

IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 29TH DAY OF NOVEMBER, 2019

BEFORE

THE HON'BLE MR.JUSTICE PRADEEP SINGH YERUR

MISCELLANEOUS FIRST APPEAL NO.2064 OF 2015 (CPC)

BETWEEN:

MR. VINCENT D'SOUZA
S/O. LATE BENJAMIN D'SOUZA
INDIAN CHRISTIAN
AGED ABOUT 69 YEARS
RESIDING AT NO.A-2
STARLET APARTMENT
SHIVBAGH ROAD, MANGALURU
DAKSHINA KANNADA

...APPELLANT

(BY SRI SANATH KUMAR SHETTY, ADVOCATE)

AND:

1. MR. RONALD PINTO
AGED ABOUT 50 YEARS
2. MR. PETER PINTO
AGED ABOUT 46 YEARS

THE RESPONDENTS ARE
INDIAN CHRISTIANS AND
CHILDREN OF LATE THOMAS PINTO
AND BOTH ARE R/AT. "SUREKHA HOUSE"
MENNABETTU VILLAGE, KNNIGOLI POST
MANGALURU TALUK – 574 150

...RESPONDENTS

(BY SRI K.K. CHANDRANATH ARIGA, ADV FOR R1 & R2)

THIS MISCELLANEOUS FIRST APPEAL IS FILED
UNDER SECTION 104 READ WITH ORDER 43 RULE 1 (R)
OF THE CODE OF CIVIL PROCEDURE PRAYING TO SET
ASIDE THE ORDER PASSED ON I.A.NO.6 IN

O.S.NO.129/2012 ON THE FILE OF SENIOR CIVIL JUDGE AND ACJM, KARKALA AND ALLOW THIS APPEAL WITH COSTS THROUGHTOUT AND GRANT SUCH OTHER RELIEFS.

THIS APPEAL COMING ON FOR ADMISSION THIS DAY, THE COURT, DELIVERED THE FOLLOWING:

JUDGMENT

Heard the learned counsel appearing for appellant and the learned counsel appearing for the respondents.

2. Though the matter is listed for Admission on consent of both the learned counsels, the matter is taken up for final disposal.

3. The appellant herein is the plaintiff before the learned Senior Civil Judge & ACJM, Karkala in OS No.129 of 2012 and the respondents herein are the defendants. The appellant had filed a suit for the relief of declaration that he is the absolute owner of the Plaintiff 'A' Schedule Property by virtue of settlement deeds dated 27.10.1994, 16.11.1994, 05.12.1994, 02.02.1995 and 14.03.1995, which was registered at Sub-Registrar Office, Mulki and was executed by one Smt. Kitheria Crasta in favour of the appellant and that the same are valid and consequently to direct the defendants to quit and surrender the vacant possession of the plaintiff 'A' Schedule property. The

respondents / defendants have appeared before the Court below and filed their statements and contested the matter.

4. The appellant has filed an application under Order 39 Rules 1 and 2 and Section 151 of the Code of Civil Procedure, 1908 numbered as IA No.6, for the relief of injunction restraining the defendants, their men and servants from altering the nature of the plaint 'A' Schedule property and from cutting and removing the tree growth and from putting up any new construction in the said property. The respondents / defendants have filed their objections. The learned trial Judge by an order dated 17th January 2015 after considering the contentions of both the parties dismissed the said application, which is impugned herein by virtue of this appeal.

5. It is the case of the appellant that originally plaint 'A' Schedule property was owned by Late Smt. Maria Mornel D'Souza Bai, grand mother of the plaintiff. By virtue of settlement deed dated 12.08.1955 the suit schedule property was transferred to the mother of the plaintiff Smt. Kitheria Crasta under the registered settlement deed.

6. The mother of the plaintiff through the Power of Attorney Holder executed five registered settlement deeds in favour of the plaintiff. It is the case of the respondents / defendants that for the same property a 'Will' has been executed in favour of the mother of the defendants on 08.09.1960 and thereafter, the mother of the defendants has further executed a Will dated 05.06.1992 in favour of the defendants. It is also the case of the respondents / defendants that they have filed a case in P&SC No.17/1995 and got probate of the Will dated 05.06.1992 by virtue of the order date 31.07.1995. Further, the appellant herein had challenged the same by filing Misc. Case No.54/1999. The same was not pressed by the appellant. It is also the case of the appellant that he had filed a suit in OS No.256/2005 against the very same defendants for the relief of injunction with respect to the property measuring to an extent of 10 cents, which came to be dismissed and the same was taken up in appeal in RA No.138/2011. The said appeal has been heard and remanded for reconsideration before the learned Civil Judge, which was challenged by the respondents / defendants by filing MSA No.134/2018 and the same is pending adjudication. This being the facts of the case,

while deciding the application filed by the appellant on IA No.6, the appellant has sought for the relief of not to change or not to alter the nature of the suit schedule property, not to cut and remove the trees and not to put up any new construction.

7. Admittedly, even according to the appellant the respondents / defendants are in possession of the suit schedule property. As the statement made by the learned counsel appearing for the respondents and from the averments made by the appellant, it is apparent fact that there are some trees and agricultural activity, which is carried on in the suit schedule property by the respondents / defendants. Therefore, the question of possession and usage of the property by the respondents / defendants is not in dispute.

8. The apprehension of the appellant is to the extent that there would be change in the nature of the suit schedule property, which may affect the rights of the appellant in case he succeeds in the suit.

9. The learned counsel for respondents/ defendants submitted that the respondents are cultivating

the land and have already put up certain constructions in the suit schedule property, which should not be disturbed.

10. In my considered opinion, when the respondents / defendants are in admitted possession of the suit schedule property and cultivating the lands for several years in the guise of the Will, they have *prima facie* established the fact that they have continued in possession and cultivating the lands on the basis of the statement and averments made in their counter. It is trite law that when a person is in admitted possession, he should not be disturbed until and unless contrary is established or proved. In the case on hand, the appellant has himself stated in the plaint and in the application that the defendants are in possession of the property and seeking for possession from the defendants.

11. It is needless to observe that no opinion is expressed with regard to the validity and proof of the Will of the defendants and the settlement deeds of the appellant, which would be decided in full fledged trial by the learned Civil Judge in a Civil Suit. Therefore, the order passed by the learned Civil Judge with regard to the validity of the settlement deed not giving any right to the

mother of the plaintiff, may not be right, as the said suit in OS No.256/2005 is remanded and is pending adjudication.

12. Accordingly, I pass the following order:

The respondents / defendants, who are in admitted possession of the suit schedule property shall continue to be so and are permitted to collect and conduct activities in the suit schedule property. The respondents / defendants are hereby directed not to change the nature of the suit schedule property. Accordingly, the order of the learned Civil Judge is set aside to the extent stated above. The appeal is accordingly disposed of with the observations made above. It is needless to add that this Court has not expressed any opinion with regard to the merits of the case. All contentions are left open. No order as to costs.

Sd/-
JUDGE

VK