that, there is a cart way run in the said Sy.No. north to south. Further he deposed in his cross-examination that, towards the southern side of the suit land there is a main road is existed and also he admitted the fact that, there is a kharab left for the footpath in the suit schedule property which runs from western side to the northern side. And also he says that at the time of he visiting

the spot he has not issued the notice to the adjacent land owner and also plaintiff and also not measured the property.

20. The defendant produced Ex.D1 the document issued by the Tahsildar regarding the existence of kharab land, left for footpath in the Sy.No.29/5. As per the said document land in Sy.No.29/5 there is a 0-04 guntas kharab is left for cart track and footpath. Moreover, in the land in Sy.No.29/4, A1 and B1 0-01 gunta each left for footpath. Ex.D2 is notice issued by the village accountant to the defendant regarding enquiry of the footpath. Ex.D3 is the RTC of land in Sy.No.29/5 .i.e. not disputed by the plaintiff and Ex.D4 is the RTC in respect of Sy.No.29/4B1, Ex.D5 RTC in respect of 29/4A1, which are not disputed by the plaintiff Defendant produced the photographs Ex.D6 to D10. The said photographs also not disclose the existence of footpath towards the eastern side of the plaintiff land, as stated by the defendant. The land of the plaintiff is uncultivated land. The defendant also produced Ex.D11 the atlas copy in respect of the Sy.No.29/5. As per the said sketch issued by the Tahsildar, Tiptur, the cart track runs in the land in Sy.No.29/5 towards the western side. They admittedly the said land in Sy.No.29/5 divided as two portion i.e. 2-18 guntas belongs to the plantiff and 2-18 guntas belongs to the Siddalingappa and Huliyappa. As per the said sketch the said cart track runs from Shanthanahalli to Peddihalli and Eachanur. Said road not run or pass through the land of plaintiff. As per the said sketch the footpath run from Eachanur to Kodlighatta, which runs towards the western portion of the suit land from south

west corner to north side. As per the said document also there is no footpath existed towards the eastern side of the plantiff land, as stated by the defendant. Ex.D18 the atlas sketch also discloses the same thing. Even though that the defendant claiming the road towards the eastern side of the plaintiff land. Hence, it is clear that, the defendants interfere with the peaceful possession and enjoyment of the plaintiff property and tried to make use of the road illegally in the eastern portion of the suit land. Even though there is a footpath existed towards the western side of the plantiff land as admitted by him and plaintiff himself pleaded that, he has not made any obstruction to the defendant to make use of the said road. Also the Tahsildar is below the rank of Deputy Commissioner, not having the right to ordered to form the new road in the eastern side of the plaintiff land, as per the provision stated by the plaintiff side ie. Sec. 67 of the Land Revenue Act and also the plaintiff stated the citations reported in 1978 of KLJ page 434 of Hon'ble High Court of Karnataka held that.

"Held the Tahsildar or the Taluka Magistrate has no jurisdiction and power to pass the order. Sub-sec(2) of Sec.67 of the 1964 Act, in express terms, confers the power only on the Deputy Commr or a Survey Officer not lower in rank than a Deputy Commissioner. Further the Tahsildar/Taluka Magistrate should ;not have passed any order so as to affect the rights of the parties that are being agitated in the civil suit"

In another decision reported in 2002 (2) KLJ Page 241 which reads as under:

"Tahsildar, not accepting claim, passing eviction order for removal of obstruction to cart-track passing through disputed land and used by public-Where person in possession of land has admitted existence of cart-track and its use by public, he is liable to be evicted-However, it would be appropriate that fresh order of eviction is passed by Competent authority after surveying disputed land and fixing its boundaries".

Hence in this case the Tahsildar not having right to order to form the road in the eastern side of the plaintiff property. Only order to clear the obstruction to make use of the road or footpath existed as per the atlas sketch copy produced by the defendant. But plaintiff himself admitted that, there is a footpath existed in the western portion of his land for the movement of the defendant and others to reach their land and also he has not made any interference or disturb to defendant or any others regarding use of said footpath. These are all facts not considered by the lower court at the time of giving findings and also giving answers to issue framed by the trial court. The trial court without perusing the pleadings of the plaintiff and defendant and the material document, only considering the behaviors of the plaintiff and his attitude i.e. immaterial. The defendant also failed to existence of the footpath towards the eastern side of the plaintiff land to reach his land. As per records available before this court and trial court, there is a footpath existed which runs in the western portion of the plaintiff land towards the northern side from south. Hence, the evidence of the defendant and his written statement itself shows that, he interfere with. the possession

of the plaintiff over the suit schedule property and trying to make the road by damaging and cause loss to the plaintiff property in the eastern portion of the plaintiff land. Hence it is just and proper to restrain the defendant, his men and any persons on behalf of him from making any type of loss and damage to the suit property legally by putting the fence, forming road and any other means which is exclusively possession of he plaintiff. It is not the case of the plaintiff that, restrain the defendant and any persons on behalf of him to form the road and any other means legally. He only prayed for restraining the defendant from doing the illegal act by causing damage to the plaintiff property and also there is no prayer to restrain the movement of the defendant to reach the land of the defendant by passing over the plaintiff land. Plaintiff clearly stated in its pleading itself the defendant is making use of the pathway which is existing in western portion of the suit property that the said access in existence since several decades that from the main road to the defendant land the same pathway is existing and defendant and other persons are use the same. These are all not observed by the trial court. Hence, this court just and proper to interfere with the judgment and decree passed by the trial court. If the suit is not decreed in favour of the plaintiff the legal injury cause to the plaintiff. Thereby the plaintiff made out the ground to allow the appeal. Hence, I answered point No.1 to 3 in the affirmative.

21. Point No. 4 :- In view of the findings given on point No.1 to 3 above, I proceed to pass the following:-

ORDER

The regular appeal filed by the appellant is allowed. The Judgment and decree passed by the Trial Court in O.S.93/2007 dated:13-2-2009 is set aside and suit of the plaintiff is decreed and thereby restrain the defendant or any persons on behalf of him from making any type of loss and damage to the suit property illegally by removing the fence, forming the road and any other means which is exclusive possession of the plaintiff.

Under the circumstances of the case there is no order as to cost.

Draw decree accordingly."

8. This Court admitted the appeal on 13.08.2014 to consider the following substantial question of law:

"In a suit instituted by the respondent for injunction, when the Trial Court dismissed the suit on appreciation of the evidence on record, whether the First Appellate Court was justified in reversing the judgment and decree and in doing so, did not assign appropriate reasons to overcome the findings of Trial Court and thereby committed an illegality in passing the impugned judgment and decree?"

9. Heard learned counsel for the appellant and learned counsel for respondent No.3 and perused the material on record. Though respondent Nos.1 and 2 were served, they remained absent and did not chose to contest the appeal before this Court.

Re. Substantial Question of Law:

10. A perusal of the impugned judgment and decree of the First Appellate Court will indicate that the First Appellate Court Has recorded a finding that there was no dispute regarding ownership of the plaintiff over 2 acres 18 guntas of land in the suit schedule property. The First Appellate Court also took into account the sketch at Ex.P-5, revenue documents at Exs.P-5, 6 and 7 and the photographs at Exs.P-9 to 17 in order to come to the conclusion that there was a pathway on the western side of the suit schedule property, which would connect the property of the defendant on the northern side to the main road on the southern side.

11. The First Appellate Court also came to the conclusion that the evidence on record disclosed that there was a pathway on the western side of the suit schedule property and that the appellant had not produced any legal or acceptable evidence to establish that there was a pathway on the eastern side of the suit schedule property. The First Appellate Court also adopted an equitable approach by coming to the conclusion that even according to the plaintiff himself, the defendant's property was

situated to the north of the suit schedule property and that the defendant was entitled to use the pathway situated on the western side of the suit schedule property for the purpose of access to his property from the main road situated to the south of the suit schedule property.

12. A perusal of the impugned judgment and decree passed by the Trial Court will clearly indicate that the trial Court had not properly considered and appreciated the pleadings and evidence of the parties and failed to notice that the pathway on the western side of the suit schedule property was in existence from several decades and the same would be used by the appellant-defendant to access his property to the north of the suit schedule property and no prejudice would be caused to the appellant-defendant if he is permitted to use the said pathway situated to the west of the suit schedule property.

13. The substantial question of law formulated above is accordingly answered by holding that the First Appellate Court was fully justified in setting aside the judgment and decree passed by the Trial Court, which had overlooked material evidence and failed

to consider the evidence on record, which clearly established that there existed a pathway situated to the west of the suit schedule property and consequently, since no prejudice would be caused to the appellant-plaintiff by decreeing the suit and by permitting the appellant to use the pathway on the western side of the suit schedule property.

14. Under these circumstances, I answer the substantial question of law against the appellant and consequently, I do not find any merit in the appeal and the same is hereby **dismissed**.

Sd/-
(S.R.KRISHNA KUMAR)
JUDGE

BMC
List No.: 1 Sl No.: 46