

**IN THE HIGH COURT OF KARNATAKA AT BENGALURU**

**DATED THIS THE 31<sup>ST</sup> DAY OF DECEMBER, 2019**

**BEFORE**

**THE HON'BLE Dr. JUSTICE H.B. PRABHAKARA SASTRY**

**R.F.A. No.1343 OF 2015**

**BETWEEN:**

Sri. B.N. Pavan Kumar,  
S/o.A.R. Nagarajachari  
Aged about 32 years,  
R/a No.004, Ground Floor,  
Vahin Towers,  
Parama Prasad Church Road,  
Hale Mangammanapalya road,  
Bommanahalli,  
Bengalore – 68.

...Appellant

(By Smt. Deepashree, Advocate)

**AND:**

Sri. Harish Kumar T.  
S/o. Talanki Rangaiah Setty,  
Aged about 38 years,  
No.126, Pailwan T. Annaiappa Main Road  
Bangalore -02  
Represented by his GPA Holder  
R. Nanjundaswamy,  
S/o. Ramaiah Setty,  
Aged about 66 years  
Residing at No.29,  
Veeraswamy Street,  
Seven Wells,

Chennai – 600 001.

...Respondent

(By Sri. Keshava Bhat A., Advocate)

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This Regular First Appeal is filed under Section 96 of the Code of Civil Procedure, 1908, against the judgment and decree dated:25-07-2015 passed in O.S.No.5138/2012 on the file of the XLIII Additional City Civil and Sessions Judge, Bangalore (CCH 44), decreeing the suit of the plaintiff in part for injunction.

This Regular First Appeal having been heard and reserved on 10-12-2019, coming on for pronouncement of judgment, this day, the Court delivered the following:

### **J U D G M E N T**

This is a defendant's appeal. The present respondent as a plaintiff had instituted a suit against the present appellant in O.S.No.5138/2012, in the Court of the XLIII Additional City Civil and Sessions Judge, Bangalore (CCH 44) (hereinafter for brevity referred to as "Trial Court") for a mandatory injunction, directing the defendant to open the lock put to the staircase of the building situated in the suit schedule property and to keep open the staircase. Consequently, for a

permanent prohibitory injunction, restraining the defendant, his men etc. from interfering with the plaintiff's right to use the staircase of the building in the suit schedule property.

2. The summary of the case of the plaintiff in the Trial Court was that, the plaintiff is the absolute owner in possession and enjoyment of the suit schedule property bearing old Numbers 85 and 86, later on Nos. 92 and 93, next No.93/B Kumbarpet Main Road, Tigalarapete, Bengaluru, and measuring East to West - 24 feet, North to South - 45 feet with RCC ground floor, First floor and second floor buildings.

The defendant's father by name Sri. Nagarajachari was the original owner of the suit property. He had executed a registered Sale Deed dated 12-03-2004 in favour of one Sri. M. Shanmugam Sundaram and Smt. Senthamarai Jayasheelan, who in turn, had

mortgaged the said property in favour of Indian Bank, Koramangala Branch, Bengaluru, as a security to a loan. Since they committed default in the repayment of the loan, the Bank brought the property for sale under the provisions of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (hereinafter for brevity referred to as "SARFAESI Act"). The plaintiff purchased the said property in the auction for a sum of ₹34,70,000/- from the said Bank on 14-07-2011. Thereafter, a Sale Certificate was issued by the Bank and the same is registered. As such, the plaintiff has become the owner in possession of the property.

It was further the contention of the plaintiff that, the defendant who does not have any right over the property, joined by his two brothers filed a suit in O.S.No.6940/2005, before the Trial Court, for partition and for seeking declaration that the Sale Deed dated

12-03-2004 executed by their father in favour of M. Shanmugam Sundaram and Smt. Senthamarai is not binding on them. The said suit came to be dismissed on 18-01-2011.

It was further the case of the plaintiff that, the suit property consists of a building with three floors, wherein, the ground floor consists of four commercial shops and upper floor consists of residential premises. There is a staircase situate on the North West portion of the building to have access to the upper floors. The said staircase is being used by the plaintiff and the persons occupying upper floors, since many years, from the date of construction of building. The plaintiff has no other staircase to reach the upper floors.

The defendant claims to be the owner of land measuring 8 ft. X 28 ft. situated by the side of the suit schedule property also has a building with two floors and

a common staircase for access to the upper floors for both the buildings. Thus, the said stair case is common for both the buildings situate in the schedule property including the plaintiff as well that of the defendant. The defendant taking advantage of the absence of the plaintiff, has locked the stair case entrance.

The plaintiff after amending the plaint further contended that, the defendant has illegally demolished only the staircase building reaching the upper floors, due to which the plaintiff is not in a position to construct a separate staircase to his property as it would be in contravention of the bye-law. With this, he prayed for allowing the suit.

3. The defendant appeared through his counsel and filed his Written Statement, wherein, he denied the plaint averments. However, he admitted that the defendant's father late Sri.A.R. Nagarajachari was the

owner of the entire property consisting of the suit schedule property measuring 24' X 45' and adjacent property measuring 8' X 28'. Both these units were treated as one unit. One Sri. Shanmuga Sundaram had approached A.R. Nagarajachari for help as he was in financial trouble. At that time, Nagarajachari executed a Sale Deed in favour of Shanmuga Sundaram on 12-03-2004 and on the same day, a re-conveyance Deed was executed by Shanmuga Sundaram in favour of A.R. Nagarajachari. Since the said Sale Deed was a sham document, possession was never transferred but continued to be with A.R. Nagarajachari.

The defendant also admitted that there is a building in the schedule property with three floors. However, he denied that the alleged staircase is the only access to the building. The father of the defendant had built the structure on the whole of the property without differentiating between the suit schedule property and

the adjacent property measuring 8' X 28'. The plaintiff is not prevented from putting up a staircase in his own property and that he has no right over the property measuring 8' X 28 '. The defendant further alleged that the staircase portion has not been sold nor any rights have been confirmed to the plaintiff. The staircase is the integral part of 8' x 28' portion of the suit schedule property. There is no easementary right in favour of the plaintiff. With this, he prayed for dismissal of the suit.

4. Based on the pleadings of the parties, the Trial Court framed the following issues:

*"1. Whether the plaintiff proves that he is in peaceful possession and enjoyment of the suit property as on the date of suit?*

*2. Does the plaintiff prove that there is interference by the defendant to his lawful possession over the suit property?*



3. *Does the plaintiff prove that he is entitled for the relief of Permanent Injunction against the defendant?*

4. *What order or decree?"*

*Additional Issues:*

1. *Does the plaintiff prove that the defendant put up lock to the staircase illegally without any right?*

2. *Does the plaintiff is entitled for the relief of Mandatory Injunction?"*

5. In support of his plaint, the plaintiff got himself examined as PW-1 and documents from Exs.P-1 to P-11 were marked. The defendant got himself examined as DW-1 and documents from Exs.D-1 to D-31 were marked.

6. After hearing both side, the Trial Court by its impugned judgment and decree dated 25-07-2015 while answering issues No.1, 2 and 3 and additional issues No.1 and 2 in the affirmative, decreed the suit of the

plaintiff. It is against the said judgment and decree, the defendant has preferred this appeal.

7 Lower Court records were called for and the same are placed before this Court.

8 Heard the arguments of the learned counsels from both side and perused the material placed before this Court including the memorandum of appeal and the impugned judgment.

9. Learned counsel for the appellant/defendant in her argument submitted that the defendant would not dispute the fact that the plaintiff is the purchaser in auction of the suit schedule property. However, she contended that the plaintiff has no ownership or right to use the staircase which is exclusively in the property measuring 8' X 28' and belonging to the defendant.

Learned counsel gave more emphasis on the aspect that the plaintiff in his suit has described the alleged disputed staircase as the staircase of the building situated in the suit schedule property. While highlighting the said aspect, learned counsel submitted that since, admittedly, there being no stair case in the suit schedule property and the only stair case being in the adjoining property of the defendant, the decree also since confines to the stair case in the suit schedule property, the appeal deserves to be allowed.

She further contended that the plaintiff has not sought for any relief of declaration with respect to any easementary right regarding use of the staircase in the property of the defendant. The plaintiff giving a picture in the Trial Court that the stair case is in the suit schedule property, has played fraud upon the Court. However, the Trial Court, without noticing that the stair

case was out side the suit schedule property, but the plaint depicts it as though it is in the suit schedule property, has erroneously decreed the suit.

10. Learned counsel for the respondent/plaintiff in his argument submitted that, the entire dispute in the suit is only with respect to the right to use of the staircase adjoining the suit schedule property. The mentioning of the location of the said staircase as though in the suit schedule property is only a small mistake, however, both parties have understood the case correctly that the staircase is outside the suit schedule property. In so far as the maintainability of the bare suit for mandatory injunction, in the absence of any relief for declaration of easementary right is concerned, the learned counsel submitted that there is no related pleadings in the Written Statement. He also submitted that, the easement of necessity is the right

claimed in the suit, though it is not expressly spelt out in the pleading. While concluding the argument, learned counsel submitted that, the relief in the impugned decree is similar to an order of *status quo* till either of the parties file a declaratory suit. Therefore, the said relief in the nature of an interim order deserves to be continued by dismissing the appeal.

11. After hearing the learned counsels from both side, the points that arise for my consideration in this appeal are:

*1] Whether the alleged staircase situated in the property of the defendant measuring 8'X28' is a common staircase amenable for the use of the plaintiff also?*

*2] Whether the plaintiff is entitled for the relief of mandatory injunction?*

*3] Whether the judgment and decree under appeal deserves any interference at the hands of this Court?*

12. One Sri. R. Nanjundaswamy, the General Power of Attorney holder of plaintiff was examined as PW-1, who in his examination-in-chief in the form of affidavit evidence has reiterated the contentions taken up by the plaintiff in his plaint. He has reiterated that the suit schedule property was purchased by the plaintiff from the authorised Officer of the Indian Bank for consideration of a sum of Rs.34,70,000/- in the auction sale under SARFAESI Act and obtained a Sale Certificate dated 14-07-2011. The same has been registered in the Office of the Sub-Registrar, Gandhinagar. Thus, the plaintiff has acquired absolute right, title and interest over the suit schedule property. To corroborate the same, he has produced a certified copy of the Sale Certificate and got it marked at Ex.P-2. Stating that thereafter, the Khata of the suit schedule property was also made over by the Bruhat Bengaluru Mahanagara Palike (hereinafter for brevity referred to as "BBMP") in

favour of the plaintiff, PW-1 got produced a Khata Certificate and Khata extract at Exs.P-3 and P-4 respectively. Further stating that thereafter, it is the plaintiff who has been paying property tax with respect to the suit schedule property, the plaintiff has also produced copies of two tax paid receipts for the year 2011-12 and 2012-13 at Exs.P-5 and P-6 respectively. The evidence of PW-1 on these points and also these documents have not been seriously disputed from the defendant's side. Further, to show that the present defendant had instituted a suit against his father Sri. A.R. Nagarajachari and others, for the relief of partition and injunction and that the said suit came to be dismissed for non-prosecution on 18-01-2011, the plaintiff has also produced a certified copy of the plaint in O.S.No.6940/2005 and the certified copy of the order dated 18-01-2011(in order sheet) at Exs.P-7 and P-8 respectively. The said fact that the present defendant

had instituted a suit against his father A.R. Nagarajachari and against one M. Shanmugam Sundaram and Smt. Senthamarai Jayasheelan who are said to have purchased the portion of the property from A.R. Nagarajachari and the fact that those two purchasers had subsequently mortgaged the property in favour of Indian Bank since having not been in dispute, Exs.P-7 and P-8 have not been disputed by the defendant. Therefore, from the defendant's side, in the cross-examination of PW-1, the evidence of PW-1 as to the flow of title to the plaintiff with respect to the suit schedule property has not been denied or disputed.

13. On the other hand, it was only elicited in the cross-examination of PW-1 that, the defendant is holding his property measuring 8' X 28' adjoining the suit schedule property and eleven photographs from Exs.D-1 to D-11 were also got marked through PW-1, by



confronting those photographs to the witness, who admitted that those photographs are with respect to the suit schedule property and the adjacent properties said to be belonging to the defendant. However, most important point that was elicited in the cross-examination of PW-1 is that, the witness has stated that the present staircase is not within the area of 24 feet X 45 ½ feet and that he has not seen the existence of a staircase earlier to purchase. However, the witness volunteered that there was a lock put to the staircase, even though they were intending to see the staircase. By making the said statement, PW-1 has clearly admitted that the alleged staircase is not within the area of the suit schedule property belonging to the defendant and measuring 8' X 28'.

14. The defendant as DW-1 in his examination-in-chief in the form of affidavit evidence has reiterated the

contentions taken up by him in his Written Statement and specifically contended that, the staircase with respect to which the plaintiff has prayed for the relief of mandatory injunction is not within the suit schedule premises, but the said staircase is in his (defendant's) adjacent property upon which the plaintiff has got no right, title or interest in any manner. He has categorically stated that the said staircase is not a common staircase.

15. In his support, he has got produced apart from the photographs from Exs.D-1 to D-11, a copy of the application for Khata filed by the plaintiff with BBMP at Ex.D-12 and tax paid receipt with respect to the property paid by his father for the year 2011-12 at Ex.D-13. Most importantly, he has produced a copy of the Sale Deed dated 12-03-2004 executed by his father Sri.A.R. Nagarajachari in favour of M.Shanmugam Sundaram and Smt. Senthamarai Jayasheelan at

Ex.D-15. The property sold under the said Sale Deed is the property which was later mortgaged by the said purchasers in favour of Indian Bank and from whom the plaintiff had purchased the same in an auction sale. The schedule of the property sold to those purchasers under Ex.D-15 by the father of the defendant mentions in the schedule that, the property was measuring East to West: 24 feet, North to South: 45 feet with a particular boundary. It also says that the said property comprises ground floor, first floor and second floor, each measuring 930 sq.ft. with RCC building having electricity, water and sanitary connections. Interestingly, there is no whisper about any right of the purchasers to use the alleged staircase which is in the remaining property belonging to the very same vendor Sri.Nagarajachari or any right transferred to the purchasers to use the very same staircase in the defendant's property as a common staircase.

16. On the other hand, Ex.D-16 produced by DW-1 which is a copy of the Sale Deed dated 14-06-1973 from one Smt. Chinnathayamma as a vendor executed in favour of Sri.A.R. Nagarajachari who is the father of the defendant, in the schedule clearly mentions that, the property sold was measuring East to West: 24 feet and North to South: 45 feet 6" with RCC construction there upon and also a space measuring East to West: 8 feet, North to South: 28 feet on the Northern side of the property sold. It is further mentioned in the same schedule that the said space has got a staircase, bathroom, passage, electrical light and water tap. Thus, a conjoint reading of Ex.D-15 and D-16 would go to show that even though Nagarajachari had purchased under Ex.D-16 a constructed building in the sital area measuring 24' X 45 ½ feet and an adjoining open space measuring 8' X 28', but he has sold to Sri.M. Shanmugam Sundaram and

Smt. Senthamarai Jayasheelan under Ex.D-15 only an area of 24' x 45'. Thus, the entire open space on the Northern side of the said property together with the staircase, bathroom, lavatory, water tap, were not made part of the Sale Deed under Ex.D-15, as such, were retained by the vendor Sri.Nagarajachari himself. The said purchasers from Nagarajachari, i.e. Sri.M. Shanmugam Sundaram and Smt. Senthamarai Jayasheelan have mortgaged the property what they had purchased under Ex.P-15 in favour of Indian Bank and since the plaintiff has purchased the very same property in an auction sale from the Indian Bank, the plaintiff cannot have any title, over the open space measuring 8' x 28' which also includes a staircase in it. This very clearly establishes that the staircase upon which the plaintiff is claiming the relief of mandatory injunction against the defendant is not within the suit

schedule property of the plaintiff, but it is located in the adjacent property belonging to the defendant.

As such, the plaintiff describing the staircase as though it is 'in' the suit schedule property purchased by him, both in his plaint as well in his evidence is utterly a falsehood. Thus, the very prayer made by the plaintiff that the defendant be directed to open the lock put to the staircase of the building situated 'in' the suit schedule property (emphasis supplied by me), amounts to misleading. It is this act of the plaintiff, the appellant herein (defendant) calls as a fraud played upon the Trial Court. In the absence of the defendant proving that the plaintiff had intentionally made a wrong statement for some gain in his favour, the said act of the plaintiff in mis-describing the location of the staircase cannot be called as a fraud played upon the Court. However, the fact remains that the plaintiff has not described the

correct location of the staircase and has misrepresented to the Court that the staircase was located in the suit schedule property upon which he claims his title. Therefore, the very prayer of the plaintiff wherein he has stated that the staircase is situated in his suit schedule property is proved to be false.

17. For that matter, it is also to be noticed that, even in the cross-examination of DW-1 also, the plaintiff has elicited from the witness that the staircase was in the property measuring 8' X 28' abutting the suit property and that there are no other staircase in the building, except the one provided in 8' X 28' portion.

18. The second question that remains is, whether the said staircase situated in the abutting property measuring 8' X 28' was a common staircase being used by all the persons to go to the upper floors located in the suit schedule property and the abutting property

measuring a sital area of 8' x 28'. The plaintiff has not expressly stated the same in his evidence through PW-1. On the contrary, though he denied a suggestion made in his cross-examination that, the staircase was not a common staircase, however, he stated that he has not produced any documents to show that the staircase was a common staircase, which means, admittedly, the plaintiff except his oral statement, has not produced any corroborative evidence to show that, the said staircase situated in the property measuring 8' X 28' was a common staircase.

19. In the cross-examination of DW-1, though it was elicited that, that was the only staircase put up for the entire building, but no specific statement was brought from DW-1 to show that it was a common staircase. For a suggestion made to DW-1 in his cross-examination that from the last forty years, till the date



of evidence, the staircase situated in 8' X 28' portion was being used by all the persons to go to the upper floors as earlier they were using it, the witness stated that, the said staircase was not used by the persons when the Bank had seized the property. He further stated that, he has locked the door leading to the staircase since the said staircase belonged to his property. The said statement elicited in the cross-examination would go to show that, when both the portions of the property were being used by A.R. Nagarajachari, after its purchase by him from Smt. Chinnathayamma under Ex.D-16, the staircase was being used as a common staircase for the building. It is also because as on the date of purchase of the said property under Ex.D-16, in 1973, it appears that 8' X 28' portion of the building was an open space. However, when said Nagarajachari sold the property to Sri.M. Shanmugam Sundaram and Smt. Senthamarai

Jayasheelan in the year 2004 under Ex.D-15, he did not make any mention about the right of the purchasers to use the said staircase as a common staircase. He retained the property measuring 8' X 28' with himself and sold only the area within 24' X 45' with RCC building thereupon. However, there is no evidence on record to show that after the sale of the said portion of the property to M. Shanmugam Sundaram and Smt. Senthamarai Jayasheelan, they were using the very same staircase in the abutting property as the staircase for their approach for the upper floors. Neither PW-1 has stated anything about it, nor has specifically elicited any details in that regard in the cross-examination of DW-1.

In that background, even though the suggestion made to DW-1 in his cross-examination that, it was a common staircase used by all the persons, has confined only to a suggestion without any specific admission or

denial by the witness. However, DW-1 has shown that when the Bank has seized the property, he has put lock to the staircase. Admittedly, the present plaintiff has purchased the suit schedule property subsequent to the Bank seizing the said property, by which time, the defendant had already put lock to the staircase, denying the use of the said staircase by anyone as an approach to the upper floors. The same can be further inferred by the Statement of PW-1 made in his cross-examination that, he has not seen existence of staircase earlier to purchase, since there was a lock even though they were intending to see the staircase. That means, as on the date of the purchase of the suit property, the purchaser/plaintiff was aware that the alleged approaching staircase was put under lock and key and without even seeing the upper floors in the suit schedule property, he has proceeded to purchase the property as was in the same position from the Indian bank. In that

situation, when there is no evidence to show that at no point of time, the plaintiff either has used or has been using the said staircase as an approaching staircase for the suit schedule property, and more particularly, when the plaintiff has not claimed any easementary right over the use of staircase as the common staircase of approach to his upper floors in the suit schedule property, a mere suit for mandatory injunction seeking a direction to the defendant to open the lock put by him to the staircase and a permanent prohibitory injunction against the defendant from interfering with his right to use the staircase of the building, is not maintainable.

20. Learned counsel for the respondent/plaintiff in his argument submitted that, the suit is maintainable both under Section 34 of the specific Relief Act, 1963, as well under Section 13 (a) of the Indian Easements Act,

1882, and an express relief in that regard need not be claimed.

He further submitted that the relief granted by the Trial Court in the impugned decree is similar to an order of *status quo* till either of the parties file a necessary declaratory suit, as such, the same relief be continued by dismissing the appeal.

21. The said argument of the learned counsel for the respondent/plaintiff is not acceptable for the reason that, admittedly, Section 34 of the Specific Relief Act speaks about the declaratory decree and that the suit of the plaintiff was not for any declaratory relief. The plaintiff has nowhere sought any declaration either about his alleged ownership upon the staircase or right to use the staircase as a common staircase.

Secondly, Section 13(a) of the Indian Easements Act, no doubt says that, where one person transfers or bequeaths immovable property to another, if an

easement in other immovable property of the transferor or testator is necessary for enjoying the subject of the transfer or bequest, the transferee or legatee shall be entitled to such easement, but, the plaintiff's prayer made in the plaint nowhere comes near to the one which he was required to seek under easement of necessity.

As already observed, the prayer of the plaintiff was only for a mandatory injunction without whispering anything about his right of easement of necessity anywhere in his pleading or evidence.

22. Therefore, in the absence of any pleading, evidence or prayer in the present facts and circumstance of the case, the Court cannot *suo motu* infer certain existence of easementary right or consider any easement of necessity in favour of the plaintiff. It is on this point, the Trial Court has committed an error.

23. The Trial Court did not notice the fact that the staircase was outside the suit schedule property to the plaintiff. It also did not notice that there was no mentioning about the plaintiff's right to use the staircase even as an easement of necessity. Added to the same, it also did not even notice that, the vendor to the plaintiff himself had not acquired title with respect to the staircase in the Sale Deed at Ex.D-15. He did not even get mentioned anything about his right to use the staircase as the only mode of approach to the property purchased by them. As such, the Trial Court ought to have observed that all the transferors who did not have with themselves or could not show that they had some particular rights in the suit schedule property, could not have transferred them to the purchaser who is the plaintiff in the instant case.

However, the Trial Court ignoring all these important aspects, has assumed by itself that until the

plaintiff locked the staircase, all the persons were using the staircase and proceeded to hold that, though the said observation cannot be considered as creating an absolute right in favour of the plaintiff, but, till either of the parties get their rights determined, the plaintiff is entitled for making use of the staircase.

The said reasoning since is not found to be appropriate, for the reasons given above, and also in view of the fact that, when the plaintiff had an opportunity to file a suit seeking declaration of his right over the property or claiming any easementary right, has not chosen to do so, the Court cannot invent some remedy which is not sought for by the party and which causes prejudice to the interest of the other side. As such, the judgment and decree under appeal deserves to be set aside and the suit of the plaintiff deserves to be dismissed.



Accordingly, I proceed to pass the following:

**ORDER**

[i] The appeal is ***allowed***;

[ii] The judgment and decree dated 25-07-2015 passed by the learned XLIII Additional City Civil and Sessions Judge, Bangalore (CCH 44) in O.S.No.5138/2012, is ***set aside***;

[iii] The suit of the plaintiff is dismissed.

Registry to transmit a copy of this judgment along with the Lower Court records to the concerned Trial Court immediately.

**Sd/-  
JUDGE**

BMV\*