

(2015) 08 KAR CK 0157

In the Karnataka High Court

Case No : Regular Second Appeal No. 893/2011

S.G. Prabhu

APPELLANT

Vs

Jayachamaraja Wadeyar Golf Club and Others

RESPONDENT

Date of Decision : 19-08-2015

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 22, Order 41 Rule 27, Order 41 Rule 33

Citation : (2015) 08 KAR CK 0157

Hon'ble Judges : Aravind Kumar, J.

Bench : Single Bench

Advocate : G. Balakrishna Shastry, Advocate, for the Appellant

Final Decision : Partly Allowed

Judgement

Aravind Kumar, J.—This is a plaintiffs second appeal assailing the judgment and decree passed by VI Addl. District Judge, Mysore dated 18.12.2010 in R.A. No. 379/2009 (old No. 353/2006) whereunder judgment and decree passed by II Addl. Civil Judge (Jr.Dn), Mysore in O.S. No. 172/2002 dated 27.09.2006 partly decreeing the suit by declaring that decision of rejecting the application of plaintiff for permanent membership by defendants-1 and 2 on 26.11.2001 through a letter dated 14.12.2001 as null and void and directing the defendants 1 and 2 to extend one more opportunity to the plaintiff for attending the interview to establish 2/3rd majority vote in the meeting as per bye-law No. 4.08 within two (2) months from the date of said order though confirmed, came to be modified by holding that plaintiff is not entitled for the declaratory relief sought for by him and plaintiff is also not entitled for mandatory injunction as sought for by him.

2. This Court by order dated 05.12.2011 has admitted the appeal for considering the following Substantial Questions of Law:

"i) "In the absence of a cross-appeal or a cross-objection by a party, against

whom certain directions are issued by the trial Court, whether the Lower Appellate Court has jurisdiction to reverse the judgment of the trial Court in the appeal filed by the plaintiff in respect of denial of certain reliefs and set aside the relief granted by the trial Court?

ii) Whether the Lower Appellate Court has power to receive additional evidence in the absence of an application under Order 41 Rule 27 of C.P.C. and without satisfying the Court the requirement of Rule 27 of Order 41 of CPC?"

FACTUAL MATRIX:

3. Plaintiff claiming to be a successful Sportsman throughout his career as a student and also thereafter was admitted as a temporary member of the Jayachamarajendra Wodeyar Golf Club (for short "Golf Club"). An application was filed by the plaintiff claiming permanent membership and after depositing necessary amount by way of cheque, Golf Club had intimated the plaintiff to appear before the Managing Committee for being balloted in the proposed meeting to be held on 22.10.2001. A communication was forwarded to the plaintiff by the Golf Club on 20.10.2001. However, consideration of the plaintiffs application came to be deferred in the said meeting held on 22.10.2001. Thereafter, a meeting was said to be held on 26.11.2001 in which meeting the application of plaintiff is said to have been considered by the defendant/Golf Club and was rejected after being balloted with ten (10) votes against plaintiff one (1) vote in his favour. Being aggrieved by this rejection and contending that said rejection is not in consonance with extant rules and regulations of the Golf Club suit in question i.e., O.S. No. 172/2002 came to be filed by the plaintiff.

4. On service of suit summons, defendants 1 and 2 appeared and filed their written statement and admitted that plaintiff underwent preliminary test and temporary membership was awarded to him after collecting Rs. 2,422/- which was for a period of six (6) months and subsequently it was renewed for a further period of six (6) months. It was admitted that plaintiff had applied for permanent membership and he underwent Proficiency test and succeeded in said test and as such plaintiff was asked to appear for interview before the Managing Committee and the cheques issued by the plaintiff was not encashed since at the Special General Body meeting, membership fee has been enhanced from Rs. 25,000/- to Rs. 50,000/- and accordingly plaintiff after taking back the old cheque issued for Rs. 25,000/- had issued fresh cheque for Rs. 50,000/- and same was not encashed by the Golf Club. The averments made in the plaint came to be denied.

5. On the basis of the pleadings of the parties, trial court framed following issues for its consideration:

"1. Whether the plaintiff proves that, the letter dated 14.12.2001 is illegal, null and void and same is not binding on him?

2. Whether the defendant proves that, the application filed by the plaintiff has been rejected on bona fide reasons?

3. Whether the defendant proves that, this Court has no jurisdiction to entertain and decide the suit as alleged in para No. 8 of written statement?

4. Whether the defendant proves that, the suit of plaintiff is bad for misjoinder of the defendants No. 1 and 3?

5. Whether the plaintiff is entitled for relief as prayed for?

6. What order or decree?"

6. Plaintiff got himself examined as P.W. 1 and on his behalf two (2) witnesses were examined as P.W. 2 and P.W. 3 and he got marked 30 documents as Exs. P-1 to P-30. The President of Golf Club was examined as D.W. 1 and through him 9 documents were produced and it was got marked as Exs. D-1 to D-9.

7. The trial Court on appreciation of evidence held that Managing Committee of Golf Club which had taken up for consideration of the application of the plaintiff for being balloted to permanent membership in its meeting held on 22.10.2001 had deferred the consideration, which had not been intimated to the plaintiff and therefore, consideration of said application in the subsequent meeting held on 26.11.2001 was contrary to Rules. It came to be held that application of the plaintiff for permanent membership taken up for consideration in the meeting held on 26.11.2011 was without intimation to the plaintiff though it came to be rejected by ten votes against one vote and non disclosure of balloting held on 26.11.2001 to the plaintiff and the subsequent intimation on 14.12.2001 as per Ex. P-22 does not satisfy the extant rule namely bye-law No. 4.08. On these amongst other grounds, trial Court answered issue No. 1 in the affirmative. In view of finding recorded on issue No. 1 trial Court held that issue No. 2 which related to the burden cast on defendants to prove that application filed by plaintiff has been rejected on bona fide reasons, would not survive for consideration and accordingly, it did not venture to answer the said issue. In conclusion, trial Court held that there was violation of bye-law No. 4.08 by defendant - Golf Club. Hence, suit came to be decreed in part by declaring that rejection of Membership Application filed by plaintiff for permanent membership by defendant Nos. 1 and 2 in its meeting held on 26.11.2001 is null and void and as such issued further direction to defendant Nos. 1 and 2 to give one more opportunity to plaintiff for attending the interview as per bye-law No. 4.08.

8. Being aggrieved by judgment and decree passed by trial Court, unsuccessful plaintiff assailed the same in R.A. No. 379/2009 contending inter alia that suit ought to have been decreed as prayed for and material evidence placed by the plaintiff before trial Court was sufficient enough to arrive at a conclusion that plaintiff was entitled for judgment and decree as prayed for. Lower appellate Court after considering the arguments advanced by respective learned Advocates formulated following points for its consideration:

"1) Whether the appellant-plaintiff proves that the letter dated 14.12.2001 issued by defendant No. 1 rejecting permanent playing membership of plaintiff is

null and void and not binding on the plaintiff?

2) Whether the respondent-defendant proves that the application of the plaintiff for permanent membership has been rejected lawful?

3) Whether appellant- plaintiff further proves that the judgment and decree of the trial Court are perverse unsustainable and interference of this court is required and he is also entitled for the relief of mandatory injunction?

4) What order or decree?"

Lower appellate Court answered point Nos. 1 and 3 in the negative and point No. 2 in the affirmative i.e., against plaintiff and consequently dismissed the appeal and confirmed the judgment and decree passed by trial Court. While doing so, the modification was effected to by the lower appellate Court that plaintiff is not entitled for declaratory relief sought for by him and so also he is not entitled for the mandatory injunction as sought for by him vide judgment and decree dated 18.12.2010.

RE: SUBSTANTIAL QUESTION OF LAW No. 1:

9. Sri G. Balakrishna Shastry, learned Advocate appearing for plaintiff has prayed for answering substantial question of law No. 1 in favour of plaintiff by contending that first appellate Court ought not to have modified the judgment and decree passed by trial Court that too, in favour of defendants purportedly in exercise of its power under Order 41 Rule 33 CPC. He would elaborate his submission by contending that in the facts and circumstances of the present case, defendant did not challenge the judgment and decree passed by the trial Court nor they had filed cross objections/cross appeal as contemplated under Order 41 Rule 22 CPC and in the absence of it, first appellate Court ought not to have exercised its power under Order 41 Rule 33 CPC to modify the judgment and decree passed by trial Court. In support of his submission, he has relied upon judgment of Hon''ble Apex Court in the case of Banarsi and Others Vs. Ram Phal, .

10. Per contra, Sri G.B. Shenoy, learned Advocate appearing for respondents-defendants would fairly submit that there was no appeal filed against judgment and decree passed by trial Court nor cross objections filed in the appeal filed by the plaintiff. He would also contend that defendants have virtually accepted the decree and complied with the direction issued by trial Court and it is in this background, memo came to be filed before lower appellate Court indicating thereunder the compliance of decree passed by the trial Court and contends that first appellate Court in this background has obviously exercised its power under Order 41 Rule 33 CPC to modify the judgment and decree passed by the trial Court and dismissed the suit of the plaintiff in its entirety. In support of his submission, he has relied upon the judgment of Hon''ble Apex Court in K. Muthuswami Gounder Vs. N. Palaniappa Gounder, .

11. Perusal of the judgment passed by the lower appellate Court does not even

remotely suggest that it has invoked power vested in it under Order 41 Rule 33 CPC to modify the judgment and decree passed by trial Court. Undisputedly, there was no appeal filed by defendants against judgment and decree passed by trial Court. It is also not in dispute that none of the defendants has filed cross objections in the appeal filed by plaintiff i.e., R.A. No. 379/2009.

12. Under Rule 22 of Order 41 CPC respondent though has not preferred an appeal from any part of the decree would be entitled to not only support the decree but can also contend that finding recorded by the Court below against him in respect of any issue ought to have been in his favour and may also take any cross objection. Thus, Rule 22 of Order 41 CPC consists of two parts. One is where respondent in the appeal would be entitled to not only support the judgment and decree passed by trial Court and second is, he would also be entitled to call upon first appellate Court to answer an issue in respect of which finding has been recorded against him, for being answered in his favour, to sustain such judgment and decree.

13. Keeping this in mind, when Rule 33 of Order 41 CPC is perused, it would clearly indicate that said provision is based on the salutary principle that appellate Court would have power to do complete justice between the parties and to avoid any conflicting or contradictory decisions on the same question in the same suit to operate. It would also indicate that Rule 33 of Order 41 CPC also consists of three parts. First part confers power on the appellate Court to pass such orders in appeal as the case may require. To put it differently, power of the appellate Court would be same as the trial Court would exercise. Second part contemplates that this wide power available to the appellate Court would be exercised notwithstanding that appeal is as to part of the decree only and it may exercise in favour of all or any of the respondents or parties to the lis, though such respondents may not have filed any appeal. Third part relates to cross suits namely, where they have been decrees in cross suits or where two or more decrees are passed in one suit and this power is exercised in respect of all or any of the decrees, although appeal may not have been filed against such decree/s.

14. This aspect of Order 41 Rule 33 has been explained by the Hon'ble Apex Court in the case of Banarsi and Others Vs. Ram Phal, wherein it has been held that where plaintiff seeks a decree against defendant on grounds (A) and (B), any one of the two grounds being enough to entitle the plaintiff to a decree and such Court passes a decree on ground (A) deciding it in favour of plaintiff and ground (B) has been decided against plaintiff, then in an appeal preferred by defendant, inspite of the finding on ground (A) being reversed, the plaintiff as a respondent can still seek to support said judgment and decree of the trial Court by challenging the finding recorded on ground (B) by trial Court and persuade the appellate Court to form an opinion on ground (B) in his favour inspite of finding on ground (A) being reversed and extent the benefit of the decree to respondent- plaintiff though plaintiff - respondent has not filed an appeal against such decree either by way of filing separate appeal or filing cross objections. It

has been held by the Hon''ble Apex Court to the following effect:

"9. Any respondent though he may not have filed an appeal from any part of the decree may still support the decree to the extent to which it is already in his favour by laying challenge to a finding recorded in the impugned judgment against him. Where a plaintiff seeks a decree against the defendant on grounds (A) and (B), any one of the two grounds being enough to entitle the plaintiff to a decree and the Court has passed a decree on ground (A) deciding it for the plaintiff while ground (B) has been decided against the plaintiff, in an appeal preferred by the defendant, in spite of the finding on ground (A) being reversed the plaintiff as a respondent can still seek to support the decree by challenging finding on ground (B) and persuade the appellate court to form an opinion that in spite of the finding on ground (A) being reversed to the benefit of defendant-appellant the decree could still be sustained by reversing the finding on ground (B) though the plaintiff-respondent has neither preferred an appeal of his own nor taken any cross objection. A right to file cross objection is the exercise of right to appeal though in a different form. It was observed in *Sahadu Gangaram Bhagade Vs. Special Deputy Collector, Ahmednagar and Another*, that the right given to a respondent in an appeal to file cross objection is a right given to the same extent as is a right of appeal to lay challenge to the impugned decree if he can be said to be aggrieved thereby. Taking any cross-objection is the exercise of right of appeal and takes the place of cross-appeal though the form differs. Thus it is clear that just as an appeal is preferred by a person aggrieved by the decree so also a cross-objection is preferred by one who can be said to be aggrieved by the decree. A party who has fully succeeded in the suit can and needs to neither prefer an appeal nor take any cross-objections though certain finding may be against him. Appeal and cross-objection - both are filed against decree and not against judgment and certainly not against any finding recorded in a judgment. This was well-settled position of law under the unamended CPC."

In the very same judgment, Hon''ble Apex Court based on 1976 amendment to CPC has examined the right of respondent to assail the finding recorded by trial Court without filing cross objections and its effect thereof and has held:

"10. CPC Amendment of 1976 has not materially or substantially altered the law except for a marginal difference. Even under the amended Order 41, Rule 22 , sub-rule (1) a party in whose favour the decree stands in its entirety is neither entitled nor obliged to prefer any cross-objection. However, the insertion made in the text of sub-rule (1) makes it permissible to file a cross-objection against a finding. The difference which has resulted we will shortly state. A respondent may defend himself without filing any cross-objection to the extent to which decree is in his favour; however, if he proposes to attack any part of the decree he must take cross-objection. The amendment inserted by 1976 amendment is clarificatory and also enabling and this may be made precise by analysing the provision. There may be three situations:--

(i) The impugned decree is partly in favour of the appellant and partly in favour

of the respondent;

(ii) The decree is entirely in favour of the respondent though an issue has been decided against the respondent;

(iii) The decree is entirely in favour of the respondent and all the issues have also been answered in favour of the respondent but there is a finding in the judgment which goes against the respondent.

11. In the type of case (i) it was 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 that part of the decree which is in his favour he is entitled to support without taking any cross-objection. The law remains so post amendment too. In the type of cases (ii) and (iii) pre-amendment CPC did not entitle nor permit the respondent to take any cross-objection as he was not the person aggrieved by the decree. Under the amended CPC, read in the light of the explanation, 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 and he may support the decree without cross objection, the amendment made in the text of sub-rule (1), read with the explanation newly inserted, gives him a right to take cross-objection to a finding recorded against him either while answering an issue or while dealing with an issue. The advantage of preferring such cross-objection is spelled out by sub-rule (4). In spite of the original appeal having been withdrawn or dismissed for default the cross objection taken to any finding by the respondent shall still be available to be adjudicated upon on merits which remedy was not available to the respondent under the unamended CPC. In pre-amendment era, the withdrawal or dismissal for default of the original appeal disabled the respondent to question the correctness or otherwise of any finding recorded against the respondent."

A bare reading of Rule 22 of Order 41 CPC would indicate that where respondent under sub-rule (4) has filed cross objections is faced with a situation where appellant would withdraw the appeal or appeal is dismissed for default may, nevertheless seek for such cross objections being heard and determined after notice to the opposite party. This sub-rule (4) of Rule 22 of Order 41 CPC was held by the Hon"ble Apex Court as a rule which achieved one of the several objects sought to be achieved by Rule 33 of Order 41 and also to avoid situation of conflicting decrees coming into existence in the same suit. It came to be held that power of the appellate Court under Rule 33 is to do complete justice between the parties. It has been held as under:

"15. Rule 4 seeks to achieve one of the several objects sought to be achieved by Rule 33, that is, avoiding a situation of conflicting decrees coming into existence in the same suit. The abovesaid provisions confer power of widest amplitude on the appellate Court so as to do complete justice between the parties and such power is unfettered by consideration of facts like what is the subject-matter of appeal, who has filed the appeal and whether the appeal is being dismissed,

allowed or disposed of by modifying the judgment appealed against. While dismissing an appeal and whether the appeal is being dismissed allowed or disposed of by modifying the judgment appealed against. While dismissing an appeal and though confirming the impugned decree, the appellate Court may still direct passing of such decree or making of such order which ought to have been passed or made by the Court below in accordance with the findings of fact and law arrived at by the Court below and which it would have done had it been conscious of the error committed by it and noticed by the appellate Court. While allowing the appeal or otherwise interfering with the decree or order appealed against, the appellate Court may pass or make such further or other, decree or order, as the case would require being done, consistently with the findings arrived at by the appellate Court. The object sought to be achieved by conferment of such power on the appellate Court is to avoid inconsistency, inequity, inequality in reliefs granted to similarly placed parties and unworkable decree coming into existence. The overriding consideration is achieving the ends of justice. Wider the power, higher the need for caution and care in discretion while exercising the power. Usually the power under 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 either injustice 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 of Order 41."

15. As to whether there can be any straight jacket formula is to be applied for the appellate Courts to exercise power under Rule 33 of Order 41 CPC has been held by the Hon"ble Apex Court as no such precise formula can be laid down. Even in the absence of such cross objections or cross appeal, power of the appellate Court being wide enough and appellate Court continuing to exercise power of trial Court or appeal being continuation of original proceedings, Rule 33 of Order 41 does not restrict appellate Court's power to modify or alter the decree passed by trial Court to achieve the purpose of doing complete justice between parties. It has been held that no rigid rule can be laid down and it would depend upon facts and circumstances of each case. In the case of K. Muthuswami Gounder Vs. N. Palaniappa Gounder, it has been held by Hon"ble Apex Court that in exceptional cases, appellate Court can pass decree or order as it ought to have been passed even in favour of a party who had not preferred

any appeal. It has been held as under:

"12. Order 41 Rule 33 enables the appellate court to pass any decree or order which ought to have been made and to make such further order or decree as the case may be in favour of all or any of the parties even though (i) the appeal is as to part only of the decree; and (ii) such party or parties may not have filed an appeal. The necessary condition for exercising the power under the Rule is that the parties to the proceeding are before the court and the question raised properly arises (sic out of) one of the judgments of the lower court and in that event, the appellate court could consider any objection to any part of the order or decree of the court and set it right. We are fortified in this view by the decision of this Court in *Mahant Dhangir v. Madan Mohan*. No hard and fast rule can be laid down as to the circumstances under which the power can be exercised under Order 41 Rule 33 C.P.C. and each case must depend upon its own facts. The Rule enables the appellate court to pass any order/decreed which ought to have been passed. The general principle is that a decree is binding on the parties to it until it is set aside in appropriate proceedings. Ordinarily the appellate court must not vary or reverse a decree/order in favour of a party who has not preferred any appeal and this Rule holds good notwithstanding Order 41 Rule 33 C.P.C. However, in exceptional cases, the Rule enables the appellate court to pass such decree or order as ought to have been passed even if such decree would be in favour of parties who have not filed any appeal. The power though discretionary should not be declined to be exercised merely on the ground that the party has not filed any appeals. We are not impressed with the argument that the finding as to the nature of Exhibit A-6, the Security Deed has become final as the finding operates as *res judicata*. When the entire matter was still in appeal and any part of the finding could be varied by the appellate court, it is idle to contend that the same had become final. So also when the matter had not attained finality and was still in dispute, the principle of *res judicata* could not arise. In some cases, finding recorded at an earlier stage will operate as *res judicata* if such finding had become final. In the present case, that was not the position. The High Court had to find out the rights of the parties arising out of the deed under Exhibit A-6 and necessarily had to give a finding one way or the other to determine the status of the appellant as *puisne mortgagee*. In doing so the High Court decided that the document Exhibit A-6 did not amount to a charge and therefore, the appellant did not derive any rights of *puisne mortgagee* thereunder. The High Court having so held proceeded further to upset the decree as otherwise if the decree for redemption remained in the face of the finding of nonexistence of a charge with the consequent right as *puisne mortgagee*, the position would be anomalous, if not absurd. And so, the High Court in the special circumstances arising in this case exercised the discretion vested in it under Order 41 Rule 33 C.P.C. It cannot be said that such a question was not germane to the determination of the matter in issue. To defend the finding in his favour, the respondent could contend that the appellant could not claim to be a *puisne mortgagee* as no charge arises from Ex. A-6. In that event it

cannot be said that there is any inconsistency in the stand of respondent. Therefore, we find that there is no merit in the contention of the appellant and the same is rejected."

16. Keeping these principles in mind, when I turn my attention back to the facts on hand, as already observed herein above, it would emerge from the perusal of the judgment and decree of appellate Court that neither the counsel appearing for defendant - respondent had raised an issue for modification of the judgment and decree passed by trial Court nor cross objection had been filed by them. In fact, text of the judgment rendered by the lower appellate Court does not even remotely suggest that in order to modify the decree passed by trial Court, it is exercising its power under Order 41 Rule 33 CPC or that for that matter any reason as having been assigned to why such power is being exercised by it. Finding recorded by the first appellate Court is silent on this aspect. It is only in the operative portion of the order the modification has been indicated by first appellate Court.

17. There cannot be any dispute to the fact that in the circumstances of a given case, if there is no cross objection to the judgment and decree passed by trial Court, it does not take away the power of first appellate Court to modify or alter or substitute the decree of trial Court in order to do complete justice between the parties. Such modification cannot be detrimental to the interest of third parties who are not before the Court. In the instant case, as noticed supra, first appellate Court has not assigned reasons much less cogent or strong compelling circumstances prevailing to modify the judgment and decree passed by the trial Court.

18. Yet another fact which cannot go unnoticed by this Court is the fact that defendants have been consistently contending before first appellate Court as well as before this Court of having complied with judgment and decree passed by the trial Court and it was never defendant's case or claim that finding record on issue No. 5 in its judgment and decree by trial Court ought to have been reversed by first appellate Court. For these myriad reasons indicated hereinabove, this Court is of the considered view that substantial question of law No. 1 formulated herein above requires to be answered in the negative i.e., in favour of plaintiff and against defendants - respondents in the facts obtained in the instant case and subject to observations made herein above.

RE: SUBSTANTIAL QUESTION OF LAW No. (2):

19. It is the grievance of the plaintiff - appellant that in the absence of an application for additional evidence under Order 41 Rule 27 CPC, first appellate Court had no power to receive additional evidence. Records would indicate that respondents herein who were respondents before first appellate Court by memo dated 03.12.2010 have produced office copy of communication dated 25.10.2006 forwarded to the appellant - plaintiff and a copy of the letter calling upon the plaintiff - appellant to appear before the Committee on 25.10.2006 for interview

was also enclosed to the said memo. Said memo has been filed in the open Court on 03.12.2010 by the learned Advocate appearing for respondents. Same is not opposed to by learned counsel for plaintiff- appellant though he was very much present in the Court and had argued the matter as recorded by the appellate Judge. He did not raise his little finger. He has not objected to the production of the communication namely, letter addressed by the appellant himself which was in reply to the communication of respondent - defendants. Obviously, appellant - plaintiff being the author of said document and there being no dispute to this fact, it was not agitated. First appellate Court has not received it by way of additional evidence. As such, the event which has transpired subsequent to passing of the decree and during the pendency of appeal has been brought to the notice of appellate Court by defendants-respondents and same cannot be construed as additional evidence, inasmuch as, these two letters had not altered the factual situation in any manner whatsoever, inasmuch as, appellate Court has affirmed the judgment and decree passed by the trial Court and at the same time, it has also modified finding recorded on issue No. 5 which has since been held in the facts obtained in the present case as could not have undertaken such an exercise. Thus, substantial question of law No. 2 has to be held in the facts of the present case that respondents-defendants had not tendered any additional evidence and as such lower appellate Court has not invoked Order 41 Rule 27 CPC nor received said documents by way of additional evidence and this situation did not arise at all. Hence, answering of substantial question of law No. 2 does not arise at all.

20. For the reasons aforesaid, I proceed to pass the following:

"ORDER

1) Appeal is hereby allowed in part.

2) The judgment and decree passed by VI Addl. District Judge, Mysore in R.A. No. 379/2009 (old No. 353/2006) dated 18.12.2010 is hereby set aside insofar as modifying the decree of the trial Court.

3) Judgment and decree passed in O.S. No. 172/2002 by the II Addl. Civil Judge (Jr.Dn), Mysore dated 27.09.2006 as affirmed by appellate Court in R.A. No. 379/2009 dated 18.12.2010 except to the extent noted herein above at para 20(2) stands confirmed.

4) No order as to costs."