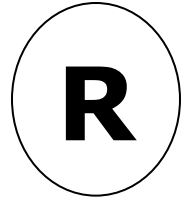


IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 13<sup>th</sup> DAY OF JUNE, 2025

BEFORE

THE HON'BLE MR. JUSTICE H.P. SANDESH



**REGULAR SECOND APPEAL NO.23/2021 (DEC)**

**BETWEEN:**

- 1 . SOMAYYA BELCHADA  
S/O KORAGE BELCHADA  
AGED ABOUT 73 YEARS  
R/AT CHAPPUGURI, BOLJE  
UDYAVARA VILLAGE  
UDUPI TALUK AND DISTRICT-574 118.  
... APPELLANT  
(BY SRI. PRASANNA V.R., ADVOCATE)

**AND:**

- 1 . SANTHOSH  
S/O LATE GULABI BELACHADTHI  
AGED ABOUT 33 YEARS
- 2 . SANDEEP  
S/O LATE GULABI BELACHADTHI  
AGED ABOUT 30 YEARS  
  
BOTH ARE  
R/AT BHAGAVATHI NILAYA  
NEAR FISH MARKET  
UDYAVARA, UDUPI TALUK  
UDUPI DISTRICT-574118.
- 3 . SHEKHAR A. KOTIAN  
S/O LATE AITHU BELCHADA  
AGED ABOUT 54 YEARS

- 4 . VASU A. KOTIAN  
S/O LATE AITHU BELCHADA  
AGED ABOUT 52 YEARS
- 5 . SURESH A. KOTIAN  
S/O LATE AITHU BELCHADA  
AGED ABOUT 53 YEARS
- 6 . SMT. LEELA  
D/O LATE AITHU BELCHADA  
AGED ABOUT 49 YEARS
- 7 . ASHOKA A. KOTIAN  
S/O LATE AITHU BELCHADA  
AGED ABOUT 47 YEARS

RESPONDENTS NO.3 TO 7 ARE  
R/AT NEAR FISH MARKET  
UDYAVARA VILLAGE, UDUPI TALUK  
UDUPI DISTRICT-574 118.

... RESPONDENTS

(BY SRI. CHANDRANATH ARIGA K., ADVOCATE FOR  
R1, R3 AND R6; R7 - SERVED AND UNREPRESENTED;  
VIDE ORDER DATED 30.10.2024,  
NOTICE TO R2, R4 AND R5 IS HELD SUFFICIENT)

THIS R.S.A. IS FILED UNDER SECTION 100 OF CPC, 1908  
AGAINST THE JUDGMENT AND DECREE DATED 07.08.2020  
PASSED IN R.A.NO.03/2016 ON THE FILE OF THE PRL. SENIOR  
CIVIL JUDGE AND CJM, UDUPI DISMISSING THE APPEAL AND  
CONFIRMING THE JUDGMENT AND DECREE DATED 17.11.2015  
PASSED IN O.S.NO.100/2002 ON THE FILE OF THE PRL. CIVIL  
JUDGE AND JMFC, UDUPI.

THIS R.S.A. HAVING BEEN HEARD AND RESERVED FOR  
JUDGMENT ON 09.06.2025 THIS DAY, THE COURT  
PRONOUNCED THE FOLLOWING:

CORAM: HON'BLE MR JUSTICE H.P.SANDESH

**CAV JUDGMENT**

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

2. This second appeal is filed against the concurrent finding of the Trial Court and also the First Appellate Court passed in O.S.No.100/2002 dated 17.11.2015 and R.A.No.3/2016 dated 07.08.2020 granting the relief of declaration declaring that plaintiffs are the absolute owners of the plaint 'A' schedule properties.

3. The factual matrix of case of plaintiffs/respondents before the Trial Court that Aithu Belchada is the father of the plaintiffs had claimed occupancy right in respect of the properties covered by Sy.No.13/32 measuring 67 cents and Sy.No.13/48 measuring 30 acres of Udyavara village, Udupi Taluk along with other properties by filing an application under section 48A(1) of the K.L.R Act and that his claim has been

enquired into by the land tribunal, Udupi in LRY NO:74/361/915/917/TRI/1754/79-80 occupancy right has been granted in his name by the Land Tribunal, Udupi vide its order dated 28-09-1981 In pursuance of the order passed by the Land Tribunal, occupancy certificate in Form No.10 has also been issued in the name of aforesaid Aithu Belchada by the Spl. Tahsildar, Land reforms, Udupi on 15-11-1981. It is further case of the plaintiffs that during the life time of Aithu Belchada he had entered into a registered partition deed with his sisters on 30-10-1991. The said Aithu Belchada died intestate on 04-01-1998 leaving behind plaintiffs as his only legal heirs and it is contended that thereby the right, title and interest over the plaint 'A' schedule properties devolved upon them. When this is the status of the property the defendant started proclaiming in the village that deceased Aithu Belchada had bequeathed the property covered in Sy.No.13/48A, measuring 26 cents, and Sy.No.13/32 measuring 23 cents

out of the properties mentioned in the plaint 'A' schedule properties and they also learnt from the RTC extracts that the defendant by virtue of the alleged forged Will got mutated some of the properties out of the suit properties. It is further contended that at no point of time defendant is in possession of plaint 'A' schedule property and there was no occasion arisen to Aithu Belchada to execute the Will in favour of the defendant, disinheriting his own legal heirs. Hence, sought for relief of declaration.

4. In pursuance of suit summons the defendant appeared and filed the written statement and denied the averments made in the plaint. It is contended that Aithu Belchada was in a sound state of mind and he had executed a Will dated 11.06.1996 voluntarily on his free will bequeathing the immovable properties bearing Sy.No.13/48B (portion) measuring 11 cents, Sy.No.13/48B (portion) 9.5 cents, Sy.No.13/48B (portion) 9.5 cetns and Sy.No.13/32 (portion) measuring 23 cents and consequent

upon the death of the Aithu Belchada the said properties have devolved upon the defendant and he has been in exclusive possession and enjoyment of the same improving the said land. It is also his case that defendant has constructed a house and he became the owner in lawful possession and enjoyment of the property in view of the Will and plaintiffs have no right, title and interest over the property and they never been in possession or enjoyment of any portion the said properties. The Trial Court having considered the pleadings of the parties, framed the following issues and additional issue:

1. Whether the plaintiffs prove that the land bearing S.No.13/32 measuring 67 cents and S.No.13/48 measuring 1.05 acres of Udayavara village have been granted in favour of Aithu Belchada by the Land Tribunal?
2. Whether the plaintiffs prove that Aithu Belchada obtained the suit 'A' schedule

property through a registered Partition Deed dated 30-1-1991?

3. Whether the plaintiffs prove their possession and enjoyment over the plaint "A" schedule property?
4. Whether the plaintiffs prove their ownership over the suit 'A' schedule property?
5. Whether the defendant proves that Aithu Belchada executed unregistered Will dated 11.6.1996 bequeathing the immovable properties bearing S.No.s.13/48B (portion) measuring 9.5 cents, S.No.13/48B(portion) measuring 9.5 cents and S.No.13/32 (portion) measuring 23 cents in favour of defendant?
6. Whether the defendant proves that he is in possession and enjoyment of properties alleged to have been obtained by him through registered Will?
7. Whether the plaintiffs are entitled for the relief of declaration as claimed in the plaint?

8. What order or decree ?

**Additional Issue:**

Whether the plaintiffs prove that the alleged Will dated 11.06.1996 is invalid in view of Section 61(3) of Karnataka Land Reforms Act?

5. The plaintiff in order to prove the case, examined 2<sup>nd</sup> plaintiff as P.W.1 and got marked Ex.P.1 and closed his side of evidence. On the contrary, the defendant examined himself as D.W.1 and also examined another two witnesses as D.W.2 and D.W.3 and got marked 31 documents as Ex.D.1 to Ex.D.31.

6. The Trial Court having considered both oral and documentary evidence placed on record, comes to the conclusion that plaintiffs failed to prove the land was granted in favour of Aithu Belchada by the Land Tribunal in respect of the said properties and also answered the issue Nos.2 to 4 and 7 and Addl. Issue No.1 as affirmative and answering these issues, decreed the suit declaring that



plaintiffs are the absolute owners of plaint 'A' schedule properties. Being aggrieved by the judgment of decree of declaring the plaintiffs are the owners of the property, an appeal is filed by the appellant herein in R.A.No.3/2016 before the First Appellate Court. The First Appellate Court also having considered the grounds urged in the appeal memo, formulated the point as whether the defendant has proved proper and due execution of the Will as per Ex.D.1 and whether the bequeath by way of Will as per Ex.D.1 is in violation of Section 61 of the Karnataka Land Reforms Act and whether the judgment of the Trial Court is apparent illegal, perverse and capricious and requires interference. The First Appellate Court answered the point No.1 as negative and also answered point No.2 as affirmative in coming to the conclusion that bequeath by way of Will as per Ex.D.1 is in violation of Section 61 of Karnataka Land Reforms Act and answered the point No.3 as negative and confirmed the judgment of the Trial Court dismissing the

appeal. Being aggrieved by the concurrent finding of the Trial Court and First Appellate Court, the present second appeal is filed before this Court.

7. The main ground urged by the appellant's counsel before this Court is that both the Courts have committed an error in coming to the conclusion that the Will was hit by Section 61 of Karnataka Land Reforms Act is erroneous and declaring the plaintiffs are the owners in respect of the suit schedule properties are erroneous and documents produced by the defendants show the possession of the properties is with the defendants and finding of the Trial Court on Ex.D.1 Will was barred under Section 61(3) of Karnataka Land Reforms Act is not justifiable and also contend that the judgment and decree of the Trial Court is hit by proviso Section 34 of the Specific Relief Act, 1963. Further, contend that First Appellate Court has erred in law confirming the judgment and decree of the Trial Court in so far as possession is concerned when the

defendant sworn that he has been in possession of written statement schedule properties and without appreciating these facts both the Courts have committed an error.

8. The counsel in his argument would vehemently contend that though Land Tribunal passed an order dated 29.03.1981 with regard to occupancy rights, the same was challenged. Subsequently, in the year 1987 granted right in favour of Aithu Belchada and also Seshi Belchadthi. It is contended that father of the plaintiff has executed the Will in the year 1986 in favour of sister's son. The counsel would vehemently contend that Will is not barred. The finding of Trial Court that there cannot be Will within the stipulated time of grant is also erroneous. The counsel in his argument would vehemently contend that D.W.1 in his cross-examination particularly on 16.06.2016 categorically admitted that D.W.1 is in possession and also suggestions are made that as he is in permissive possession. The counsel would vehemently contend that even assuming that

without there being a Will possession is also proved and possession is not sought. Hence, the very suit is not maintainable for the relief of declaration. The fact that the property was granted in favour of Aithu Belchada and Seshi Belchadthi is in the joint name in terms of Ex.P.12. When there is a material before the Court that appellant is in continuous possession of the property and he had constructed the house and he has been in possession, the Trial Court ought not to have granted the declaratory relief without seeking relief of possession and the suit is not within the purview of Section 34 of Specific Relief Act.

9. Per Contra, the counsel appearing for the respondents would vehemently contend that the very suit is filed for the relief of declaration and specifically contend that plaintiff is in possession and there was no any threat of dispossession. When such being the case, not required to seek the relief of possession. The counsel also would vehemently contend that no dispute with regard to land was

granted earlier in favour of the Aithu Belchada and there was a partition in the family on 30.12.1991 and also contend that under Section 2(12) of K.L.R Act, defendant not comes within the definition of the family. The counsel also would vehemently contend that Section 61 of Karnataka Land Reforms Act is very clear that there is a bar to transfer the property even by way of Will. Hence, both the Courts have taken note of the said fact into consideration. The detail discussion was made in the judgment while passing the relief of declaration by the Trial Court and the same was confirmed by First Appellate Court.

10. The counsel appearing for the appellant relied upon the judgment **AIR 2024 SC (Civil) 978** in case of **Vasantha (Dead) THR. LR. V/s Rajalakshmi alias Rajm (Dead) Thr.LRs.** the counsel referring this judgment would vehemently contend that a detail discussion was made in the judgment if material discloses that plaintiff was not in possession of the suit property and even not made

any attempt to seek relief of recovery of possession and categorically held that hence, the suit for declaration simpliciter was not maintainable. The counsel brought to notice of this Court discussion made in paragraph No.24 wherein also Section 34 of Specific Relief Act was also extracted in paragraph No.25. In paragraph No.26 held that in view of proviso to Section 34, the suit of the plaintiff could not have been decreed since the plaintiff sought for mere declaration without the consequential relief of recovery of possession.

11. The counsel also brought to notice of this Court detailed discussion made in paragraph Nos.27, 28, 29 and 30 and definite conclusion is that when plaintiff not being in possession and claiming only declaratory relief, ought to have claimed the relief of recovery of possession and hence, held that the Trial Court rightly dismissed the suit on the basis that the plaintiff has filed a suit for a mere

declaration without relief of recovery which is clearly not maintainable.

12. The counsel also relied upon the judgment reported in **ILR 2007 KAR 4174** in case of **Joseph Albert Lewis V/s Michael Roque Lewis and Others** and brought to notice of this Court paragraph No.10 wherein held that a Will would become valid only if the legatee/beneficiary establishes that he is a member of the joint family as defined under the Karnataka Land Reforms Act. The counsel referring this paragraph No.10 would contend that in the case on hand, the occupancy right was conferred on 23.09.1997 vide Ex.P.12 in the joint name of Seshi Belchadthi mother of the defendant and Aithu Belchada the father of the plaintiff and Ex.D.1 dated 11.06.1996 marked through P.W.1 executed by Aithu Belchada in favour of sister's son the defendant.

13. The counsel would vehemently contend that when the grant was made in favour of joint name, he is not

an outsider and grant was also in favour of mother of the defendant and when such being the case, the counsel contend that this judgment is also aptly applicable to the case on hand as the relationship is established.

14. Per Contra, the counsel appearing for the respondents relied upon the judgment of Bombay High Court in case of ***Nagorao Narayan Diwane since deceased through L.Rs and Others V/s Narayan Awadutrao Dighe since deceased through L.Rs and other*** in reported ***2000(2) Mh.L.J Page 273*** the counsel referring this judgment brought to notice of this Court the discussion made in paragraph No.11 and also paragraph No.21 and held that plaintiffs' suit was maintainable for the relief of declaration simpliciter and the same is not barred by under Section 34 Specific Relief Act as contended by the learned counsel for the appellant.

15. The counsel referring this judgment would contend that suit is maintainable for the relief of



declaration. Having considered the grounds which have been urged in the second appeal and also the oral and documentary evidence available on record as well as the oral submissions of respective counsels, this Court has to analyze the material available on record. This Court while admitting the second appeal framed the following substantive question of law:

" Whether the Courts below committed an error in entertaining the suit for mere declaration without seeking for the consequential relief of possession is contrary to proviso to section 34 of the Specific Relief Act and the law laid down by the Hon'ble Apex Court in case of ***Vasantha (Dead) Thr. L.R. v/s Rajalakshmi @ Rajam (Dead) Thr. Lrs.*** in Civil Appeal No.3854/2014?"

16. Having heard the learned counsel for respective parties and also on perusal of material available on record, it is not in dispute that it is the claim of the plaintiffs that they are the legal heirs of Aithu Belchada and also not in

dispute that property was granted at the first instance by the Land Tribunal vide order dated 28.09.1981 and the plaintiff relies upon the document of registered partition deed with the sisters on 30.10.1981 and also the fact that Aithu Belchada died on 04.01.1988 leaving behind plaintiffs as his legal heirs. On the other hand, it is the contention of the defendants that the very same Aithu Belchada voluntarily executed a Will on 11.06.1986.

17. It is important to note that Will was got marked as Ex.D.1 and plaintiffs relies upon only the document of death certificate. On the other hand, defendants have relied upon the several documents of tax paid receipt, RTC as Ex.D.25, Ex.D.26 and Ex.D.27 and proceedings of Executive Officer Ex.D.28 and Ex.D.29 Sketch and Ex.D.31 sketch. It is also important to note that defendant also got examined two witnesses as D.W.2 and D.W.3 who are the attesting witnesses to the document of Ex.P.1. It is also important to note that defendant also proved the Will and Trial Court

comes to the conclusion that though the Will established to be true, the same cannot be make use by the defendant in proving the title, possession and interest because of the imposition of restriction in Section 61 of the Karnataka Land Reforms Act.

18. It is also important to note that even First Appellate Court also while re-assessing the material comes to the conclusion that in paragraph No.27 that based on the Will the defendant mutated his name in revenue records and paid taxes regularly and no doubt it is true that defendant had constructed house in the property alleged to have been bequeathed and residing their, but these criteria are not condition precedent to accept the Will. Having taken note of these material on record, it is clear that consequent upon the Will possession is established with the defendant. The counsel appearing for the appellants during the course of argument brought to notice of this Court, the suggestion made to the witnesses of the defendant that defendant is in

possession of the property and D.W.1 categorically deposed that he is cultivating the property, when the suggestion was made that plaintiffs are cultivating the property. He categorically stated that he had constructed the house and residing there and also he categorically says that Aithu Belchada has given permission to him to reside there and even suggestion was made to the D.W.1 that permission was given and even witness to the D.W.2 also, same suggestions are made. These witnesses are children of attesting witnesses since the attesting witnesses are no more and D.W.2 also identifies the signature of his father in Ex.D.1.

19. The other witness D.W.3 also identifies the signature of his father in Ex.D.1 as Ex.D1(f). Now, the question before this Court is with regard to maintainability of the suit. Though counsel appearing for the appellant brought to notice of this Court the judgment of this Court reported in 2007 with regard to the execution of the Will is

concerned the moot point urged before this Court is with regard to possession as well as whether the suit is maintainable without seeking the relief of possession. The Apex Court in the judgment referred supra, **AIR 2024 SC(Civil) 978** and also this Court while admitting the appeal also taken note of the judgment and framed the substantive question of law relying upon this judgment. The point No.2 was also considered by the Apex Court while considering the same in paragraph No.24 made an observation that now proceeding to examine whether the suit for declaration simpliciter was maintainable in view of Section 34 of the Specific Relief Act, 1963.

20. It is also important to note that Section 34 of the Specific Relief Act extracted in paragraph No.25 and detail discussion was made and this Court like to extract paragraph No.24, 25 and 26 which reads as follows:

*24. We now proceed to examine whether the suit for declaration simpliciter was*

*maintainable in view of Section 34 of the SRA,1963.*

*25. Section 34 reads as:*

*34. Discretion of Court as to declaration of status or right. Any person entitled to any legal character, or to any right as to any property, may institute a suit against any person denying, or interested to deny, his title to such character or right, and the Court may in its discretion make therein a declaration that he is so entitled, and the plaintiff need not in such suit ask for any further relief:*

*Provided that no Court shall make any such declaration where the plaintiff, being able to seek further relief than a mere declaration of title, omits to do so.*

*(Emphasis Supplied)*

*26. The learned senior counsel for the appellant has contended that it has been settled by the Courts below that the appellant has been in possession of the subject property since 1976. In view of the proviso to Section 34, the suit of the plaintiff could not have been decreed since the plaintiff sought for mere declaration without*

*the consequential relief of recovery of possession.*

21. The Apex Court having dealt with Section 34 and also issue involved between the parties, relied upon earlier judgment **1993 supp (3) SCC 129 : (AIR 1993 SC 957)** in case of **Vinay Krishna V/s Keshav Chandra** and observed that this Court while considering Section 42 of The erstwhile Specific Relief Act, 1963 observed that the plaintiff's not being in possession of the property in that case ought to have amended the plaint for the relief of recovery of possession in view of the bar included by the proviso.

22. It is also important to note that this principle was also followed and the same is discussed in paragraph No.29 that in the judgment of **Union of India V/s Ibrahiim Uddin** reported in **(2012) 8 SCC 148** held that the same principle was elaborated the position of a suit filed

without the consequential relief therein also extracted paragraph No.55 which reads as follows:

*55. The section provides that Courts have discretion as to declaration of status of right, however, it carves out an exception that a court shall not make any such declaration of status or right where the complainant, being able to seek further relief than a mere declaration of title, omits to do so.*

23. Even though the Apex Court discussed the judgment reported in **AIR 1972 SC 2685** wherein also in case of **Ram Saran V/s Ganga Devi** held that suit seeking for declaration of the title of ownership but where possession is not sought, is hit by the proviso of Section 34 of the Specific Relief Act, 1963 and, thus, not maintainable and also made an observation that in case of **Vinay Krishna V/s Keshav Chandra** referred above similar issue where the plaintiff was not in exclusive possession of property and had filed a suit seeking declaration of title of



ownership was also discussed and held that suit was not maintainable and also discussed that if barred by the Section 34 of Specific Relief Act and so also discussed the judgment of ***Gian Kaur V/s Raghubir Singh*** reported in ***(2011) 4 SCC 567***. The Apex Court having considered all the four judgments, comes to the conclusion that in view of the above, law becomes crystal clear that that it is not permissible to claim the relief of declaration without seeking consequential relief.

24. Having considered the principles laid down in the judgment referred supra, adverting the facts of present case on a perusal of the plaint, it is evident that the defendant was in possession of the suit schedule property and also there is a clear admission in the evidence also and also he categorically pleaded in the written statement that he is in possession of the property and there was a Will and also he had constructed the house and residing there. Even in the case on hand also, during the course of cross-

examination, suggestion was made to the D.W.1 that he has been in permissive possession. Hence, it is clear that defendant was in possession of the property in respect of the written statement schedule property which he had claimed and also not made any effort seek for the relief of possession by amending the plaint as observed in the above judgment of Vinay Krishna V/s Keshava Chandra and also material is very clear that defendant is in possession of the property. Though an attempt was made by the counsel appearing for the respondent relying upon the judgment of Maharashtra referred simple imprisonment[ra that suit for declaration simpliciter is maintainable, but in view of the judgment of the Apex Court it is very clear that when the plaintiffs are not in possession of the property they cannot seek for the relief of declaration without seeking the relief of possession and suit for declaration simpliciter is not maintainable and also it is held that it is settled law that amendment of a plaint can be made at any stage of a suit,

even at the second appellate stage and in the present case on hand also no such attempt was made and when such being the case, it is clear that the judgment of the Trial Court and First Appellate Court is erroneous and though comes to the conclusion that Will is hit by Section 61 of Karnataka Land Reforms Act but, both the Courts failed to take note of fact that defendant is in possession of the property and plaintiffs are not in possession of the property in respect of the written statement schedule property and without seeking the relief of possession, the very suit for simpliciter for declaration is not maintainable. Hence, there is a force in the contention of the appellants' counsel. This Court also while admitting the second appeal taken note of this judgment and framed the substantive question of law and having considered the material on record, detailed discussion is made. Hence, it requires interference of this Court and answered the said substantive question of law as *affirmative*.

25. In view of the discussions made above, I pass the following:

**ORDER**

- i) The Second Appeal is ***allowed.***
- ii) The suit filed for the relief of declaration without seeking the relief of possession is not maintainable and hence, impugned order passed by the Trial Court in O.S.No.110/2002 dated 17.11.2015 and R.A.No.3/2016 dated 07.08.2020 passed by the First Appellate Court are set-aside.

Sd/-  
**(H.P. SANDESH)**  
**JUDGE**

RHS