

Govt. of Kar.,

TITLE SHEET FOR JUDGMENT IN APPEAL.

Form No.11 (Civil) Title Sheet for Judgment in Appeal (R.P.93)	<u>IN THE COURT OF THE PRL. SENIOR CIVIL JUDGE AT KALABURAGI</u>
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Present : **Shri. BALAPPA APPANNA JARAGU**, *B.Sc., LL.M.,*
Prl.Senior Civil Judge,
Kalaburagi

REGULAR APPEAL No.01 OF 2018

DATED THIS THE 24th DAY OF NOVEMBER 2020

APPELLANT:

Shantappa S/o Karabasappa
Kadaganchi, Age:50 Years,
Occ: Police Constable,
R/o H.No.2-907/83/1/15,
Badepur Kalaburagi.

[By Sri. G.A.Deshpande - Adv.]

// V/s. //

RESPONDENT:

Leather Tanning goods industries
co-operative society, through its
secretary Bharat S/o Bhagawan Rao,
Age:38 Years, Occ: Private service, R/o
Sndar Nagar Kalaburagi.

[By Sri Laxmikanth Kulkarni-Adv]

CROSS OBJECTION

CROSS OBJECTOR:-

Leather Tanning goods industries
co-operative society, through its
secretary Bharat S/o Bhagawan Rao,
Age:38 Years, Occ: Private service, R/o
Sndar Nagar Kalaburagi.

[By Sri Laxmikanth Kulkarni-Adv]

//VS//

RESPONDENT:-

Shantappa S/o Karabasappa
Kadaganchi, Age:50 Years,
Occ: Police Constable,
R/o H.No.2-907/83/1/15,
Badepur Kalaburagi.

[By Sri. G.A.Deshpande - Adv.]

Date and nature of the decree: Judgment and decree passed
or order appealed against in O.S.No.498/2010 dated
25.11.2017 by the Prl.Civil Judge,
Kalaburagi.

Date of the institution of the : 02.01.2018
Appeal

Date of the institution of cross : 22.03.2018
objection the Appeal

Duration of the Appeal	: <u>Year/s</u>	<u>Month/s</u>	<u>Day/s</u>
	02	10	22

Duration of the Appeal	: <u>Year/s</u>	<u>Month/s</u>	<u>Day/s</u>
	02	08	22

J U D G M E N T

This regular appeal under Order 41 Rule 1 of CPC is preferred by the defendant in O.S.No.498/2010 on the file of Prl. Civil Judge Court, Kalaburagi questioning the validity of the judgment passed thereon dated 25.11.2017, whereby the suit of the plaintiff was decreed.

Likewise, cross appeal/objection under Order 41 Rule 22 of CPC is preferred by the plaintiff society in O.S.No.498/2010 on the file of Prl. Civil Judge Court, Kalaburagi questioning the validity of the judgment passed thereon dated 25.11.2017, in not granting mandatory injunction directing the defendant/respondent to handover vacant possession of suit property as per order dated 03.01.2011 and as per undertaking dated 10.06.2011 by the defendant before Trial Court.

2. For the sake of convenience, parties are referred to as plaintiff and defendant as per their original ranking in the Trail Court.

3. The plaintiff society has filed suit for declaration to declare, registered sale deed dated 05.02.2011 bearing document No.6074/2000-2001 executed by Manjukumar in favour of defendant is null, void and not binding on the plaintiff society. The plaintiff society has also sought for mandatory injunction, directing the defendant to demolish illegal construction on suit property constructed by him which is store room with tin shed measuring 6x7 ft. and hand over vacant possession of same to the plaintiff society. Further plaintiff has sought for consequential relief of permanent injunction, restraining the defendant, his men, agents, servants or anybody claiming through him from interfering in plaintiff's peaceful possession and enjoyment of suit property.

4. The facts of the case in brief are that, on 14.04.1956, plaintiff society was registered under Government of Hyderabad and same was came into existence. Initially plaintiff society was running smoothly. Thereafter in the year 1975, there arose some difference of opinion in between members of society. As such, the plaintiff society was dissolved and all documents and possession of suit property were with registrar Co-Operative Society, Kalaburagi from 1975 to 03.04.2003. During that period, liquidator was appointed to look after business and suit property of plaintiff society. On 31.03.2003 earlier members of society had conveyed meeting and it was resolved to restart functioning of society. Consequently, the members had made request, as such on 08.07.2003 the Assistant Registrar of Co-operative Society handed over possession of suit property and other documents to plaintiff society. Further correspondence made by officials of society requesting to remove name of liquidator from records of rights of suit property, as there was some objection, mutation proceedings pending before Tahasiladar. By following procedure, in the year 2003 and 2008, office bearers of plaintiff society were elected. That, plaintiff society on 16.02.1970 through its secretary by name Tulajaram had purchased Sy.No.83/1 measuring 3 acre 26 guntas and Sy.No.83/2 measuring 4 acre 28 guntas from Vittalrao Deshmukh. Out of 3 acres

26 guntas in Sy.No.83/1, an area of 01 acre 6 guntas was acquired by municipality and 37 guntas was acquired by Government for formation of road. Remaining property to an extent of 1 acre 23 guntas in Sy. No.83/1 is suit property. Sy. No.83/2 to an extent of 4 acres 28 guntas was already converted into non agriculture purpose, plots were formed and already those plots were sold to different persons. The defendant is no way concerned to suit property. Sy.No.83/1 is an agriculture land, it is not converted into non agriculture purpose. Except plaintiff society, no other person has got right to alienate suit property. Manjukumar has no right to alienate plot No.15, measuring 30x60 ft in Sy.No.83/1 in faovr of defendant through sale deed dated 05.02.2001. Hence, sale deed executed by Manjukumar is not binding on the plaintiff society. On 23.10.2010 members of society have visited suit property and found the defendant was making preparation for construction in suit property. The defendant taking advantage that, 24.10.2010 fall on Sunday, he constructed temporary tin shed in suit property illegally. Hence, occasion arose for plaintiff to approach Trial Court seeking appropriate relives.

5. In pursuance of suit summons, the defendant has tendered his appearance before the court through his counsel and contested the case. The defendant has filed written statement by denying plaint

averments in toto. It is specifically contended, Bharat who filed suit as secretary of society is no way concerned to plaintiff society. Further plaintiff society is also no way concerned to suit property and society has no right to file present suit. It is denied that, plaintiff society was registered in the year 1956 and thereafter it was dissolved and in the year 2003, earlier order of winding up of society was revoked and governing members were elected. It is specifically denied that, plaintiff society has purchased Sy.No. 83/1 to extent 3 acres 26 guntas and Sy. No. 83/2 measuring 4 acres 28 guntas through registered sale deed. It is further specific contention of defendant that, Sy.No.83/1 is not agriculture land. Already as per order of Deputy Commissioner dated 25.09.1974, Sy.No. 83/1 was converted into non agriculture purpose. After conversion of Sy.No. 83/1 to an extent 4 acres 31 guntas, plots were formed and more than 65 plots were sold by Tulajaram in favor of different persons. Tulajaram died in the year 1985. After his death, his son Manjukumar based on GPA executed by his mother, brother and sister sold remaining plots in Sy.No. 83/1. The defendant had purchased plot No.15, measuring 30x60 ft of Badepur through sale deed dated 05.02.2001 from Manjukumar for sale consideration of Rs. 1,26,000/-. The defendant has mutated his name to purchased property in concerned register maintained by Municipality. On

08.02.2003 the defendant had applied seeking construction permission, concerned Municipality after due verification of records had issued construction permission. Such construction permission was renewed on 08.04.2007 to 08.04.2011. The defendant had dug bore-well in said plot and obtained temporary KEB connection. The defendant had already collected construction material and stored it. The plaintiff without knowledge of the defendant has filed present false suit. Suit of the plaintiff is not maintainable in absence of seeking possession of property. On these grounds, the defendant has requested the court to dismiss the suit filed by the plaintiff with costs.

6. Based on pleadings of respective parties to the suit, following issues have been framed by Trial Court, which are as under:

ISSUES

1. Whether the plaintiff society proves that it is the absolute owner and possessor of the suit property as mentioned in para No.2 of the plaint?
2. Whether the plaintiff is entitled for mandatory injunction as sought ?
3. Whether the plaintiff is entitled for as claimed?
4. What order or decree?

ADDITIONAL ISSUES

1. Whether the plaintiff's society proves the alleged interference by defendant as on the date of filing suit?

2. Whether the suit is bad for non-joinder of necessary parties?
3. Whether the defendant proves that the plaintiff is not in the possession of the suit schedule property?
4. To what reliefs the parties are entitled for?
5. What order or decree?

7. As could be seen from Trial court records, the secretary of plaintiff society got examined himself as PW.1. Ex.P.1 to Ex.P.40 got marked on behalf of plaintiff. Where as defendant got examined himself as DW.1 and got marked 18 documents as Ex.D.1 to E.D.18.

8. Trial Court after hearing the arguments of both side has answered Issue No.1 to 3 and additional issue No. 1 & 4 in the “**Affirmative**” and additional issue No.2 & 3 in the “**Negative**” and Issue No.4 and additional Issue No.5 as per final order, thereby the Trial court has proceeded to decree the suit.

9. Feeling aggrieved by judgment and decree passed by Trial Court, the appellant/defendant has come up in this appeal challenging the correctness and validity of judgment and decree passed by Trial court, on the following grounds:

- a. The judgment and decree of Trial court is wrong, erroneous and same is against well established principles of law.
- b. The Trial Court has not properly appreciated evidence adduced by defendant/ appellant.
- c. The Trial Court failed to consider the defendant in order to prove Sy.No. 83/1 is non agriculture land produced five sale deeds in respect of plot No.1,2,3, 12 and 32, sale deeds marked as Ex.D.14 to Ex.D.18.
- d. The Trial Court has failed to appreciate Ex.D.14 to Ex.D.18 sale deeds executed by Tulajaram in favor of purchasers in the year 1973-1974 and all persons who have purchased plots constructed houses.
- e. The Trial Court has failed to appreciate Ex.P.29 to Ex.P.32, wherein it is mentioned Sy.No. 83/1 is non agriculture land.
- f. The Trial court wrongly relied on judgment in OS No. 209/2005 and thereby wrongly come to conclusion plaintiff is owner of Sy.No. 83/1 measuring 1 acre 23 guntas.
- g. The Trial Court has failed to appreciate boundaries mentioned in Ex.P.1 not tally with boundaries mentioned in Ex.P.9 as such suit property of plaintiff situated somewhere and same is not concerned to plot No.15 purchased by defendant.
- h. The Trial Court has failed to appreciated Bharat has no locus standi to file suit as he clearly admitted in his cross examination that, is not member or office bearer of society.

- i. The Trial Court without framing issue with regard to nullity of sale deed executed by Manjukumar in favor of defendant declared said sale deed is null and void.
- j. The Trial Court while giving findings on issue No.1 and additional issue No.3 has not considered material facts and evidence on record, same resulted into miscarriage of justice. On these grounds, the appellant has requested the court to set aside the judgment and decree passed by Trial court.

10. Likewise, feeling aggrieved by judgment and decree passed by Trial Court, the cross objector/plaintiff has filed cross appeal challenging the correctness and validity of judgment and decree of Trial Court to the extent of not directing the defendant to handover vacant possession of suit property bearing plot No.15 to the plaintiff society, on the following grounds:

- a. The Trial Court has not taken into consideration while disposing the suit of plaintiff that, defendant filed memo of undertaking on 10.06.2011.
- b. The Trial Court has not considered, memo dated 10.06.2011, wherein defendant had undertaken that, in event of success of the plaintiff, the defendant will handover suit property by removing the construction made on plot by exhausting all remedies available under law.
- c. The Trial Court though discussed about undertaking memo filed by defendant in its judgment but failed to grant mandatory injunction as prayed by plaintiff society in suit

d. The order of Trial Court in not granting mandatory injunction as prayed by the plaintiff is illegal and same is against order dated 03.11.2011 passed by Trial Court. On these grounds, the cross appeal objector has requested the court to modify judgment and decree passed by Trial court and thereby grant mandatory injunction against defendant as prayed in the plaint.

11. After registering the appeal and cross appeal in response to service of notice, the respondents have put in their appearance through their Counsels. Trial court records were secured.

12. I have heard arguments of both side.

13. In view of the points canvassed in the course of argument and the grounds urged in the Appeal Memorandum and memorandum of cross appeal, following points felt necessary for determination:

POINTS

- 1. Whether in given facts and circumstances of the case, the Trial Court erred in not considering Bharat S/o Bhagwan Rao has no locus-standi to represent plaintiff society as secretary and to file suit against defendant?*
- 2. Whether in given facts and circumstances of the case, the Trial Court erred in coming to conclusion plaintiff society is an absolute owner of suit property?*
- 3. Whether in given facts and circumstances of the case, the Trial Court erred in giving findings that, sale deed executed by Manjukumar in favour of defendant is null, void and not binding on plaintiff society without framing any issue with regard to nullity of sale deed?*

4. *Whether in given facts and circumstances of the case, the Trial Court erred in not considering, the plaintiff has failed to prove very identity of suit property?*
5. *Whether in given facts and circumstances of the case, cross appeal filed by plaintiff society is maintainable with regard to relief of vacant possession of suit property from defendant?*
6. *Whether judgment and decree passed by trial court has to be interfered in present appeal?*
7. *What order?*

14. On meticulous considering entire material on record, I answer above points as follows:

Point No.1: In the Negative.

Point No.2: In the Negative.

Point No.3: In the Negative.

Point No.4: In the Negative.

Point No.5: In the Affirmative.

Point No.6: In the Affirmative.

Point No.7 : As per final order, for the following.

REASONS

15. Point No.1: It is one of main contention of defendant that, Bharat S/o Bhagwan Rao has no locus-standi to represent plaintiff society as secretary and to file suit against defendant. It is pleaded in the plaint that, plaintiff society came into existence on 14.04.1956 under Government of Hyderabad bearing reg. No. 21/22208. Further it is case of plaintiff society that, initially society was running smoothly.

In the year 1975 there was some difference arose between members of society, as such plaintiff society was dissolved and matter was reported to Assistant Registrar Co-operative Society Gulbarga. In the year 2003 again society was re-started. In between 1975 to 2003, official liquidator was appointed to look after the plaintiff society.

16. The PW.1 in his cross examination denied that, registration certificate of plaintiff society not produced before the Court. On careful perusal of documents produced before Trial Court by the plaintiff, registration of certificate of plaintiff society not produced before the Court. On going through, other documents produced before the Court, it is not possible to come to conclusion plaintiff society is not in existence. On the other hand, there are ample documents on record to show, the plaintiff Leather Tanning Goods Industries Co-operative Society is still in existence as on date of filing suit.

17. There are documents on record as per Ex.P.3, which is certificate dated 04.11.2003, Ex.P.4 order issued by Assistant Registrar Co-operative Societies dated 08.07.2003, Ex.P.5 order of same authority dated 04.07.2003 are sufficient to come to conclusion that, in the year 2003 the plaintiff society was handed over from official liquidator to elected members. In addition as per Ex.P.13 to Ex.P.15 the plaintiff society had participated in OS No. 262/1983 as juristic person through

official liquidator. As per Ex.P.21 to Ex.P.26 it can be inferred the members of society had conducted meeting and they have decided to request the concerned authority to revoke earlier order of winding up of society and to get revocation of the same.

18. The PW.1 in his cross examination has deposed to the effect, governing members of society election was held in the year 2003-2004 and 2007-2008. It is admitted by PW.1, as per Ex.P.22 in the year 2003-2004 nine directors were elected. It is clearly admitted by PW.1 that, he was not one of the director so elected in the election of 2003 or 2008. It is also admitted by PW.1 that, in those elections, to the post of secretary election were not held.

19. Based on evidence of PW.1 as mentioned above, it is vehemently argued on behalf of learned counsel for defendant that, PW.1 had failed to prove he was authorized by governing body to represent the society and to file suit on behalf of plaintiff society. It is worth to note here that, the PW.1 in his cross examination has deposed, as he was working in society, he was appointed as secretary of said society. It is further clarified, by passing resolution in the year 2003, he was appointed as secretary of plaintiff society. There after time to time he was continued as secretary of plaintiff society. In order to establish same Ex.P.34 book containing minutes of proceedings of

society is produced before the Court. On perusal of resolution dated 01.08.2003, the Bharat S/o Bhagwan Rao was appointed as secretary of plaintiff society. It is admitted by PW.1 that, in Ex.P.34 it is not mentioned he was continued as secretary of plaintiff society by resolution of the year 2008. It is clarified by PW.1 that, though there is no mention in Ex.P.34 that, he was continued as secretary of plaintiff society but in view of his earlier appointment, he was permitted to continue to secretary of plaintiff society.

20. It is important to note here that, on careful perusal of Ex.P.34, PW.1 was appointed as secretary through resolution. Said Ex.P.34 contains minutes of resolutions from 2003 to 2008. In all these resolutions as could be seen in book, the PW.1 put his signature as secretary of plaintiff society. On perusal of signatures of PW.1 in Ex.P.34 and his signature in plaint, those signatures tally with each other. Further it is to be noted here, the PW.1 while adducing his examination in chief has produced important and material documents pertaining to plaintiff society. In case, PW.1 was not continued as secretary of plaintiff society, he might not have custody of these important and material documents of plaintiff society. The fact that, PW.1 had custody of important documents of affairs of plaintiff society

itself sufficient to draw safe inference at the time of filing suit, he was continued as secretary of plaintiff society.

21. The PW.1 being continued as secretary of plaintiff society, he has got every authority to represent plaintiff society and file the suit against defendant in respect of suit property. In view of above made discussion, when there is sufficient material on record to show, the PW.1 permitted to act as secretary of plaintiff society, the contention of defendant that, Bharat S/o Bhagwan Rao has no locus-standi to represent plaintiff society and to file suit on behalf of said society is not sustainable. Such contention of defendant is against the record produced by plaintiff society. **Hence, I answer Point No. 1 in the Negative.**

22. Points No.2 to 4:- As these points are interrelated to each other, require common appreciation of facts and evidence on record, findings on one point are bearing on other points, hence in order to avoid repetition of facts and for convenience sake, these points taken together for common discussion.

The plaintiff society is claiming suit property as shown in para No.2 of the plaint is property belong to said society. On the other hand, it is specific contention of defendant that, property as claimed by plaintiff existed somewhere or same may not be existed with those

boundaries but unnecessarily the plaintiff society asserting right over property of defendant, which he validly purchased through registered sale deed.

23. On proper re-appreciation of pleadings of respective parties and material on records, there is serious dispute between plaintiff and defendant as to whether suit property existed in Sy.No. 83/1 and same is belong to plaintiff society. As already discussed above, there are ample documents on record to show plaintiff society is a registered society. According to plaintiff society it is owner of Sy.No. 83/1 measuring 3. Acres 26 guntas and Sy. No. 83/2 measuring 4 acres 28 guntas. It is further definite case plaintiff society that, Sy.No. 83/1 is agricultural land. Except plaintiff society no other person, much less Manjukumar got any right to sell suit property in favor of defendant. Per contra, the defendant has contended, Sy.No. 83/1 was converted into non agriculture purpose by Tulajaram, after his death Manjukumar beaing his legal heir and he being GPA holder of other legal heirs of Tulajaram had sold plot No.15 in Sy.No. 83/1 of Badepur, to an extent of 30x60 ft in his favor for sale consideration of Rs. 1,26,000/-.

24. Looking into rival contentions of parties to the suit, real dispute is as to whether plaintiff society is owner of suit property or

whether Manjukumar got alienable right over suit property so as to execute sale deed in favor of defendant has to be decided.

25. It is pleaded by plaintiff and same is deposed by PW.1 that, the plaintiff society through registered sale deed dated 16.02.1970 had purchased Sy.No. 83 of Badepur measuring 8 acres 14 guntas. Further it is specifically pleaded, total extent of 8 acres 14 guntas in Sy.No. 83 divided in two parts as Sy.No. 83/1, measuring 3 acres 26 guntas and Sy.No. 83/2 measuring 4 acres 28 guntas.

26. It is further case of plaintiff that, out of 3 acres 26 guntas in Sy.No.83/1, an area of 1 acres 6 guntas was acquired by Municipality and 37 guntas was acquired by Government of Karnataka for laying road. There remains only 1 acre 23 guntas which is suit property. It is specific case of plaintiff society that, Sy.No. 83/1 remained as agricultural land. On the other hand, Sy.No. 83/2 measuring 4 acres 28 guntas converted into non agricultural purpose.

27. Copy of sale deed dated 16.02.1971 issued Prl. Munsiff Court Gulbarga has been produced as per Ex.P.1. In said document it is mentioned, Sy.No. 83 is divided into two parts, wWhich were Sy.No. 83/1 measuring 3 acres 26 guntas & Sy.No. 83/2 measuring 4 acres 28 guntas. One Vittalrao Deshmukh as Karth of family had sold total extent of Sy.No. 83 to Tulajaram S/o Rukkaman Jagade through

registered sale deed dated 16.02.1971. In sale deed, it is mentioned, sale consideration amount received from leather Goods Industrial Co-operative Society.

28. It is to be noted here sale deed has been produced as per Ex.P.28. The PW.1 in his cross examination has deposed in records of rights whole extent of Sy.No. 83 mentioned as 8 acres 14 guntas. It is specifically stated by PW.1 that, in records of rights sub division of Sy.No.83/1 and Sy.No.83/2 not effected separately. Such entries was made only in sale deed executed by original vendor in favor of Tulajaram. The PW.1 had deposed, he did not know boundaries of Sy.No. 83/1 and Sy.No. 83/2. He is not produced sketch of Sy.No. 83/1 & Sy.No. 83/2 before the Court. Even it is not case of plaintiff society that, an extent as mentioned Sy.No. 83/1 and Sy.No. 83/2 with their respect extent as mentioned in sale deed where entered in concerned records of rights separately.

29. It is pertinent to note here that, in sale deed as per Ex.P.28 itself, in second and third page, it is mentioned out of said Sy.No.83/1 01 acre 6 guntas acquired by Municipality and 37 guntas was acquired by Government for construction of road.

30. Accord to plaintiff society, after deducting property acquired by Municipality and by Government formation of road in total extent, there remains only 1 acres 23 guntas in Sy.No. 83/1.

31. As already discussed above, plaintiff society is contending still Sy.No.83/1 remained as agricultural land. On the other hand, defendant is contending Sy.No.83/1 is already converted into non agricultural purpose, plots were formed and sold to many purchasers. In order to establish Sy.No. 81/3 to an extent of 4 acres 31 guntas was converted into non agriculture purpose by Tulajaram, the defendant has much relied on Ex.P.29 to Ex.P.32 and Ex.D14 to Ex.D18.

32. In Ex.P.29 it is mentioned in land bearing Sy.No. 83/1 of Badepur village measuring 6 acres 11 guntas. In Ex.P.30 it is motioned as per records of rights an extent is shown as 6 acres 11 guntas and town planning authority has sanctioned for layout for area of 4 acres 31 guntas. In Ex.P.31 it is mentioned, intimation was issued by Deputy Commissioner Gulbarga to Tulajaram in respect of non agriculture permission in respect of Sy.No. 83 of Badepur. In Ex.P.32 which is copy of proceedings of Special Deputy Commissioner Gulbarga with regard to application of Tulajaram to issue permission to use agricultural land Sy.No.83/1 of Badepur village for non agricultural purpose.

33. It is important note here that, as per order sheet, Learned Trial Court has called for relevant records pertaining to application submitted by Tulajaram and non agriculture passed on it from Deputy Commissioner Kalaburagi. It is not in dispute such proceedings which are in respect of proceedings took place before Special Deputy Commissioner based on letter submitted by Tulajarm requesting permission to use land for non agriculture purpose.

34. In these record submitted by Special Deputy Commissioner to the Court, it is mentioned, as per records of rights applicant is owner to extent of 6 acres 11 guntas. As per letter dated 08.10.1974 submitted by Tulajaram, the Deputy Commissioner Gulbarga was requested to calculate commutation fees. In said letter it is mentioned applicant is owner of Sy. No.83 covering 6 acres 11 guntas situated at Badepur. As per letter dated 16.11.1973 issued by Deputy Commissioner to Tahasildar Gulbarga Sy.No. 83 of Badepur village was applied for non agriculture purpose. As per letter dated 09.03.1974 only Sy.No. 83 of Badepur mentioned in the purpose of construction of Government callege, subsequently it was cancelled. In letter dated 16.03.1974 an extent of Sy.No. 83/1 of Badepur, it is mentioned total extent is 6 acres 11 guntas. Out of which area of the plots and rods

motioned as 4 acres 31 guntas. Nandur road area is mentioned as 27 guntas. Open space shown as 33 guntas.

35. It pertinent to note here that, in plaint para 7 and in examination in chief of PW.1, it is mentioned, as per sale deed Sy.No. 83/1 was measuring 3 acres 26 guntas. Out of that total extent, an area of 1 acres 6 guntas was acquired by Municipality and 37 guntas was acquired by Government for formation of road. It is specifically mentioned remaining area in Sy.No. 83/1 is only 1 acre 23 guntas. As mentioned in sale deed Sy.No.83/2 measuring 4 acres 28 guntas. If remaining of area of Sy.No. 83/1 to an extent of 1 acre 23 guntas and an area of Sy.No. 83/2 to an extent of 4 acres 28 gutnas are added together, it comes to 6 acres 11 guntas. In all relevant records pertaining to proceedings before Special Deputy Commissioner in respect of conversation of land applied by Tulajaram, it mentioned total extent is 6 acres 11 guntas. An extent as mentioned in application submitted by Tulajaram to Special Deputy Commissioner Gulbarga is tally with total extent of Sy.No.83/1 and Sy.No. 83/2 which is 6 acres 11 gutnas.

36. It is to be noted here, there were proceedings before the Court earlier in respect of properties comprised in Sy. No. 83/1. This fact is evident from Ex.P.13 to Ex.P.15 which are certified Copies of

plaint, written statement and sale deed in O.S No. 262/1983. In said proceedings, it was observed Sy.No.83/1 is property of plaintiff society. In earlier proceedings, official liquidator was contested the suit on behalf of plaintiff society. In Ex.P.16 sale deed dated 20.02.1981, it is mentioned plot in Sy. No.83/1. In Ex.P.17 & Ex.P.18 are certified copies of judgment and decree passed in OS No 262/1983.

37. In Ex.P.39 total area of Sy.No.83 mentioned as 8 acres 14 guntas. Even in sale deed relied by defendant as per Ex.D.14 to Ex.D.18, in some of sale deed it is mentioned Sy.No.83/1. Ex.D6 is sale deed executed by Kamalabai, Shantabai & Shrinivas through their GPA holder Manjukumar in respect of plot No.15 in favor of defendant herein. In said document also, it is mentioned plot No.15 existed in Sy.No. 83/1. In order to show the plots shown in Ex.D.14 to Ex.D.18 in Sy.No.83/, defendant has relied on these documents.

38. As already discussed above, after purchase of total extent of Sy.No. 83 as per Ex.P.28 by Tulajaram as secretary of plaintiff society from its original owner through sale deed dated 16.02.1971, mutation to Sy.No.83/1 & 83/2 as mentioned in sale deed to that extent not effected. It is clearly admitted by PW.1, revenue records pertaining to Sy.No.81 were not effected as Sy.No.83/1 and 83/2. Even there is no records of rights, touch map, Form No.10 and documents to show

physical hissas to the effect Sy.No.83/1 and Sy.No.83/2 were bifurcated in total extent of Sy.No.83 as mentioned in sale deed of the year 1973. In absence of such hissa phodi, Tulajaram had filed application before Special Deputy Commissioner Gulbarga requesting said authority to accord permission to use 6 acres 11 guntas in Sy.No.83/1 for non agriculture purpose.

39. It is to be noted here, without there being in physical hissa as Sy.No.83/1 and Sy.No.83/2, Tulajaram had simply mentioned in application that, Sy.No.83/1 measuring 6 acres 11 guntas to be converted into non-agricultural purpose. As per records submitted by Deputy Commissioner Office before the learned Trial Court, it is forthcoming that, in some documents it is only mentioned as Sy.No.83/1 and in some document, it is mentioned as Sy.No.83.

40. As already discussed above, it is undisputed fact that, after deducting area acquired by Municipality and Government in total extent of Sy.No.83/1, there remains only 1 acre 23 guntas in Sy.No.83/1. If that extent is added to an extent of Sy.No.83/2 which is measuring 4 acres 28 guntas, total extent comes to 6 acres 11 guntas which is mentioned in all relevant records in proceedings of non agricultural permission before Special Deputy Commissioner Gulbarga.

41. The PW.1 had tried to explain in his cross examination that, though it was Sy.No.83/2 and the Tulajaram had requested the concerned authority to accord permissions to use same for non agricultural purpose, but by mistake in relevant documents, it was mentioned as Sy.No.83/1. On going through the oral and documentary evidence paced before the Court, in absence of any phodi hissas, while seeking non agricultural permission, it was mentioned in some documents just as Sy.No.83/1 to an extent of 6 acres 11 guntas. Under such circumstances it can be inferred, the Tulajaram had applied seeking conversion of remaining extent of 6 acres 11 guntas in total extents of Sy.No.83.

42. As per Ex.P.7, records rights of Sy.No.83 for the year 1983-1984 to 1987-1988 total extent was shown as 8 acres 14 guntas. As already discussed supra, recent records of rights produced as per Ex.P.39 for the year 2016-2017. In said documents also total extent of Sy.No.83 mentioned as 8 acres 14 guntas.

43. It is undisputed fact that, entries in Ex.P.7 were subsequent to non agriculture order passed by Special Deputy Commissioner. In back page of Ex.P.7, it is mentioned, as per non agriculture order passed by Special Deputy Commissioner dated 08.01.1973 out of total

extent of Sy.No.83, an area of 4 acres 31 guntas was converted into non agriculture purpose.

44. As per records produced before the court by Special Deputy Commissioner, it is very much evident that, Tulajaram by forwarding application had requested authority to accord non agriculture permission to the property to an extent of 6 acres 11 gutnas, but said authority has passed non agriculture order only in respect of 4 acres 31 guntas.

45. Taking into consideration of non existence of phodi hissa records, From No.10, touch map, pertaining to Sy.No.83, which would have been subsequent to sale deed executed by original owner of property in favor Tulajaram, only possible inference would be, said Tulajaram just by mentioning Sy.No.83 or Sy.No.83/1 while filing application before Special Deputy Commissioner requesting to converted an area of 6 acres 11 guntas for non agriculture propose. Considering records said authority passed non agriculture order according permission to use 4 acres 31 guntas for non agriculture purpose.

46. In view of above made discussion, it is very much evident that, without there being bifurcation or phodi, total extent of Sy.No.83 of Badepur as Sy.No.83/1 and Sy.No.83/2, concerned authority which is

Special Deputy Commissioner has accord permission to use 4 acres 31 guntas in total extent of Sy.No.83 for non agriculture purpose. Under such circumstances, it is not very much important as to whether present suit property is existed in 83/1 which remained as agriculture land or same is existed in Sy.No.83/2 which was already converted into non agriculture purpose as contended by defendant. Only it is important that as to whether present suit property belonging to plaintiff society or not.

47. It is material to note here that, once plaintiff society sufficiently established, said property is property of society and vendors whose name shown in sale deed as per Ex.D.6 have no right or interest to alienate that property to defendant, then defendant cannot claim ownership or possession over suit property based on contents of sale deed dated 05.02.2001.

48. In earlier proceedings as per Ex.P.13 to Ex.P.15, Ex.P.17 & Ex.P.18 it was held that, Sy.No.83 is property of plaintiff society. This fact is also evident from proceedings of O.S.No.441/2009 as per Ex.P.35 to Ex.P.37. There is no clinching material on record produced by defendant to establish Tulajarm in his individual capacity not as secretary of plaintiff society had purchased total extent of Sy.No.83 from its original owner.

49. It is pertinent to note here that, even in some of letter correspondence between special Deputy Commissioner and applicant Tulajaram, those letters were addressed to Tulajaram as secretary of plaintiff society. In addition in Ex.P.7, it is mentioned in column No.9 Tulajaram and office liquidator of leather Training And Goods Industrial Ltd as owner of property.

50. On combined appreciation of contents of sale deed as per Ex.P.28, wherein it is mentioned, sale consideration amount was paid by plaintiff society, letters correspondence between Special Deputy Commissioner and Tulajaram, wherein letter were addressed to Tulajaram as secretary of plaintiff society and in Ex.P.7 wherein in owners column of records of rights, name of official liquidator of plaintiff society mentioned are itself sufficient that, whole extent of Sy.No.83 as mentioned in Ex.P.28 was purchased in the name of Tulajaram, representing himself as secretary of plaintiff society.

51. It is important to note here that, in Ex.D.14 to Ex.D.17 Tulajarama shown himself as secretary of plaintiff society. In case he had treated these properties, which are plots there was no occasion for him to mention himself as secretary of plaintiff society and to execute sale deeds. Inference can be drawn, Tulajaram as secretary of plaintiff

society had sold these plots in Sy.No.83/1 to the purchaser as mentioned in those documents.

52. There are ample documents on record to show total extent of Sy.No.83 was purchased in the name of Tulajaram, who was secretary of plaintiff society, there after Tulajaram representing himself as secretary of plaintiff society had applied Special Deputy Commissioner Gulbaraga requesting to pass non agriculture order in respect of property to an extent of 6 acres 11 guntas. At no point of time the Tulajaram exercised his right over Sy.No.83 as an exclusive and independent owner. On the other hand, all the while Tulajaram had considered total extent of Sy.No.83 as property belonging to plaintiff society.

53 The defendant had purchased plot No.15 as per Ex.D.6 from Manjukumar S/o Tulajaram, who stated to be power of attorney holder of Kamalabai, Shantabai and shrinivas, who are wives and son of Tulajaram. Under such circumstances , the defendant who claiming his right, title and possession over plot No.15 as mentioned in sale deed has to establish his vendor Manjukumar had alienable right over property so as to transfer in his favor. On going through Ex.D.6, it can be safely concluded that, the vendors as mentioned in document are

just legal heirs of deceased Tulajaram but they are not owner of property.

54. As already discussed above Tulajaram, had no independent right over Sy.No.83 of Badepur, which was purchased him on behalf of plaintiff society. Once the Tulajaram, who is ancestor of vendors as mentioned Ex.D.6 has no independent right over Sy.No. 83, the present vendors who are legal heirs of Tulajarm cannot claim their right or interest over any portion of Sy.No.83, much less plot No.15 which sold by them in favor defendant. The Tulajaram by his act always considered whole extent Sy.No.83 as property of plaintiff society. He never made any independent claim over whole extent of Sy.No.83 or after non agriculture conversation any portion of it. Once there is an ample material on record to show, the plots formed either in Sy.No.83/1 or Sy.No.83/2 are under ownership of plaintiff society, the vendors in Ex.D.6 being legal heirs of Tulajaram cannot execute or sell property mentioned in said document in favor defendant.

55. It is case of defendant and same is argued by learned counsel for appellant that, suit property and property purchased defendant are altogether different. |Suit property as claimed by plaintiff society is existed somewhere. In Ex.D.6 itself it is mentioned plot existed in Sy.No.83/1 of Badepur village. Once it is clearly mentioned

sale deed plot sold in favor defendant existed in Sy.No. 83/1, the defendant will not get any right, title over purchased plot by virtue of sale deed as per Ex.D.6. Sale deed as per Ex.D.6 executed by persons mentioned as vendors in favor of defendant herein have executed sale deed without right or title acquired by them in respect of said property.

56. It is vehemently argued on behalf of learned counsel for appellant that, the plaintiff society has failed to prove very existence and identity of suit property. It is further argued boundaries as mentioned in plaint schedule and sale deed are not tally with each other. Further it is argued, the boundaries as mentioned in plaint are not tally with boundaries of property mentioned in Ex.D.1.

57. It is worth to note here that, boundaries of whole extent of Sy.No.83 to an extent of 8 acres 14 guntas mentioned in sale deed. The present suit property as shown in plaint is only in respect of small portion in Sy.No. 83/1, approximately measuring 30x60 ft. The boundaries of suit property are mentioned in plaint. On comparing boundaries of Sy.No.83/1 as mentioned in sale deed as per Ex.P.28 and boundaries of present suit property mentioned in plaint it could not be same. It is to be noted here, suit property is not whole extent of Sy.No.83/1. It is only small portion in whole Sy.No.83/1. Under such circumstance boundaries of suit property as mentioned in plaint may

not tally with boundaries of whole of extent of Sy.No.83/1. Further it is to be noted here, though it mentioned as Sy.No.83/1 and Sy.No.83/2, out of whole extent of Sy.No. 83/1 an area of 4 acres 31 guntas was converted into non agriculture purpose. It is not clear as to whether such extent of existed in Sy.No.83/2 but at the same time, it is very evident as per original sale deed Sy.No.83/2 was measuring 4 acres 28 guntas. As per conversion order 4 acres 31 guntas out of 6 acres 11 guntas was converted into to non agriculture purpose. Under such circumstances it can be inferred suit property measuring 30x40 ft existed in Sy.No.83/1. It is also evident from records that, there is no clear bifurcation of properties by way of subsequent survey or by preparation of phodi map.

58. As admitted by PW.1 in his cross examination, photos as per Ex.D.1 to Ex.D.5 are plots situated near by present suit property. Once the adjacent property of suit property already converted in non agriculture purpose, boundaries of suit property may not tally with boundaries of property mentioned in earlier sale deeds. Hence, contention of defendant that, plaintiff has failed to prove very identity of suit property cannot be acceptable one. On the other hand, on careful appreciation of cross examination of DW.1, coupled with other documents and hand sketch produced along with plaint, it can be held

plaintiff has proved existence of boundaries of suit property as mentioned in plaint. The DW.1 in his cross examination has admitted, boundaries of suit property to its east, west and north. It is further evident from compromise entered in OS.No.441/2009 an extent of 5 guntas in Sy.No.83/1 was given to Hyderabad Karanataka Dhora KakKaya Samaj Kalaburagi. Hence, even there may be change of boundaries of suit property taking into consideration of all these subsequent events and boundaries as mentioned in plaint may not tally with boundaries mentioned in earlier sale deeds.

59. It is to be noted here, vendors who executed Ex.D.6 had no right over any portion of property in Sy.No.83/1 admittedly whole property was owned by plaintiff society. Hence, sale deed as per Ex.D.6 executed by legal heirs of Tulajaram in respect of Sy.No.83/1 is not binding on plaintiff society.

60. The learned counsel for appellant has relied upon decision reported in **2013(2KLJ)356 in case of Poojappa /vs/ Annapurnamma and others** wherein it is held that, boundaries in sale deed did not tally with suit property and there is no evidence placed before the court to demonstrate old Sy.No.178 was assigned Sy.No.171.

61. The learned counsel for appellant has also relied upon decision reported in **ILR 2005 KAR884 in case of TLNagendra Babu /vs/ Manhorarao Pawar**, wherein it is held that, unless court is satisfied with regard to material details in the light of material evidence with regard to identification of the property, no declaration and injunction can be granted.

62. The learned counsel for appellant has also relied upon decision reported in **AIR2014 SC 937 in case of Union of India and others /vs/ Vasavi Co-operative housing society ltd and others** wherein it is held that, plaintiff in suit for declaration and title and possession could succeed on the strength of his own title and that could be done by adducing sufficient evidence to discharge onus, irrespective of question of whether the defendants have proved their case or not.

63. Likewise the learned counsel for appellant has also relied upon decision reported in **AIR 2009 SC 2966 in case TK Mohammed Abubucker (dead by his lrs and others)/vs/ P.S.M. Ahmed Abdul Khadar** and others wherein it is held that, plaintiff in suit for declaration of title and possession can succeed only by making out his title and entitled to possession and not on any alleged weakness in the title and possession of defendant.

64. Herein the case, as already discussed above, in view of change of circumstances identity of suit property may not exactly the boundaries as mentioned in sale deed relied by defendant. The DW.1 in his cross examination has admitted east, west and north boundaries of suit property as mentioned in plaint. Further there is sufficient material on record to show plaintiff society is owner of Sy.No.83/1 wherein suit property or property shown in Ex.D.6 existed.

65. The plaintiff society has produced sufficient material to prove its ownership over suit property. Hence, in my humble opinion the principles laid down by Hon'ble Superior Courts in above decisions are not aptly applicable to facts and circumstances of present case on hand.

66. It is vehemently argued on behalf of learned counsel for appellant that, without framing issue with regard nullity of sale deed, the Trial Court erred in giving findings that, sale deed executed by Manjukumar in favor of defendant is not binding on plaintiff society.

67. It is material to note here that, there is specific issue No.1, framed by learned Trial Court, whether plaintiff society prove that, it is owner and possessor of suit property as mentioned in para 2 of plaint. Based on contention raised in written statement, there was also specific

issue as to whether defendant prove that, plaintiff is not in possession of suit schedule property.

68. The learned Trial Court on careful appreciation of pleadings and respective contentions of parties has framed, issue No.1 with regard to whether plaintiff society prove that it is absolute owner of suit property. Even initial onus was discharged by plaintiff society in this regard, then onus will shift on defendant to prove the plaintiff society is not owner, on the other hand, he become owner of property by virtue of Ex.D.6. Further parties knowing fully well about their pleadings and contentions have lead their respective evidence in trial of the case. Under such circumstances non framing of each issue on each contentions taken by parties to the suit is not is not fatal to the defendant. The court on consideration of pleadings has framed material issue which are very much necessary for effective decision in the suit. Further herein the case, defendant unable to demonstrate non framing of such issues, he was put to hardship and injury. Issues No.1 covers contention taken up by the defendant in written statement. Hence, taking into consideration of specific issue No.1 as framed by the Trial Court, contention of appellant herein that, without framing any issue with regard to nullity of sale deed, the Trial Court gave findings

on the same is not sustainable in the eye of law. **Hence, I answer Point No.2 to 4 in the Negative.**

69. Point No.5: It is vehemently argued on behalf of learned counsel for appellant that, cross objection or cross appeal filed by defendant is not maintainable which is with regard to relief of vacant possession of suit property from defendant. It is further argument advanced by learned counsel for appellant that, suit is filed by plaintiff society was decreed by Trial Court. As per amended order 41 Rule 22, the defendant can canvass findings in judgment which are against him hence, cross appeal is not maintainable. The learned counsel for appellant has relied upon decision reported **in AIR2007 SC 987 in case of S. Nazir Ahemd /vs/ State Bank of Mysore and others** wherein it is held that the memorandum of cross objection is needed only if respondents claim any relief which had been negative to him by the Trial Court and in addition what is has already been even by the decree and challenging.

70. It is important to note here that, so far as the Explanation to order 41 Rule 22 was concerned, the Law Commission stated that it was necessary to "empower" the respondent to file cross-objection against the adverse finding. That would mean that a right to file cross-objections was given but it was not obligatory to file

cross-objections. That was why the word 'may' was used. That meant that the provision for filing cross-objections against a finding was only an enabling provision. An Explanation is also being added to Rule 22 empowering the respondent to file cross-objection in respect to a finding adverse to him notwithstanding that the ultimate decision is wholly or partly in his favour.

71. In the judgment reported in (2007)5 MLJ 768(SC) in the case of S.Nazeer Ahmed vs. State Bank of Mysore and others, the same principle was reiterated and held as follows:-

The respondent in an appeal is entitled to support the decree of the trial court even by challenging any of the findings that might have been rendered by the trial court against himself. For supporting the decree passed by the trial court, it is not necessary for a respondent in the appeal, to file a memorandum of cross-objections challenging a particular finding that is rendered by the trial court against him when the ultimate decree itself is in his favour. A memorandum of cross-objections is needed only if the respondent claims any relief which had been negated to him by the trial court and in addition to what he has already been given by the decree under challenge.

72. Hon'ble Supreme Court in the judgment reported in **(2003)9 SCC 606 [Banarsi and others vs. Ram Phal]**, the necessity to file the cross appeal or objection, arises only when the impugned decree is partly in favour of the appellant and partly in favour of the respondents and in other cases, namely when the decree is entirely in favour of the respondent, though an issue has been decided against the respondent or whether when the decree is entirely in favour of the respondents and all the issues are answered in favour of the respondent, but there is a finding against the respondents, there is no need to file cross appeal or objection and only it is an optional, even in the absence of any appeal or cross objection, adverse finding against the respondents can be challenged by the respondents in the appeal filed by the appellant.

73. This was also clarified by the Hon'ble Supreme Court in the judgment reported in **(2013)9 SCC 261 in the case of Hardevinder Singh vs. Paramjit Singh and others**, wherein the judgment reported in (2003)9 SCC 606 [Banarsi vs. Ram Phal], was followed and held as follows:-

After the 1976 amendment of Order 41 Rule 22, the insertion made in Sub-rule (1) makes it permissible to file a cross-objection

against a finding. The difference is basically that a Respondent may defend himself without taking recourse to file a cross-objection to the extent the decree stands in his favour, but if he intends to assail any part of the decree, it is obligatory on his part to file the cross-objection. In *Banarsi and Ors. v. Ram Phal*(supra), it has been observed that the amendment inserted in 1976 is clarificatory and three situations have been adverted to therein. Category No. 1 deals with the impugned decree which is partly in favour of the Appellant and partly in favour of the Respondent. Dealing with such a situation, the Bench observed that in such a case, it is necessary for the Respondent to file an appeal or take cross-objection against that part of the decree which is against him if he seeks to get rid of the same though he is entitled to support that part of the decree which is in his favour without taking any cross-objection. In respect of two other categories which deal with a decree entirely in favour of the Respondent though an issue had been decided against him or a decree entirely in favour of the Respondent where all the issues had been answered in his favour but there is a finding in the judgment which goes against him, in the pre-amendment stage, he could not take any cross-objection as he was not a person aggrieved by the

decree. But post-amendment, read in the light of explanation to Sub-rule (1), though it is still not necessary for the Respondent to take any cross-objection laying challenge to any finding adverse to him as the decree is entirely in his favour, yet he may support the decree without cross-objection. It gives him the right to take cross-objection to a finding recorded against him either while answering an issue or while dealing with an issue. It is apt to note that after the amendment in the Code, if the appeal stands withdrawn or dismissed for default, the cross-objection taken to a finding by the Respondent would still be adjudicated upon on merits which remedy was not available to the Respondent under the unamended Code.

74. The Hon'ble High Court of Karnataka in decision of V. Dhayaian v. Muniswamy, ILR 2009 Kar 4527 = (2010) 2 KCCR 864 was pleased to observe that, right to take cross objection in an appeal is nothing but the exercise of the same right of appeal, which is given to an aggrieved party and is not a new right conferred by Rule 22. The filing of cross objection is necessary only if the respondent wants to take any cross objection to the decree, which he could have taken by way of an appeal. However, in order to support the decree or in order to argue that the finding in respect of

an issue should have been in his favour, the respondent is not required to file a cross-objection. Cross objection is not necessary to assail a finding on which decree is not founded. The first part of the rule authorizes the respondent to support the decree not only on the grounds decided in his favour but also on any of the grounds decided against him in the Court below. The first part thus authorises the respondent only to support the decree. It does not authorise him to challenge the decree. If he wants to challenge any part of the decree, he has to take recourse to the second part, that is, he has to file a cross objection if he has not already filed an appeal against the decree.

In *Banarasi and Others v. Ramphal* [(2003) 9 SCC 606 : AIR 2003 SC 1989.] , the Apex Court was considering an almost similar case. In the said case, it has been held that a plaintiff who files a suit for specific performance claiming compensation in lieu of or in addition to the relief of specific performance or any other relief including the refund of any money has a right to file an appeal against the original decree if the relief of specific performance is refused and other relief is granted. The plaintiff would be a person aggrieved by the decree in spite of one of the alternative reliefs

having been allowed to him because what has been allowed to him is the smaller relief and the larger relief has been denied to him. A defendant against whom a suit for specific performance has been decreed may file an appeal seeking relief of specific performance being denied to the plaintiff and instead a decree of smaller relief such as that of compensation or refund of money or any other relief being granted to the plaintiff for the former is larger relief and the latter is smaller relief. The defendant would be the person aggrieved to that extent. It follows as a necessary corollary from the above said statement of law that in an appeal filed by the defendant laying challenge to the relief of compensation or refund of money or any other relief while decree for specific performance was denied to the plaintiff, the plaintiff as a respondent cannot seek the relief of specific performance of contract or modification of the impugned decree except by filing an appeal of his own or by taking cross objection. Therefore, in the absence of cross appeal preferred or cross objection taken by the plaintiff/respondent the first appellate Court while dismissing the defendants appeal did not have jurisdiction to modify the decree by decreeing plaintiffs suit for specific relief.

The submission of the Learned Counsel for the appellant that this Court can modify the decree under Order 41 Rule 33 of the CPC is also without any merit. For ready reference, Order 41 Rule 33 of the CPC is as under:

“33. Power of Court of Appeal: The Appellate Court shall have power to pass any decree and make any order which ought to have been passed or made and to pass or make such further or other decree or order as the case may require, and this power may be exercised by the Court notwithstanding that the appeal is as to part only of the decree and may be exercised in favour of all or any of the respondents or parties, although such respondents or parties may not have filed any appeal or objection and may, where there have been decrees in cross-suits or where two or more decrees are passed in one suit, be exercised in respect of all or any of the decrees, although an appeal may not have been filed against such decrees. Provided that the Appellate Court shall not make any order under Section 35-A, in pursuance of any objection on which the Court from whose decree the appeal is preferred has omitted or refused to make such order.”

Law is well settled that the appellate Court finds any inconsistent, contradictory or unworkable order would be the ultimate result if the decree is not passed in favour of the appearing respondent, the appellate Court would exercise its power under Order 41 Rule 33 CPC and not otherwise. The power under Rule 33 could be exercised only when the portion of the decree appealed against is so inseparably connected with the portion not in the appeal, and a complete inconsistent decree cannot be passed unless the latter portion, is as well interfered with. The power under Order 41 Rule 33 CPC can be exercised only when, as a result of interference in favour of the appellant, it becomes necessary to adjust the rights of the parties. Ordinarily the power in this rule should be limited to those cases where, as a result of the appellate Court's interference with a decree in favour of the appellant, a further interference is required in order to adjust the rights of the parties in accordance with justice, equity and good conscience. The rule however does not confer an unrestricted right to reopen decrees which have become final merely because the appellate Court does not agree with the opinion of the Court appealed from. In *Nirmala*

Bala Ghose v. Balai Chand Ghose [AIR 1965 SC 1874.] , it has been held as under:

“When a party allows a decree of the Court of First instance to become final, by not appealing against the decree, it would not be open to another party to the litigation, whose rights are otherwise not affected by the decree, to invoke the powers of the appellate Court under Order 41 Rule 33 to pass a decree in favour of the party not appealing so as to give the latter a benefit which he has not claimed. Order 41 Rule 33 is primarily intended to confer power upon the appellate Court to do justice by granting relief to a party who has not appealed, when refusing to do so, would result in making inconsistent, contradictory or unworkable orders.” In Shankar Popat Gaidhani v. Hiranman Umaji More (Dead) by L.Rs. and Others [(2003) 4 SCC 100 : AIR 2003 SC 1682.] , the Apex Court has held that where a decree in a suit for specific performance of contract for sale of land did not direct delivery of possession to purchaser and an appeal was filed against the decree only by vendor and the purchaser chose not to challenge the decree and the person claiming to be in possession of land as a tenant who was not party to agreement for sale was not represented before the High Court, the order by High

Court dismissing the appeal and further directing that the decree was to be construed as directing delivery of possession was liable to be set aside. In the course of the order, the Apex Court has held as under:

The plaintiff, as noticed hereinbefore, did not question the judgment and decree passed by the Trial Court. Evidently, the Court did not grant a decree for recovery of possession so far as the suit land is concerned. In that view of the matter, the High Court, in our opinion, committed a serious error in granting a relief in favour of the plaintiff in an appeal filed by defendant No. 1, purporting to modify relief (a), as aforementioned; particularly in view of the fact that amongst others, the appellant claimed himself to be in physical possession of the lands in question. — The appellant, indisputably was not a party to the said agreement for sale. The High Court also could not have exercised its jurisdiction in issuing the said direction even under Order 41 Rule 33 of the Code of Civil Procedure inasmuch the said provision could not be invoked by one respondent as against another as therefore it was obligatory on the part of the plaintiff to file a cross objection in terms of Order 41 Rule 22 of the Code of Civil

Procedure and give notice in relation thereto to the parties who claimed independent possession over the suit land.”

In Banarsi's case (*supra*), the Apex Court has held that usually the power of Rule 33 is exercised when the portion of the decree appealed against or the portion of the decree held liable to be set aside or interfered by the appellate Court is so inseparably connected with the portion not appealed against or left untouched that for the reason of the latter portion being left untouched either in justice would result or inconsistent decrees would follow. The power is subject to at least three limitations: firstly, the power cannot be exercised to the prejudice or disadvantage of a person not a party before the Court; secondly, a claim given up or lost cannot be revived; and thirdly, such part of the decree which essentially ought to have been appealed against or objected to by a party and which that party has permitted to achieve a finality cannot be reversed to the advantage of such party. A case where there are two reliefs prayed for and one is refused while the other one is granted and the former is not inseparably connected with or necessarily depending on the other, in an appeal against the latter, the former relief cannot be

granted in favour of the respondent by the appellate Court exercising power under Rule 33 Order 41.

75. It is material to note here that, the plaintiff has sought for vacant possession of property from defendant by way mandatory injunction. Admittedly the learned Trial Court though held plaintiff society is absolute owner of suit property not granted mandatory injunction as prayed by the plaintiff society in plaint. The learned trial Court gave specific findings that plaintiff society is absolute owner of suit property. Further issue No.2 was framed to the effect whether plaintiff is entitled for mandatory injunction has sought. Said issue answered in the Affirmative but in operative portion mandatory injunction as prayed by plaintiff it was not granting. When specific relief as prayed by plaintiff with regard to mandatory injunction not granted by the learned Trial Court though there was findings, it can be held the learned Trial Court has rejected said relief. The relief which was not granted deemed to be rejected. Under such circumstance when mandatory injunction was not granted, it can be held suit of the plaintiff was partly decreed. Under such circumstance in view of ratio laid down in above decisions, the plaintiff who is claiming relief of vacant possession of suit property from defendant which was not considered by learned Trial Court, cross objection/cross appeal filed by cross

objector requesting the court to grant such mandatory relief is maintainable. **Hence, I answer issue No.5 in the Affirmative.**

76 Point No.6:- The learned trial court after proper appreciation of pleadings and material on record has rightly come to conclusion Bharat S/o Bhagwan Rao being appointed as secretary of plaintiff society has every right to represent plaintiff society and file suit against defendant. Further the learned Trial Court has rightly come to conclusion, the plaintiff society is owner of suit property, which is existed in Sy. 83 of Badepur Village. Further the learned Trial Court has rightly come to conclusion Manjukumar being GPA holder of vendors as mentioned in Ex.D.6 has no right or interest to alienate suit property in favor of defendant as vendors have no transferrable or alienable right in plot No.15 sold to defendant. The findings of learned Trial Court as mentioned above are based on proper appreciation of facts and evidence on records. The findings of learned Trial court wherein it come to conclusion plaintiff society is owner suit property and defendant did not get any right and title in respect of plot No.15 based on Ex.D.6 cannot be found fault.

77. At the same time, it is to noted here, the learned Trial Court gave findings that, sale deed as per Ex.D.6 executed by Manjukumar in favor of defendant is not binding on plaintiff society. It is not out of

records that, learned Trial Court on 03.01.2010 has passed considered order on application filed U/o 39 Rule 1& 2 and U/o 39 Rule 4 CPC. While passing order, it was specifically observed by learned Trial Court that, defendant has to proceed with further construction on suit property by filing undertaking memo by stating that, if he failed to succeed in the case, he voluntary handover the possession of suit property as it was existed on date of judgment or by removing the construction what are all in made in suit property.

78. The learned trial court having come to conclusion that, plaintiff society is owner of property purchased by defendant would have granted mandatory injunction as prayed by the plaintiff, taking into note of observations made while disposing I.A.No.1 and I.A. No.II.

79. It is worth to note here that, requesting this appellate court to grant mandatory injunction as prayed in the plaint, which was not considered by learned Trial Court, the plaintiff has filed cross appeal. Hence, the plaintiff society who proved it is owner of property purchased by defendant as per Ex.D.6 is entitled for vacant possession of said property from defendant. Hence, the plaintiff society is entitled for mandatory injunction, directing the defendant to remove the construction if any made on property mentioned in Ex.D.6 sale deed

and handover vacant possession of same to plaintiff society within 3 months from date of this order.

80. In view of above made discussion, an appeal filed by appellant/defendant has to be dismissed. In view of granting mandatory injunction as prayed by plaintiff, cross appeal filed by cross objector/plaintiff has to be allowed. Consequently judgment and decree passed by Trial has to be interfered by modifying granting of mandatory injunction as prayed by the plaintiff. **Hence, I answer point No.6 in the Affirmative**

81. Point No.7: In view of finding on points No.1 to 4 in the in the Negative, point No. 5 and 6 in the Affirmative, an appeal deserves to be dismissed and cross appeal filed by cross objector has to be allowed. In the result, I proceed to pass the following:

ORDER

An appeal filed by the appellant/defendant U/o 41 Rule 1 & 2 R/w Sec.96 C.P.C., is hereby dismissed with costs.

Cross appeal filed by the cross objector/plaintiff U/o 41 Rule 22 R/w Sec.96 C.P.C., is hereby allowed.

Consequently the judgment and decree dated 25.11.2017 and 02.12.2017 respectively passed by Trial court in O.S.No.498/2010 is hereby confirmed.

In view of allowing cross appeal, in addition to the confirming of judgment and decree of Trial Court, it is further judgment of trial court is modified by granting mandatory injunction as prayed by the plaintiff society.

The defendant has to handover vacant possession of property as mentioned in Ex.D.6 to the plaintiff society by removing existing construction if any on said property within 3 months from date of this order. Failing which, the plaintiff society is at liberty to get vacant possession of property from defendant by following due procedure known to law.

Draw decree accordingly.

Office is hereby directed to send records to the Trial court forthwith along with copy of this judgment and decree.

[Dictated to the Stenographer on laptop directly, same is typed by him, corrected, signed and then pronounced by me in the open court on this the 24th day of November 2020].

(BALAPPA APPANNA JARAGU)

Prl. Senior Civil Judge,
Kalaburagi.