

IN THE HIGH COURT OF KARNATAKA  
CIRCUIT BENCH AT DHARWAD

DATED THIS THE 23<sup>RD</sup> DAY OF DECEMBER 2010

BEFORE:

THE HON'BLE MR. JUSTICE B.MANO HAR

REGULAR FIRST APPEAL No.80 OF 2001 (DEC)

BETWEEN:

1. Sri.Gundu Ramachandra Naik  
Age:67 years  
Occ: Agriculture  
R/o. Nipani  
Tal:Chikodi, Dist:Belgaum.
2. Sri.Suresh Gundu Naik  
Age:40 years  
Occ: Agriculture  
R/o.Nipani, Tal:Chikodi  
Dist.Belgaum

... APPLANTS

(By Sri.R. D.Gokakar, Advocate)

AND:

1. Sri.Rajendra @ Dilip  
Appasaheb Boragave  
Age:major  
Occ:Agriculture  
R/o.Teli Galli  
Nipani, Tal:Chikodi  
Dist:Belgaum.



2. Sri.Pradeep Appasaheb Boragave  
Age:major  
Occ:Agriculture  
R/o.Teli Galli  
Nipani, Tal:Chikodi  
Dist:Belgaum.
3. Smt.Drakshayani Dilip Bivate  
Age:major  
Occ:Agriculture  
R/o.Teli Galli  
Nipani, Tal:Chikodi  
Dist:Belgaum.
4. Sri.Bandulal Ramachandra Shah  
@ Gujar, Age: major  
R/o. near Rural Police Station  
Nipani, Tal:Chikodi  
Dist:Belgaum.
5. Sri.Popatlal Ramachandra Shah  
@ Gujar, Age: Major  
R/o. near Rural Police Station  
Nipani, Tal:Chikodi  
Dist:Belgaum.

... RESPONDENTS

(By Sri.M.G.Naganuri, Advocate for R4, Sri.Jagadish Patil,  
Adv. for R4 and R5, R1 to R3 notice dispensed with)

This RFA filed u/s 96 of CPC against the judgment and decree dated 16-12-2000 passed in O.S.No.55/1993 on the file of the Civil Judge (Sr.Dn.) Chikodi, dismissing the suit for declaration and injunction.



This RFA having been heard and reserved for pronouncement of judgement this day, the Court delivered the following:-

### J U D G M E N T

Appellants are the plaintiffs before the court below, being aggrieved by the judgment and decree dated 16-12-2000 passed in O.S.No.55/1993 by the Civil Judge (Sr.Dn.) Chikodi, preferred this regular first appeal.

2. The plaintiffs had filed a suit for declaration declaring that the plaintiffs are in possession of 18 acres 23 guntas of land in Sy.No.264 situated at Nipani, Chikodi Taluk out of total extent of 19 acres 23 guntas of land and also sought for consequential relief of injunction restraining the defendants or their agents and servants from interfering with the peaceful possession and enjoyment of the suit schedule property. Further the plaintiffs also sought for declaration declaring that the



sale deeds dated 5-3-1993 and 26-3-1993 executed by the father of defendants 1 to 3 in favour of Smt.Thara Bai Narayana Shah to an extent of 5 acres 39 guntas of land in Sy.No.264 of Nipani Town, Chikodi Taluk is not binding on the plaintiffs. They also sought for alternative reliefs and cost.

3. The brief facts of the case are as follows:

The land bearing Sy.No.264 situated at Nipani town of Chikodi Taluk is an agricultural land. The total extent of the said land in all measuring 19 acres 23 guntas of land out of which, 6 guntas is phot kharab. This land originally belonged to Desai of Nipani. The father of the first plaintiff was the Mirashi tenant or permanent tenant in respect of 18 acres 23 guntas of land situated on the Western side of Sy.No.264 and the father of defendant Nos.1 to 3 was the permanent tenant in respect of 39 guntas of land situated on the Eastern side of Sy.No.264 of Nipani town. The plaintiffs further alleges that there



was a dispute in respect of the said land between the father of the first plaintiff and one Shivalinga Mallappa Boragave and Shankar Mallappa Boragave and the said dispute was referred to the Arbitrator by the parties and the matter was settled on the basis of the Arbitration Award in O.S.No.389/1924. As per the Arbitration Award, an area of 18 acres 23 guntas of land was allotted to the father of the first plaintiff and an area of 1 acre was allotted to Father and Uncle of defendants 1 to 3. Since then the plaintiffs and defendants have been in peaceful possession and enjoyment of the said land as per the decree passed by the Civil Court, Chikodi.

4. The first plaintiff being the permanent tenant and this right being an ancestral right and the plaintiffs being covered by the provision of Hindu Law, the second plaintiff claimed right in the suit land along with first plaintiff. In view of that, name of the second plaintiff was entered



along with the first plaintiff in respect of the suit land as well as other lands.

5. Plaintiffs further averred that since the land in question is the tenanted land, in view of coming into force the Karnataka Land Reforms Act in the year 1974, the first plaintiff filed a declaration in Form No.7 for grant of occupancy rights in respect of 18 acres 23 guntas of land. The Land Tribunal by its order dated 23-10-1981 granted occupancy rights in respect of 13 acres 23 guntas of land in favour of the plaintiffs. Thereafter, Form No.10 was issued by the Competent Authority in favour of the plaintiffs jointly, even though the plaintiffs claimed occupancy rights in respect of 18 acres 23 guntas of land. The plaintiffs have moved the higher authorities for correction of the area as claimed in Form No.7 and the said matter is pending consideration before the higher authorities. The plaintiffs further averred in the plaint that in the year 1956, name of the father of the first



plaintiff and father of defendants No.1 to 3 were entered as per M.E.No.4003 in the revenue records. As per the revenue records, in respect of 5 acres 39 guntas of land name of the deceased father of defendants No.1 to 3 has been shown and the name of the father of the first plaintiff is shown to the extent of 13 acres 23 guntas of land. The said mutation entry was not in accordance with the arbitration award. In view of that he has made necessary application for correction in the mutation entries and the same was corrected in M.E.No.6534 of the year 1963. Against the said entry, no appeal has been filed by the defendants and it has become final. This being the fact, the deceased father of defendants 1 to 3 along with defendant No.1 managed to get the records changed and they got an area to the extent of 5 acres 39 guntas in place of 39 guntas and thus the predecessors of defendants No.1 to 3 got the said change illegally and unlawfully, without legal procedure behind the back of the plaintiffs. Thereafter, they sold the said 5 acres 39 guntas of land in



favour of one Tharabai Narayan Shah, i.e. grandmother of defendants 4 and 5 as per the registered sale deeds dated 5-3-1993 and 26-3-1993 respectively. The plaintiffs further alleges that the father of the defendants 1 to 3 misguided the Revenue Authorities and got some entries in the revenue records as per M.E.No.15073 and M.E.No.15029 which is contrary to law. Being aggrieved by the said entries, the plaintiffs had preferred an appeal before the Deputy Commissioner and the same is pending consideration. On the basis of the sale deeds Thara Bai Narayan Shah got entered her name in the revenue records. Being aggrieved by the same, the plaintiffs preferred an appeal before the Assistant Commissioner, Chikodi and the same is pending consideration.

6. On the basis of the said registered sale deeds, the defendants tried to interfere with the peaceful possession and enjoyment of the plaint schedule property, though the defendants have no right over the said property and the



defendants 4 and 5 will not get any right on the basis of the said sale deeds. Therefore, the plaintiffs filed this suit with the above prayers.

7. In pursuance to the notice issued by the court below defendants 1 to 5 entered appearance. The defendants 1 to 3 have filed their written statement. They have contended that descriptions of the land measuring 18 acres 23 guntas without any boundaries is incorrect and the court fee paid by the plaintiffs is also incorrect. The allegations that the suit land was originally belonged to Sri.Desai of Nipani of which, father of the first plaintiff is a permanent tenant is false. The further contention of the plaintiffs that father of the defendants 1 to 3 was permanent tenant in respect of 39 guntas of land in Sy.No.264 of Nipani Town is also false and frivolous. The defendants 1 to 3 have contended that since generations, the family of the defendant Nos.1 to 3 is the grantee of soil of suit survey No.264 of Nipani town whereas, Desai



family of Nipani is the grantee of revenue of the aforesaid survey number. Between the family of the plaintiffs and the family of defendants 1 to 3, there was no dispute. Hence, the question of delivering the possession of the land to an extent of 18 acres 23 guntas of land in the said survey number does not arise. The question of registering the plaintiffs as tenants of Desai of Nipani never arose and they are not the permanent tenants. The further averment in the plaint with regard to the arbitration proceedings ended in O.S.No.389/1924 by the Court of Chikodi is totally incorrect and wrong. In the arbitration proceedings, question of allotment of the land and possession is unknown. Further the assertion of the plaintiffs that the award passed by the Arbitrator was accepted by the parties and on the basis of the award the plaintiffs were put in possession of 18 acres 23 guntas of land out of 19 acres 23 guntas in Sy.No.264 of Nipani Town of Chikodi Taluk is totally incorrect and misleading. Further averment that only 39 guntas was allotted to the



father of defendants 1 to 3 and they were put in possession of only 39 guntas in full satisfaction of arbitration award is also incorrect. From 1956 onwards RTC stands in the name of the father of the defendants 1 to 3 in respect of 5 acres 39 guntas of land and the remaining extent of land i.e. 13 acres 23 guntas stands in the name of the father of the first plaintiff. In view of coming into force the Land Reforms Act, the first plaintiff filed Form No.7 for grant of occupancy rights in respect of 18 acres 23 guntas of land. However, the Land Tribunal after conducting necessary enquiry and after perusing the revenue records and other relevant records came to the conclusion that the plaintiffs are in possession of 13 acres 23 guntas of land in Sy.No.264 of Nipani Town, Chikodi Taluk and the plaintiffs are not in possession of 18 acres 23 guntas as claimed by them. Thereafter, Form No.10 was also issued jointly in the name of plaintiffs 1 and 2 and the said order has become final. In view of coming into force the Land Reforms Act, only tenanted lands vest



with the State Government. The Land Tribunal has given a finding that the plaintiffs are tenants only in respect of 13 acres 23 guntas of land. Hence, the plaintiffs cannot claim the land more than 13 acres 23 guntas of land. Further, in the arbitration proceedings in O.S.No.389/1924 the survey number has not been mentioned. The ancestors of defendants 1 to 3 have been in possession of 5 acres 39 guntas of land. The revenue records support the case of the defendants. Hence, they are the absolute owners of 5 acres 39 guntas of land and the same was sold in favour of Smt.Tharabai Narayan Shah as per two sale deeds dated 5-3-1993 and 26-3-1993. After purchasing the said land, the Purchaser had dug the Borewell and developed the land by planting various trees and was cultivating the same. The defendants 1 to 3 further contended that from the year 1993, Tharabai Narayan Shah and after her death defendants 4 and 5 have been in possession. Since the plaintiffs are not in possession of the said land, the



question of defendants interfering with the peaceful possession does not arise. The plaintiffs have not sought for possession of the property. Hence, the question of declaring that the plaintiffs are in possession of 18 acres 23 guntas does not arise and the plaintiffs are not entitled for injunction and sought for dismissal of the suit.

8. The defendants 4 and 5 also filed objections to the plaint and denied the averments made in the plaint and contended that the suit filed by the plaintiffs is not maintainable. The description of the suit property given by the plaintiffs in the plaint is not correct and no boundaries of the property measuring 18 acres 23 guntas in Sy.No.264 was mentioned and the valuation of the property is not correct. They have denied the averment of the plaint that the plaintiffs are the owners of the land measuring 18 acres 23 guntas of land in Sy.No.264 of Nipani town, Chikodi Taluk. The court fee given was also not correct. On the application filed by the first plaintiff in



Form No.7, the Land Tribunal by its order dated 23-10-1981 granted occupancy rights only in respect of 13 acres 23 guntas of land on the basis of the revenue records and actual possession, though claim has been made for 18 acres 23 guntas of land. Thereafter Form No.10 was also issued in favour of the plaintiffs. The order passed by the Land Tribunal has become final. Further the Land Tribunal has no power to review its own order. Hence, the contention of the plaintiffs that they are the owners of land measuring 18 acres 23 guntas of land in Sy.No.264 of Nipani Town Chikodi Taluk is totally incorrect and misleading. The defendants 4 and 5 also denied that the plaintiffs 1 and 2 are the permanent tenants in respect of 18 acres 23 guntas of land under one Desai of Nipani. Further averment that there arose a dispute between the father of the first plaintiff and the sons of Mallppa Boragave in respect of suit land is also incorrect. The further averment that the said dispute came to be settled in the arbitration proceedings in



O.S.No.389/1924 in Chikodi Court is also incorrect. The plaintiffs have not produced any documents to show that they were in possession of 18 acres 23 guntas of land whereas the documents produced by the defendants 1 to 3 clearly go to show that the plaintiffs were in possession of 13 acres 23 guntas of land on the Western side of Sy.No.264 and the father of defendants 1 to 3 was in possession of 5 acres 39 guntas on the Eastern side of Sy.No.264. Sy.No.264 is not included in O.S.No.389/1924. Hence, the question of handing over the possession of 18 acres 23 guntas of land in Sy.No.264 does not arise. The Record of Rights from the year 1956 onwards stands in the name of father of defendants 1 to 3 in respect of 5 acres 39 guts of land. The grandmother of defendants 4 and 5 was the bonafide purchaser of 5 acres 39 guntas of land for a valuable sale consideration as per the registered sale deeds dated 5-3-1993 and 26-3-1993. Since then the grandmother of defendants 4 and 5 and after her death, defendants 4 and 5 have been in



possession. Since the plaintiffs were not in possession of the said land, the question of these defendants interfering with the peaceful possession of the suit schedule property does not arise and sought for dismissal of the suit.

9. On the basis of the pleadings of the parties and on the basis of the documents produced by the parties, the court below framed the following issues:

- (i) *Whether the plaintiffs prove that they are in possession of the suit land as absolute owners?*
- (ii) *Whether the plaintiffs prove that defendants 1 to 3 are estopped from claiming more than 39 guntas of land to east of the suit land in suit R.S.No.264?*
- (iii) *Whether the defendants 4 and 5 prove that as on the date of the suit sale deeds in favour of Tharabai Narayan Shah, defendants 1 to 3 and their deceased*



*father were in possession of 5 acres 39 guntas out of suit R.S.No.264?*

- (iv) Whether in view of the order of the Land Tribunal the plaintiffs are estopped from claiming 18 acres 23 guntas of land in the suit R.S.No.264?*
- (v) Whether in view of the order of the Land Tribunal, the court has no jurisdiction to entertain the suit?*
- (vi) Whether the relief of declaration is barred by time?*
- (vii) What order or decree?*

**Additional Issue:**

*Whether the valuation made by the plaintiff for the purpose of court fee is proper and correct?*

10. The additional issue regarding valuation of the suit made by the plaintiffs was treated as preliminary issue



and the Trial Court by its order dated 20<sup>th</sup> July 1996 gave a finding on the additional issue. The plaintiffs being aggrieved by the order passed by the Trial Court on additional issue, preferred Civil Revision Petition No.2668/1996 before this Hon'ble Court. This Hon'ble Court allowed the revision petition filed by the plaintiffs holding that the suit was properly valued by the plaintiffs.

11. The first plaintiff in order to prove his case examined himself as P.W.1 and got marked the documents Ex.P.1 to Ex.P.32. The fourth defendant examined himself as D.W.1 and examined other five witnesses as D.W.2 to D.W.6 and got marked documents as Ex.D1 to Ex.D.8.

12. The Trial Court after appreciating the oral and documentary evidence adduced by the parties held issue Nos. 1, 2, 5 and 6 in the negative and issue Nos.3 and 4 in the affirmative and ultimately dismissed the suit filed by the plaintiffs by its judgment and decree dtd.16-12-2000.



The plaintiffs being aggrieved judgment and decree passed by the Trial Court, preferred this appeal contending that the judgment and decree passed by the court below is contrary to law and evidence on record.

13. Sri.Ravikumar D. Gokakar, learned counsel appearing for the appellants contended that judgment and decree passed by the Trial Court is based on surmises and conjunctures rather than objective assessment of the materials on record. The court below without examining the evidence on record held that the plaintiffs failed to prove their case. The Trial Court failed to look into the Ex.P.1 Arbitration award of the year 1924 and Ex.P.6 i.e. mutation entry No.10533, Ex.P.7 i.e. M.E.No.4003 of the year 1956 and Ex.P.8-M.E. No.6534/1963. All these documents collectively read together, make it clear that since the date of Ex.P.1 i.e. Arbitration Award till the date of filing of suit in O.S.NO.55/1993, the appellants have been in possession of 18 acres 23 guntas of land in



Sy.No.264. The learned counsel further submitted that without appreciating the evidence on record, the court below came to the wrong conclusion. Further, 5 acres of land in Sy.No.264 is the tenanted land. The father of respondents 1 to 3 has no right to sell the tenanted land in favour of Smt.Tharabai Narayan Shah, the grandmother of defendants 4 and 5. This aspect of the matter is completely overlooked by the court below. The finding on issue Nos.3 and 4 is illegal and contrary to the material evidence on record and sought for setting aside the same by allowing this appeal.

14. On the other hand, Sri.M.G.Naganuri, learned counsel appearing for respondents 4 and 5 contended that the appellants have not produced any material to show that 5 acres and 39 guntas of land is a tenanted land. Further, Sy.No.264 was not mentioned in the arbitration award in O.S.No.389/1924. From the year 1956 the Record of Rights and other revenue records stand in the



name of the father of defendants 1 to 3 in respect of 5 acres 39 guntas land in Sy.No.264. Apart from that Form No.7 filed by the first plaintiff for grant of occupancy rights in respect of 18 acres 23 guntas of land was rejected. The Land Tribunal by its order dated 23-10-1981 after holding necessary enquiry and after perusing revenue records granted occupancy rights in favour of the plaintiffs only in respect of 13 acres 23 guntas of land. Hence, the question of plaintiffs claiming to be tenants in respect of 18 acres 23 guntas of land does not arise. Further, W.P.No.4762/1993 filed by the plaintiffs challenging the order rejecting occupancy rights in so far as 5 acres of land by the Land Tribunal dated 23-10-1981 was dismissed by this Hon'ble Court on 11-3-1993. Against the said order, the appellants preferred an appeal in W.A.No.849/1993, which also came to be dismissed by the Division Bench of this Court on 5-2-1997. Hence it is clear that the plaintiffs are tenants only in respect of 13 acres 23 guntas of land. Further the suit for declaration



filed by the plaintiffs is not maintainable since the plaintiffs are not the owners of the said property. Without seeking for possession of the property, the suit filed for declaration is not maintainable and sought for dismissal of the appeal confirming the order passed by the court below.

15. I have carefully gone through the arguments addressed by the parties.

16. Having heard the learned counsel for the parties, the points to be considered by this court are:

*(1) Whether the plaintiffs have proved that they are in lawful possession of 18 acres 23 guntas of land in Sy.No.264 of Nipani Town, Chikodi Taluk.?*

*(2) Whether the judgment and decree of the Trial Court is based on documents produced and the evidence adduced by the parties?*



17. Since all the points are inter-related, they are considered together.

18. The case of the plaintiffs is that they are the permanent tenants in respect of 18 acres 23 guntas of land on the Western side of land bearing Sy.No.264 of Nipani town out of 19 acres 23 guntas of land. In view of coming into force of the Land Reforms Act, they had filed an application in the year 1974 claiming occupancy rights in respect of 18 acres 23 guntas of land. The Land Tribunal by its order dated 23-10-1981 granted occupancy rights only to an extent of 13 acres 23 guntas and they had approached the higher authorities for correction of the extent of land and the said matter is pending. Further, the father of defendants 1 to 3 is the tenant in respect of 39 guntas of land in the very same survey number and he has not filed any application. In spite of the same, the father of defendants 1 to 3 sold 5 acres 39 guntas of land in favour of one Smt.Tharabai



Naryana Shah, the grandmother of defendants 4 and 5. The revenue records stand in the name of the plaintiffs. Further illegal entries made by the Tahsildar in favour of defendants 1 to 3 has been stayed by the Deputy Commissioner. Though the Land Tribunal rejected the claim in respect of 5 acres of land, the plaintiffs are in possession. On the basis of the registered sale deeds executed in favour of Tharabai Narayan Shah, the defendants are interfering with the peaceful possession of the plaintiffs. Hence, they sought for declaration declaring that they are in possession of 18 acres 23 guntas of land and also sought to declare that sale deeds dated 5-3-1993 and 26-3-1993 executed by the father of defendants 1 to 3 in favour of Tharabai Narayan Shah is not binding on the plaintiffs from restraining the defendants from interfering with their peaceful possession.

19. The first plaintiff in his evidence has deposed that the plaintiffs are in possession of the Western portion of



Sy.No.264 measuring 18 acres 23 guntas and remaining 39 guntas at Easter portion is in possession of defendants 1 to 3. As per the decree passed in O.S.No.389/1924, 18 acres 23 guntas of land was given to the possession of plaintiffs. The copy of the decree in O.S.No.389/1924 is marked as Ex.P.1 and the translated copy was marked as Ex.P.1(a). The application Form No.7 filed before the Land Tribunal to the extent of 18 acres 23 guntas has been marked as Ex.P.2. The certificate issued by the Tahsildar regarding confirmation of filing of Form No.7 is marked as Ex.P.3. The certified copy of the order passed by the Land Tribunal Chikodi granting occupancy rights in respect of 13 acres 23 guntas in favour of the plaintiffs is marked as Ex.P.4, Form No.10, the Patta issued by Land Tribunal granting occupancy rights in respect of Sy.No.264 is marked as Ex.P.5. The wardi given by the first plaintiff to enter his name and name of his son and to mutate their names in respect of 18 acres 23 guntas is marked as Ex.P.6. He further deposed that in the year 1956, the



mutation entry in respect of 5 acres 39 guntas stands in the name of Boragave family and 13 acres 23 guntas stands in the name of the plaintiffs and he made an application for cancellation of the said entries. The certified copy of the cancellation of the entry was produced at Ex.P.7. In the year 1963, he submitted wardi to enter his name in respect of 18 acres 23 guntas of land and 39 guntas in the name of Boragave family. As per the wardi, mutation M.E.No.6534 was certified and the said copy has been marked as Ex.P.8. Further deposed that mutation entries from the year 1958-59 to 1992-93 were marked as Ex.P.10 to Ex.P.15.

20. P.W.1 in his cross-examination deposed that in the year 1924, the plaintiffs' family acquired leasehold of Sy.No.264 from Boragave family. The said land belonged to Shankar Boragave and his brother Mallappa Boragave. The said Shankar Boragave and Mallappa Boragave granted leasehold right of 18 acres 23 guntas to his father



Ramachandra Naik. Shankar Boragave and Mallappa Boragave are permanent tenants in respect of Sy.No.264 from Nipanikar Desai and the same permanent tenancy rights were sold to his father for a consideration of Rs.5,000/- under the registered document. Under the same registered documents, Shankar and Shivaling sold permanent tenancy in respect of Sy.No.332 to his father. He further deposed that he has no document to show that the permanent tenancy in respect of Sy.No.264 and Sy.No.332 were sold in favour of the father of the first plaintiff. He further deposed that the name of his father was recorded as Kabjedar in respect of R.S.No.332 in the village records even prior to the proceedings pertaining to Arbitration Award. He further deposed that he does not know if the name of his father was not recorded as Kabjedar of land in respect of R.S.No.264 prior to the award at Ex.P.1. He also deposed that on 8-1-1956, he submitted a separate wardi to enter his name to Sy.No.264. P.W.1 further deposed that the dispute before



the Arbitrator was about the mortgage deed pertaining to Sy.No.264 and Sy.No.332 between his father and Boragave. He says that he do not remember whether his father received all documents produced before the Arbitrator. He states that he has not produced the mortgage deed, which was the subject matter of the dispute before the Arbitrator. He has not produced any mortgage deed because there are no recital in the said mortgage deed as to delivery of possession of Sy.No.264 to his father by Shankar Boragave and Mallappa Boragave. Prior to the commencement of the arbitration proceedings, his father was in possession of R.S.No.264 as a mortgagee. He deposed that he does not know the date of the said mortgage. It is true that the date of mortgage pertaining to Sy.No.264 prior to the arbitration case is not referred in the award of Arbitrator. He states that there is no record to show that in pursuance to the award of Arbitrator of Ex.P.1, his father came in possession of the lands bearing Sy.No.264 and Sy.No.332. It is first time in 1963 he



obtained mutation entry No.6534 by submitting wardi. P.W.1 further deposed that "it is true that my father had not produced any documents before the Arbitrator to show that he is in possession of 18 acres 23 guntas of land. It is true that in Record of Rights extract of Nipani, Sy.No.264, the extent under our cultivation was shown as 13 acres 23 guntas and therefore, Land Tribunal granted occupancy rights to 13 acres 23 guntas only. I have not shown Boragave as landlord in Sy.No.264 in Form No.7. I have not specified for the period for which, I cultivated the land in Sy.No.264." It was further deposed that "since last 3-4 years there is a borewell in 5 acres 39 guntas on the eastern portion of Sy.No.264. It is true that said borewell was put prior to the institution of the suit. It is true that the said borewell was put up by Tharabai Narayan Shah and we are cultivating tobacco, Groundnut, Jawar and paddy crop in R.S.No.264. I have no record to show that we are cultivating the said crop to an extent of 18 acres 23



guntas in Sy.No.264.” The first plaintiff has not examined any witnesses in support of his claim.

21. D.W.1 who is defendant No.4 in the suit deposed that as per the Will executed by Smt.Tharabai Narayan Shah, they are in possession of 5 acres 39 guntas of land. The same was purchased from the father of defendants 1 to 3 as per two sale deeds dated 5-3-1993 and 26-3-1993 for a valuable sale consideration. Pursuant to the registered sale deeds, Tharabai Narayan Shah was put in possession and they have dug a borewell and cultivating the crops. Tharabai Narayan Shah planted coconut trees in a portion of the land by the side of the road. In the cross-examination he has denied the suggestion made by the plaintiffs that the plaintiffs are in possession of 18 acres 23 guntas of land. He has denied the suggestion that the plaintiffs are in possession of the land in dispute from the year 1924 to an extent of 18 acres 23 guntas of land and Boragave was in possession of 39 guntas of land.



Further he has deposed that the Land Tribunal has granted occupancy rights in respect of only 13 acres 23 guntas. Hence, the plaintiffs cannot claim over and above 13 acres 23 guntas of land.

22. Defendants 4 and 5 in support of their contention examined D.W.2 who is the neighbouring landowner of the land bearing Sy.No.264 of Nipani. In his evidence he had deposed that the total extent of land bearing Sy.No.264 was 18 or 19 acres of land and it was in possession of Appasaheb Boragave, the father of defendants 1 and 2. There are two strips one on the eastern side measuring 6 acres and other on the western side measuring 13 acres. Eastern portion is in possession of defendants 4 and 5 and they were cultivating the said land. In his cross-examination he deposed that he was working as a teacher from 1952. He has denied the suggestion made by the plaintiffs that at no time, Appasaheb Boragave was in possession of the land to an extent of 5 acres 39 guntas of



land, he also denied the suggestion that D.W.1 is not in possession of the land more than 39 guntas.

23. D.W.3 who is the owner of the lands bearing Sy.Nos.333 and 334 of Nipani town deposed that the Boragave was holding 65 to 70 acres of land and the extent of the suit land is 18 acres. On the Western side there is a portion measuring 10 - 12 acres and on eastern side there is a portion measuring 5 - 6 acres. He also deposed that D.W.1 is in possession of eastern portion and he has taken 5 crops. D.W.1 dug the borewell and that the water from the said borewell is used for cultivation. In the cross-examination he had deposed that D.W.1 and his family members were cultivating the eastern portion of the land bearing Sy.No.264. He has denied the suggestion that at no point of time Boragave was in possession of the area in excess of 39 guntas. D.W.4 is the owner of the adjacent land bearing Sy.No.265 deposed that land bearing Sy.No.264 consisting of two



parts one in the western side measuring 13 acres and other on the eastern side measuring 6 acres. The eastern portion of the land was in possession of D.W.1 and he has also dug the borewell and planted trees. D.W.5 and D.W.6 are the attesting witnesses of the sale deed. They have spoken about the execution of sale deeds in favour of Tharabai Narayana Shah.

24. On appreciation of the evidence of the parties and perusal of the documents make it very clear that the first plaintiff is not sure as to how he got the land in dispute. In his evidence he deposed that even prior to 1924 he is in possession of 18 acres 23 guntas of land. In the plaint averment he has stated that in pursuance to the order passed in the Arbitration Award and decree of the court he was put in possession of 18 acres 23 guntas of land. At one stage he says that he is a permanent tenant of Desai of Nipani. In his evidence he has stated that land bearing Sy.Nos.264 and 332 were taken on mortgage from the



Boragave family i.e. the predecessors of Defendants 1 to 3. The plaintiffs relied upon Ex.P.1, the certified copy of the decree passed by the Court in O.S.No.389/1924.

25. I have carefully gone through the Ex.P.1. Ex.P.1 is not the decree made in O.S.No.389/1924 but the decree of the Court is produced at Ex.P.11. The said Ex.P.1 does not speak about the presence of the Judge and it does not bear the signature of the Judge. On the contrary, the recital in Ex.P.1 clearly shows that Ex.P.1 bears the signatures of the parties. The decree of the Court will not bear the signatures of the parties. Therefore, it is clear that Ex.P.1 cannot be treated as a decree passed in O.S.No.389/1924. P.W.1 in his evidence deposed that he does not know what is Ex.P.1. Whether Ex.P.1 is the decree of the court below or award passed by the Arbitrator is to be ascertained. However, perusal of Ex.P.1 makes it is clear that it is not the decree of the court in O.S.No.389/1924 whereas the Ex.P1 is produced in



O.S.No.389/1924 which has been marked as Ex.P.11. Hence, Ex.P1 is neither the decree of the Court nor the award passed by the Arbitrator. The Arbitration Act came in to force in the year 1940 and it was made applicable to Presidency Town. Admittedly Chikodi is not the Presidency Town. However, in Ex.P.1 Sy.No.264 has not been mentioned.

26. P.W.1 in his cross-examination has stated that in the year 1924 his family acquired the leasehold rights in respect of the land bearing Sy.No.264 of Nipani town from Boragave family. Further he has deposed that he has purchased the permanent tenancy rights for a consideration of Rs.5,000/- from Shivaling Boragave and Shankar Boragave. However, in Form No.7 filed before the Land Tribunal, Shivaling Boragave and Shankar Boragave have not been shown as owners. The documents Ex.P.10 produced before the court clearly discloses that the plaintiffs are in possession of 13 acres 23 guntas of land



and father of the defendants is in possession of 5 acres 39 guntas of land from the year 1958-59 to 1965-66. Ex.P.11 is the Record of Rights in respect of the year 1965-66 to 1972-73. The entries in the Record of Rights also go to show that the plaintiffs were in possession only to the extent of 13 acres 23 guntas of land. Ex.P.12 is the Record of Rights for the year 1973-74 to 1977-78. The entry in Ex.P.12 goes to show that plaintiffs were in possession to an extent of 13 acres 23 guntas. Ex.P.13 is the certified copy of the Record of Rights for the year 1978-79 and 1979-80, which also shows that the plaintiffs were in possession of 13 acres 23 guntas of land. Ex.P.14 is the Record of Rights for the year 1980-81 and 1981-82 which shows the same thing. The presumption available under Section 133 of Karnataka Land Reforms Act that the entries in the Record of Rights are deemed to be true and correct unless the contrary is proved. There is no convincing rebuttal evidence before the court to show that



the entries in the Record of Rights made in Ex.P.10 to Ex.P.15 are incorrect or false.

27. It is relevant to mention here that the plaintiffs filed Form No.7 for grant of occupancy rights in respect of 18 acres 23 guntas of land. The Land Tribunal by its order dated 23-10-1981 granted occupancy rights only in respect of 13 acres 23 guntas of land. Being aggrieved by the said order, after a lapse of 12 years, W.P.No.4762/1993 was filed before this Hon'ble Court. This Hon'ble Court by its order dated 11-3-1993 dismissed the writ petition. Against which, an appeal in W.A.No.849/1993 was filed and the same also came to be dismissed by the Division Bench of this court on 5-2-1997 confirming the order passed by the Land Tribunal. Further, the first plaintiff filed one more application in Form No.7 claiming occupancy rights in respect of 19 acres 16 guntas of land in Sy.No.264 on 20<sup>th</sup> December 1978. The said application was also rejected by the Land



Tribunal on 2-12-1981. Hence it is clear that the plaintiffs are in possession and enjoyment of 13 acres 23 guntas of land only. The documentary evidence clearly discloses the same.

28. Sri.Ravikumar D.Gokakar contended that defendants 1 to 3 though filed written statement, did not step into the witness box and subjected themselves to the cross-examination. Hence, an adverse inference has to be drawn against defendants 1 to 3 and also submitted that under Section 114 of the Evidence Act the presumption is in favour of the plaintiffs. However, Sri.M.G.Naganuri, advocate for Respondents 4 and 5 contended that defendant 1 to 3 have lost their interest on the land in question since they had already sold the entire extent of land measuring 5 acres 39 guntas in favour of Tharabai Narayan Shah. Hence, no adverse inference can be drawn against respondents 1 to 3. Further, the appellants relied upon the judgment reported in AIR 1992 SC 2685 in the



case of RAM SARAN AND ANOTHER v/s. SMT.GANGA DEVI and also the judgment reported in AIR 2009 SCW 5934 in the case of RADHEY SHYAM UPADHYAYA V/S STATE OF UP contending that the plaintiffs are entitled for the injunction and the Appellate Court has power to reappreciate the evidence.

29. On the other hand, advocate for the respondents relied upon the judgment reported in 2008(4) SCC 182 in the case of THIMMAIAH v/s SHABIRA AND OTHERS contending that in the absence of possession he is not entitled to relief of permanent injunction without claiming recovery of possession. He further relied upon the judgment reported in AIR 1972 SC 2685 cited supra contending that where the defendant is in possession of some of the suit properties and the plaintiff in his suit does not seek possession of those properties, but merely claiming declaration that he is the owner of the said property is not maintainable. Further he also relied upon



ILR 2007 KAR 339 in the case of SRI. ARALAPPA v/s. SRI. JAGANNATH AND OTHERS contending that in a suit for declaration of ownership and permanent injunction the plaintiff has to prove his title to the property and also his possession over the property on the date of suit. It was further held that when the plaintiff is not in possession of the property on the date of suit, relief of permanent injunction is not appropriate. The appropriate relief consequential to declaration of ownership would be recovery of possession of the property. When the plaintiff is out of possession of the property and does not seek relief of possession, mere suit for declaration is not maintainable.

30. After examining the oral and documentary evidence produced by the parties, I hold all the 3 issues against the appellants. I am of the view that the court below after considering the entire materials on the record came to the conclusion that the plaintiffs have not made out any case



for grant of reliefs prayed for them in the suit. The records produced by the parties clearly go to show that the plaintiffs are not in possession of 5 acres 13 guntas of land. The Land Tribunal has rejected the claim to an extent of 5 acres of land though the appellants claim to be the tenants to an extent of 18 acres 23 guntas. Hence, the prayer of the appellants to declare them as owners of the entire 18 acre 23 guntas of land does not arise. Hence, the appellants have not made out any case to interfere with the well-considered order passed by the court below. Hence, I pass the following:

ORDER

The appeal is dismissed.

Parties to bear their own cost.

Sd/-  
JUDGE

mpk/-\*