

IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 07TH DAY OF OCTOBER, 2021

BEFORE

THE HON'BLE MR. JUSTICE E.S. INDIRESH

REGULAR SECOND APPEAL NO.1489 OF 2007

BETWEEN:

Sri Abdul Rahman
S/o H.M. Abdul Hafeez
Aged about 45 years
D.No.1410/2, 4th Cross
Serkhazi Street, Kabir Road
Mandi Mohalla
Mysuru - 570 012.

...Appellant

(by Shri A.G. Sridhar, Advocate)

AND:

Sri G.A. Mansoor Alam Khan
S/o late G. Abdul Gafoor Khan
Aged about 50 years
D.No.25, HIG, HUDCO
Bannimantap
Mysuru-Bengaluru Road
Myruru - 570 012.

...Respondent

(by Shri H.P. Leeladhar, Advocate)

This Regular Second Appeal is filed under Section 100 of with Order XLI Rule 1 of the Code of Civil Procedure against the judgment and decree dated 09th March, 2007 passed in Regular Appeal No.275 of 2004 on the file of the III Additional District Judge, Mysuru, dismissing the appeal and confirming the judgment and decree dated 24th July, 2004 passed in OS No.575

of 2000 on the file of the Principal Civil (Sr.Dn.), Mysuru, decreeing the suit for possession and permanent injunction.

In this appeal, arguments being heard, judgment reserved, coming on "Pronouncement of Orders", this day, the Court delivered the following:

J U D G M E N T

This is defendant's appeal challenging the judgment and decree dated 09th March, 2007 passed in Regular Appeal No.275 of 2004 on the file of the III Additional District Judge, Mysuru, dismissing the appeal and confirming the judgment and decree dated 24th July, 2004 passed in OS No.575 of 2000 on the file of Principal Civil Judge (Sr. Dn.), Mysuru, decreeing the suit.

2. For the sake of convenience, parties in this appeal are referred to with their ranking before the trial Court.

3. It is the case of the plaintiff that, the plaintiff is the owner in possession of the suit schedule property and as the suit schedule property was an old building, the plaintiff intended to construct a new complex in the suit schedule property and as such, the plaintiff accepted the proposal of the defendant, who offered to construct the new building in the suit schedule property and as such, the plaintiff and defendant entered into an agreement on 10th July, 1997. The plaintiff further averred that

the plaintiff had agreed to sell the western portion of the suit schedule property for Rs.5,00,000/- shown as ABCD in the sketch enclosed to the agreement dated 10th July, 1997 to the defendant, in which the defendant agreed to put up 12 squares construction with a condition to pay Rs.2,00,000/- at the time of execution of the agreement and balance amount of Rs.3,00,000/- at the time of completion of the eastern portion of the suit schedule property, which is consisting of ground floor and first floor measuring 25 squares marked as EFGH after the demolition of the existing structure and that the defendant had also agreed to leave space of six feet for common entrance between the two structures which is shown as DCEF in the agreement. Plaintiff further pleaded that the defendant had agreed to handover the vacant possession of the eastern portion of the suit schedule property to the plaintiff and had agreed to complete the construction work within a period of one year from the date of agreement. The terms of agreement also specify that the plaintiff shall obtain licence for demolition and reconstruction on the schedule property, from Mysuru City Corporation, Mysuru. The plaintiff further averred that the said agreement provides for resolution of dispute, if any, by an

Arbitrator. It is the case of the plaintiff that for want of funds. the defendant did not pay Rs.2,00,000/- to the plaintiff as agreed, and therefore, the plaintiff rented one shop (shop No.3) to one Sri Gururaj on monthly rent of Rs.1,250/- with an advance amount of Rs.1,00,000/-. However, the plaintiff had received security deposit of Rs.25,000/- from the said Sri Gururaj. The plaintiff further submitted that the defendant had received Rs.35,000/- from the said Sri Gururaj and since there was no commencement of construction by the defendant, it resulted in dispute between the plaintiff and the defendant and as such, it is further averred in the plaint that the as per the advise of Sri Asgar and Dr. Kabir, who were the Arbitrators, the plaintiff and the defendant resolved the dispute as per agreement dated 08th January, 1999, in which the defendant agreed to sell two shops of the western portion of the constructed schedule property marked as ABCD and to use the sale proceeds for the purpose of construction of the building. However, the defendant committed breach of the contractual obligation at all stages and therefore, the plaintiff was constrained to put up construction between 25th January and 27th February, 1999 incurring expenditure of Rs.50,000/- and

the said construction of the building was obstructed by the defendant and as such, he lodged complaint before the jurisdictional police and thereafter, the plaintiff had filed OS No.534 of 1999 on the file of the IV Additional I Civil Judge (Jr. Dn.) at Mysuru. It is further averred in the plaint that the defendant had dumped his material and locked one of the shops. It is further averred that the Arbitrators passed an award on 26th June, 1999, which was signed and accepted by both the plaintiff and the defendant and as a result of the said award the shops were placed at the disposal of the Arbitrators for the purpose of sale. However, no shops were sold and ultimately, the Arbitrators decided to close the process of arbitration and they handed over the possession of the entire constructed portion to the plaintiff, since the plaintiff is in possession of the suit schedule property. It is the case of the plaintiff that the contract between the plaintiff and defendant came to be frustrated owing to the breach committed by the defendant at all stages and as such, the plaintiff has filed OS No.575 of 2000 on the file of the trial Court seeking relief of declaration that the agreement dated 10th July, 1997, followed by all other agreements between the plaintiff and defendant relating to the suit schedule property is

non-est and frustrated on account of conduct attributable to the defendant, inter alia, sought for relief of permanent injunction against the defendant from interfering with the suit schedule property.

4. After service of notice, the defendant entered appearance and filed detailed written statement denying the averments made in the plaint. The defendant admits the agreement dated 10th July, 1997 executed for the purpose of construction of a new complex as per the sketch after demolishing the old structure. Defendant further admitted that the western portion of the suit schedule property consisting of six shops, was to be sold to him and he admitted that he has agreed to put up construction on the eastern portion of the suit schedule property. It is the defence narrated in the written statement that the plaintiff had agreed to get the requisite approval from the Mysuru City Corporation for demolition and reconstruction of the building and same was postponed by the plaintiff and as such, it is the contention of the defendant that the aforementioned agreement was entered for completion of the building, after obtaining proper approval from the competent authority. Hence, it is the categorical defence of the defendant

that the plaintiff failed to obtain the proper plan and licence from the Mysuru City Corporation. It is further stated in the written statement that the defendant has paid Rs.16,000/- to the Corporation towards part payment of tax and paid Rs.2,32,000/- to the plaintiff in terms of the agreement. The defendant took up the contention that the plaintiff himself had leased one of the shops in favour of one Gururaj and thereafter, same was cancelled. He further contended that he has put up foundation in the eastern portion and the plaintiff has altered the agreement dated 26th June, 1999 unilaterally, without the consent of the defendant and therefore, the defendant contended that as the plaintiff had handed over the possession to the defendant for the purpose of demolition and construction of new building, inter alia, the defendant has put up foundation in the eastern portion of the suit schedule property and spent more than Rs.7,50,000/- towards ground work and as such, the defendant denied the possession, as made in the plaint, with regard to suit schedule property with the plaintiff and accordingly, sought for dismissal of the suit.

5. In pursuance of the averments made in the written statement, the plaintiff filed rejoinder contending that the tenant

had vacated the premises in the year 1991 itself and he had obtained licence and approval of plan on 17th November, 1997 from the Mysuru City corporation and also denied the statement made in the written statement by the defendant that the defendant has paid Rs.2,32,000/- to the plaintiff including the statement that defendant laid the foundation in the eastern portion of the suit schedule property.

6. The trial Court, after considering the pleadings on the record, formulated the following issues for its consideration:

1. *Whether the plaintiff proves that the defendant has not complied with the terms and conditions of agreement dated 10.07.1997 entered between the parties and has not completed the construction as per the agreement?*
2. *Whether the defendant proves payment of amount in terms of agreement dated 10.07.1997?*
3. *Whether the plaintiff proves payment of Rs.3,83,000/- to the defendant on various dates towards construction?*
4. *Whether the plaintiff proves that the defendant has violated the terms and conditions of the agreement entered between the parties?*

5. *Whether the plaintiff proves execution of agreement dated 26.06.1999 and entrustment of construction work to Sri Khurshid Anwar in terms of agreement dated 26.06.1999?*

6. *Whether the defendant has spent Rs.7,50,000/- for the construction purpose?*

7. *Whether the plaintiff proves cancellation of agreement dated 02.01.2000?*

8. *Whether the plaintiff proves cancellation of agreement dated 02.01.2003?*

(issue No.8 is deleted vide order sheet dated 24.07.2004) Sd/-

9 *Whether the plaintiff proves that the defendant is interfering with his peaceful possession and enjoyment of the suit schedule property?*

10 *What order and decree?*

7. In order to prove their case, Plaintiff got examined two witnesses as PW1 and PW2 and produced 241 documents and same were marked as Exhibits P1 to P241. On the other hand, defendant examined three witnesses as DW1 to DW3 and produced 46 documents and same were marked as Exhibits D1 to D46.

8. The trial Court, after considering the material on record, by its judgment and decree dated 24th July, 2004, decreed the suit. Being aggrieved by the judgment and decree passed by the trial Court, defendant preferred appeal in Regular Appeal No.275 of 2004 on the file of the First Appellate Court and the said appeal was contested by the plaintiff. The First Appellate Court, after re-appreciating the material on record, by its judgment and decree dated 09th March, 2007 dismissed the appeal, consequently, confirmed the judgment and decree passed by the trial Court. Being aggrieved, by the judgment and decree passed by the courts below, the defendant has presented this Regular Second Appeal.

9. This Court, by order dated 11th March, 2008, framed the following substantial question of law for consideration:

“Whether the courts below were justified in granting a decree of permanent injunction when admittedly, the defendant was in possession of the property?”

This Court on framed the additional substantial question of law, which reads as under:-

"Whether the judgment and decree passed by the courts below requires interference under Section 100 of Code of Civil Procedure?"

10. On 03rd September, 2021, this court framed the additional substantial question of law as under:

"Whether the trial Court is justified in not framing issue on clause (7) of the Agreement of Contract dated 10th July, 1997 (Exhibit P239)?"

11. I have heard Sri A.G. Sridhar, learned counsel appearing for the appellant and Sri H.P. Leeladhar, learned counsel appearing for the respondent.

12. Sri A.G. Sridhar, learned counsel appearing for the appellant contended that both the courts below have not properly appreciated the documents on record in the right perspective and arrived at a conclusion, ignoring the material evidence produced by the defendant. He further contended that the suit for declaration with consequential relief of permanent injunction is not maintainable without seeking relief of possession in the suit and the said aspect of the matter was not considered by the trial Court. He further contended that both the courts below have not given any finding relating to striking

off the portion of clause 12 in the agreement dated 10th July, 1997. Emphasising on these aspects, he submitted that the plaintiff, unilaterally struck off the portion of clause 12 in the agreement, and the same was signed by the plaintiff alone. He further contended that both the courts below have not considered the fact that the plaintiff had obtained approval of plan from the Mysuru City Corporation only for change of roof and staircase and not with regard to the demolition of existing building and for putting up new construction and therefore, in view of hindrance in not obtaining the approval from the competent authority, defendant was not able to complete the building. Referring to Agreement of Contract dated 08th January, 1999 (Exhibit P1), he argued that the parties have agreed to sell two shops on the western portion of the constructed schedule property and to make use of the sale proceeds for construction of building. He also invited the attention of court to the agreement dated 26th June, 1999 (Exhibit P3) and submitted that the plaintiff and the defendant, executed the deed of agreement dated 26th June, 1999, authorizing Mr. Khursheed Anwar to take over the construction work and to complete the construction as per the agreement dated 11th June, 1997 by

mobilizing funds. He further submitted that the said Khurshed Anwar was none other than the son of the sister of plaintiff's father. He further contended that the plaintiff and the said Khursheed Anwar, without the consent of the defendant, made alterations in the agreement by striking off clause 4 of the agreement, and further submitted there was no signature of the defendant agreeing to strike off clause 4 of the agreement and same would substantiate the conduct of the plaintiff that from the initial stage itself, plaintiff is not allowing the defendant to complete the construction of the building. He also referred to cancellation of the agreement dated 02nd January, 2000 (Exhibit P4), wherein both the plaintiff and Khurshed Anwar colluded with each other and cancelled the agreement. It is his submission that the said Exhibit P4 was prepared to substantiate that the suit schedule property is in possession of the plaintiff and not with the defendant. He submitted that the defendant is not a party to Exhibit P4. He also referred to recitals in the said Cancellation Agreement and argued that the said agreement was made to create evidence that keys of the premises were handed over by Khurshed to the owner (plaintiff).

13. Sri Sridhar, learned counsel appearing for the appellant further contended that the plaintiff has filed OS No.534 of 1999 before the competent court seeking relief of permanent injunction and in the said suit plaintiff has filed IA.II under Order XXXIX Rules 1 and 2 of the Code of Civil Procedure, seeking to restrain the defendant from interfering with the suit schedule property and the said application was dismissed by the trial Court on 25th June, 1999 and the said fact would clearly demonstrate that the defendant is in possession of the suit schedule property. However, the plaintiff withdrew the said suit.

14. Sri Sridhar, further, contended that the plaintiff has filed IA.I under Order XXXIX Rule 1 and 2 of Code of Civil Procedure in the present suit, which came to be allowed by the trial Court and being aggrieved by the same, defendant preferred MA No.39 of 2002 before the First Additional District Judge, Mysuru and the said Appellate Court allowed the appeal and set aside the order passed by the trial Court under Order XXXIX Rule 1 and 2 of Code of Civil Procedure. Being aggrieved by the same, plaintiff filed CRP No.2401 of 2003 before this Court and this Court, by order dated 14th October, 2003

disposed of the Revision Petition with a direction to the parties not to put up any construction in the schedule property and to maintain status-quo till the disposal of the Suit. Referring to the aforementioned orders of this Court and the order passed by the Appellate Court in MA No.39 of 2002, he argued that the possession of the suit schedule property lies with the defendant, which came to be affirmed by the Appellate Courts. He also referred to the admission made by PW1 with regard to the fact that the defendant is in possession of the suit schedule property and argued that both the courts below have ignored the admission made by PW1 and PW2. He further contended that the trial Court ought to have dismissed the suit on the ground of alternative remedy available to the plaintiff to resolve the dispute by way of arbitration as per paragraph 12 of the agreement of contract dated 10th July, 1997. He also submitted that the photographs marked by the defendant as per Exhibits D1 to D5 would clearly establish the fact that the defendant is in possession of the suit schedule property. He further submitted that the Cash Vouchers marked as Exhibits P184 to P188, except Exhibit P185, are disputed by the defendant and the said aspect of the matter was not considered by both the courts below in the

right perspective. With regard to documents produced by the plaintiff under Order XLI Rule 27 of Code of Civil Procedure in IA.I of 2021, Sri Sridhar argued that the documents enclosed are subsequent to the decree passed by the trial Court and same cannot be accepted. He also contended that IA.II of 2021 filed by the plaintiff is not maintainable, as the prayer made seeking protection from the Police, is to establish that the plaintiff is in possession of the suit schedule property and the said prayer made in the application cannot be accepted as the plaintiff is not in possession of the suit schedule property and therefore, he contended that both the courts below have misconstrued the factual aspects and decreed the suit which requires interference in this appeal.

15. Per contra, Sri H.P. Leeladhar, learned counsel appearing for the respondent/plaintiff contended that both the courts below, on facts, have arrived at a conclusion that the defendant has committed breach of agreement dated 10th July, 1997 and accordingly decreed the suit, which cannot be disturbed in this appeal. He also contended that the plaintiff tried to resolve the dispute through the Arbitrators and in this regard, the dispute was referred to Dr. Syed Kabir Ahmed and

Asgar Ali Khan, who have settled the dispute and in terms of the same, memo for withdrawal of suit was filed in OS No.534 of 1999 before the competent court at Mysuru and in view of the same, the only grievance of the plaintiff was that the defendant failed to give effect to the agreement dated 10th July, 1997 for want of funds and also he has not made any effort to mobilize the funds to complete the building in time. He further submitted that both the courts below, having appreciated the evidence of PW1 and PW2, have arrived at the conclusion that the defendant has committed breach of the agreement and thus, caused irreparable loss to the plaintiff for having not completed the building and handing over the vacant possession in time and as such, no interference is called for in this appeal and accordingly sought for dismissal of the appeal.

16. Having heard the learned counsel appearing for the parties, I have carefully considered the finding recorded by both the courts below and perused the records. The undisputed facts of the case are that, the plaintiff is the owner in possession of the subject land and the plaintiff and defendant had entered into an agreement of contract dated 10th July, 1997 (Exhibit P239), wherein the defendant agreed to construct new complex

consisting of eastern portion measuring 25 squares, both on ground and first floor, within one year and also to construct 12 squares building on the western portion of the new complex. The defendant had agreed to pay Rs.5,00,000/- towards advance consideration, of which, Rs.2,00,000/- would be paid before the commencement of construction work and balance consideration of Rs.3,00,000/- would be paid before commencing the construction of western portion. The said agreement also provided that there would be a six feet common entrance to either side of the building. The plaintiff further undertook that he shall get the layout plan approved and sanctioned by the competent authority to demolish the existing structure vis-à-vis construction of the new complex. It is also forthcoming from the records that there was a delay in handing over the possession of the existing building by the plaintiff as well as he failed to get the sanction from the competent authority for demolition and construction, at the earliest and as such, there was certain dispute between the plaintiff and defendant and both the parties approached the Arbitrators, viz. Dr. Syed Kabir Ahmed and Asgar Ali Khan to resolve the dispute and pursuant to their intervention, parties agreed to revive the

agreement dated 10th July, 1997 and as such, new agreement of contract was made on 08th January, 1999 (Exhibit P1). Perusal of the agreement of contract (Exhibit P1) would indicate that the parties agreed to alienate two shops on the western side of the constructed schedule property marked as ABCD in the sketch and to utilise the sale proceeds for the purpose of construction of remaining portion of the new building. The parties also agreed that Rs.4,29,000/- is to be utilised for the purpose of civil construction, excluding electrification of the ground floor to be constructed and the aforementioned amount of Rs.4,29,000/- to be utilised phase-wise with an intention to complete the construction. Again there was a dispute between the parties with regard to effectuating the aforementioned agreement-Exhibit P1 and as such, the plaintiff had filed a suit in OS No.534 of 1999 on the file of the IV Additional I Civil Judge (Jr. Dn.) at Mysuru and same was disposed of in terms of intervention made by the Arbitrators and accordingly, parties have executed another deed of agreement dated 26th June, 1999 (Exhibit P3). Perusal of the said deed of agreement (Exhibit P3) would substantiate the fact that both the parties have authorised one Kurshid Anwar to take over the work and to complete the

construction as per the agreement dated 10th July, 1997 in terms of the sketch appended to the plaint. It is also resolved in Exhibit P3 that plaintiff has to withdraw Original Suit No.534 of 1999 before the competent Court as the matter is settled out of Court. Careful consideration of the Deed of Agreement-Exhibit P3, would make it clear that clause (4) to the said agreement Exhibit P3 has been struck off and it is the case of the defendant that the plaintiff, unilaterally without the consent of the defendant, had struck off clause (4) of the said agreement and on careful examination of the said document would reveal that the defendant has not counter-signed the alteration/striking off of clause (4) of the agreement dated 26th June, 1999 and therefore, it may be inferred that, there is variance in the document-Exhibit P3 and perusal of the signature of the plaintiff at Exhibit P3, marked as Exhibit P3(a), would indicate that the plaintiff alone has caused alteration in the document without the knowledge of the defendant. Perusal of the record further indicate that though the plaintiff had made an application to the Mysuru City Corporation for demolition and reconstruction of the existing building in the suit schedule property, however, the Mysuru City Corporation had granted licence dated 06th April,

2004 to the plaintiff for the purpose of change of roof and staircase as per Exhibit P179. In this regard, the admission made by PW1 reads as under:

"It is true that it was my responsibility to produce the licence plan for demolishing as well as the reconstructing the building. I had obtained Exhibit P5 and Exhibit P179 from Corporation, Mysuru for such demolition and construction."

17. This would clearly establish that though there is a clear condition to complete the building, however, due to delay in securing sanction from the Mysuru City Corporation, the defendant was not able to demolish and put up the construction in terms of Agreement of Contract Exhibit P239. In this regard, there is no explanation by the plaintiff in the suit. Perusal of the deed of agreement dated 26th June, 1999 Exhibit P3, whereunder the said agreement was unilaterally altered by the plaintiff without the consent of the defendant, would substantiate the conduct of the plaintiff that he has not approached the Court with clean hands by seeking relief of declaration and consequential relief of permanent injunction, which are equitable in nature and the said aspect of the matter was not properly appreciated by both the courts below.

18. PW1 at page 29 of his cross-examination, deposed as follows:

"Kurshid Anwar is my father's sister's son. It is not true to suggest that since he is my relative, I have created Exhibit P4. Sri M.A. Wahab, Advocate has written Exhibit P3. He has struck off paragraph 4 of Exhibit P3. It is Sri Wahab who suggested to strike off paragraph No.4."

19. Perusal of the cross-examination of PW1 would indicate that one Sri Wahab, Advocate, has made alteration in the Exhibit P3. However, for the reasons best known to the plaintiff, the said Wahab, Advocate was not summoned to depose regarding alteration, which had been made unilaterally in the absence of the defendant.

20. In respect of claiming relief of possession, the trial Court ought to have framed an issue in that regard. Despite the same, parties to the suit have understood the fact that suit is one filed seeking declaration and possession and as such filed pleadings and adduced evidence and understood that the entire lis is with regard to handing over possession of the subject matter of the suit. At this juncture, it is useful to extract the

admission made by PW1 in the cross-examination, which is as follows:

"The defendant has constructed six shops in the western wing. Out of these six shops, three shops are facing towards North and remaining three shops are facing south. The same is mentioned in Exhibit P240."

21. At page 29 of his evidence, PW1 deposed as follows:

"The defendant has invested his own funds for construction of six shops. All the six shops are identical in respect of the measurement."

22. Further, at page 32 of his evidence, PW1 deposed as follows:

"The defendant had dumped his materials in shop No.2 facing towards southern side. I cannot say the date on which I obstructed the defendant when he got bills in my business."

23. PW2 in his cross-examination admits as follows:

"After I abandoned the construction work I did not come in contact with the defendant in respect of suit property. I have no documents to show that defendant was present at the time of Exhibit P4. Defendant was not present at the time of Exhibit P4. I had informed to the plaintiff before execution of Exhibit P4 that I am going to

execute Exhibit P4. It is not true to suggest that I have executed Exhibit P4 in colluding with plaintiff."

24. Both the courts below ought to have appreciated the judicial notice made in OS No.534 of 1999 filed by the plaintiff against the defendant on the file of the IV Additional I Civil Judge (Jr. Dn.), Mysuru. The Appellate Court in MA No.39 of 2002 on the file of First Additional District Judge, Mysuru, set aside the order passed by the trial Court on IA.I filed under Order XXXIX Rules 1 and 2 of Code of Civil Procedure and the said aspect would clearly establish the fact that the defendant was in possession of the suit schedule property as on the date of filing of the suit. It is also not in dispute that the plaintiff has filed CRP No.2401 of 2003 before this Court, however, the said order of granting interim relief of injunction, was not disturbed by this Court, and the said aspect of the matter was not properly appreciated by the courts below while decreeing the suit. In this regard, the testimony of PW1 and PW2 is self-explanatory regarding possession and therefore, though the plaintiff/respondent herein has filed IA.I of 2021 under Order XLI Rule 27 Code of Civil Procedure and sought to produce documents to show that he is in possession of the suit schedule property, these documents do not prevail over the finding

recorded by the Appellate Court in MA No.39 of 2002 and therefore, the judgment referred to by the respondent in the case of RAM KUMAR BARNWAL v. RAM LAKHAN (DEAD) reported in 2007(5) SCC 660 is not applicable to the case on hand to accept the subsequent event, since the Order passed by the Appellate Court in MA No.39 of 2002 still holds the field, besides the plaintiff withdraw the suit in OS No.534 of 1999. In that view of the matter, the respondent/plaintiff has failed to prove his possession with cogent reasons and therefore, IA.I of 2021 deserves to be dismissed.

25. Having thus discussed above, I carefully considered the evidence of DW1 and DW2, who are the witnesses to Exhibits P3 and P4. They have deposed that the construction work was entrusted to PW2, who abandoned the said work under the cancellation agreement executed to him in the presence of the witnesses as per Exhibit P4. The oral and documentary evidence on record, would clearly establish that the finding recorded by trial Court on Issue No.9, is without any basis and therefore, I am of the considered view that the finding recorded by the trial Court at page 35 of the judgment that the defendant is deemed to have been ousted from the suit schedule property

is not correct and the said finding was not properly re-appreciated by the First Appellate Court by looking into the documents, particularly with regard to payment of tax by the parties. At this juncture, it is useful to refer law declared by the Apex Court in the case of GOPAL, KRISHNAJI KETKAR v. MAHOMED HAJI LATIF & OTHERS reported in AIR 1968 SC 1413 wherein it is observed that, a party in whose possession of best evidence which would throw light on the issue in controversy withholding it, then the Court ought to draw an adverse inference against him notwithstanding that onus does not lie on him. In the present case, the conduct of the plaintiff who struck off clause (4) of Exhibit P4 behind the back of the defendant, would clearly establish the conduct of the plaintiff, inter alia, though the plaintiff deposed that the said alteration to Exhibit P4 was made by Sri Wahab, Advocate, however, the plaintiff has not taken any steps to examine the said Sri Wahab, Advocate to corroborate Exhibit P4, and this aspect of the matter was ignored by the trial Court and as such, the trial Court has committed error in appreciating the material on record, leaving out the material evidence stated supra and the said factual aspects have not been properly re-appreciated by the First Appellate Court

being a last court to interfere with the facts on record, as per the law declared by the Hon'ble Supreme Court in the case of SANTHOSH HAZARI VS. PURUSHOTTAM TIWARI reported in AIR 2001 SCC 965, and in the case of SRI V N KRISHNA MURTHY AND ANOTHER ETC., ETC., v. RAVIKUMAR AND OTHERS ETC., ETC., reported in AIR 2020 SC 4038.

26. As regards interference of the High Court with the concurrent findings by the courts below, the Hon'ble Supreme Court in the case of KASHMIR SINGH v. HARNAM SINGH AND ANOTHER reported in AIR 2008 SC 1749 has observed as under:

"The general rule is that High Court will not interfere with the concurrent findings of the Courts below. But it is not an absolute rule. Some of the well recognized exceptions are where (i) the Courts below have ignored material evidence or acted on no evidence; (ii) the Courts have drawn wrong inferences from proved facts by applying the law erroneously; or (iii) the Courts have wrongly cast the burden of proof. 'Decision based on no evidence', not only means cases where there is a total dearth of evidence, but also refers to any case, where the evidence, taken as a whole, is not reasonably capable of supporting the finding."

27. In the aforesaid decision the Hon'ble Supreme Court has laid down parameters for interference under Section 100 of

CPC. Further, observations made by the Hon'ble Supreme Court reads as under:

"A substantial question of law will also arise in a contrary situation, where the legal position is clear, either on account of express provisions of law or binding precedents, but the Court below has decided the matter, either ignoring or acting contrary to such legal principle. In the second type of cases, the substantial question of law arises not because the law is still debatable, but because the decision rendered on a material question, violates the settled position of law."

28. The Hon'ble Supreme Court while dealing with the scope of Section 100 of CPC with regard to the concurrent findings of trial Court and the First Appellate Court on the ground that the plaintiff was unable to prove his title, in the case of *NASIB KAUR AND OTHERS v. COLONEL SURAT SINGH (DECEASED) THROUGH LRS., AND OTHERS* reported in (2013) 5 SCC 218, has held that the High Court's jurisdiction under Section 100 of CPC is limited only to decide the substantial question of law which arises in a case and therefore, the High Court shall confine only with regard to substantial question of law framed therein and cannot interfere with the facts. It is further observed in the aforementioned judgment that, since the

First Appellate Court being a last Court to decide the lis between the parties on facts, shall decide the core issue involved between the parties.

29. In the case of S. SUBRAMANIAN v. S. RAMASAMY ETC., reported in AIR 2019 SC 3056, the Hon'ble Supreme Court, while observing that question of law cannot be considered to be as substantial question of law, at paragraph 8.2 of the judgment, has held as under:

"8.2. Even otherwise, it is required to be noted that as per catena of decisions of this Court and even as provided under Section 100 of the CPC, the Second Appeal would be maintainable only on substantial question of law. The Second Appeal does not lie on question of facts or of law. The existence of 'a substantial question of law' is a sine qua non for the exercise of the jurisdiction under Section 100 of the CPC. As observed and held by this Court in the case of Kondiba Dagadu Kadam (AIR 1999 SC 2213) (supra), in a second appeal under Section 100 of the CPC, the High Court cannot substitute its own opinion for that of the First Appellate Court, unless it finds that the conclusions drawn by the lower Court were erroneous being:

- (i) Contrary to the mandatory provisions of the applicable law;*

OR

(ii) *Contrary to the law as pronounced by the Apex Court;*

OR

(iii) *Based on in-admissible evidence or no evidence.*

It is further observed by this Court in the aforesaid decision that if the First Appellate Court has exercised its discretion in a judicial manner, its decision cannot be recorded as suffering from an error either of law or of procedure requiring interference in Second Appeal. It is further observed that the Trial Court could have decided differently is not a question of law justifying interference in second Appeal."

30. The Hon'ble Supreme Court in the case of HARYANA STATE AND OTHERS v. GRAM PANCHAYAT VILLAGE KALEHRI reported in 2016(6) SCALE 157, at paragraph 15 of the judgment has held as under:

"15. As a matter of fact, having regard to the nature of controversy and keeping in view the issues involved, such as the issue regarding ownership rights coupled with the issue regarding proper interpretation of documents (exhibits) to prove the ownership rights over the suit land, we are of the view that these issues do constitute substantial questions of law, viz., whether the Courts below were justified in properly interpreting the documents/exhibits relied upon by the parties for

determining the ownership rights over the suit land? IN other words, we are of the view that where the Court is required to properly interpret the nature of the documents, it does not involved any issue of fact as such but it only involves legal issue based on admitted documents. It is, therefore, obligatory upon the High Court to decide the legality and correctness of such findings as to which party's documents are to be preferred for conferring title over the suit land. In this case, the High Court could do so only when it had first admitted the appeal and framed substantial questions of law as required Under Section 100 of the Code."

31. The Hon'ble Supreme Court in the case of ISHWAR DASS JAIN (DEAD) THROUGH LRS. v. SOHAN LAL (DEAD) BY LRS. reported in 2000(1) SCC 434 has held that, even if there is a concurrent finding of fact by the Courts below, the findings be interfered with by the High Court under Section 100 of CPC, if the Courts below have omitted to consider the vital evidence which could have led to a different conclusion or when inadmissible evidence was relied upon which resulted in arriving at a different conclusion. The observations made by the Hon'ble Supreme Court reads as follows:

"...Under Section 100 CPC, after the 1976 Amendment, it is essential for the High Court to formulate a substantial question of law and it is not

permissible to reverse the judgment of the first appellate Court without doing so. There are two situations in which interference with findings of fact is permissible. The first one is when material or relevant evidence is not considered which, if considered, would have led to an opposite conclusion. The second situation in which interference with findings of fact is permissible is where a finding has been arrived at by the appellate Court by placing reliance on inadmissible evidence which if it was omitted, an opposite conclusion was possible. In either of the above situations, a substantial question of law can arise."

32. In view of the settled principle of law, referred to above, both the courts have not properly appreciated the factual aspects of the case by ignoring the material evidence, I am of the considered view that the judgment and decree passed by the courts below are perverse and liable to be rejected. For the foregoing reasons, and on re-appreciation of evidence on record, the substantial questions of law framed by this Court mentioned above, favours the defendant. In the result, I pass the following:

ORDER

- i) Appeal is allowed.

- ii) Judgment and decree dated 09th March, 2007 passed in Regular Appeal No.275 of 2004 on the file of the III Additional District Judge, Mysuru is set aside;
- iii) Judgment and decree dated 24th July, 2004 passed in OS No.575 of 2000 on the file of Principal Civil Judge (Sr. Dn.), Mysuru, is set aside and Suit in OS No.575 of 2000 is dismissed.

**Sd/-
JUDGE**