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IN THE HIGH COURT OF JUDICATURE AT MUMBAI
CIVIL APPELLATE JURISDICTION
CIVIL APPLICATION NO. 202 OF 2012
IN
SECOND APPEAL NO. 179 OF 2012

Jaysingpur Krishi Utpanna Bajar Samiti ... Applicant

Vs.

L.K.Akiwate Ayudyogik Vasahat Ltd. and others ... Respondents

Mr.P.M.Arjunwadkar, Advocate for Applicant.

Mr.M.L.Patil, Advocate for Respondent No.1.

CORAM : R. G. KETKAR, J.

DATE : 10th APRIL, 2015

P.C. :

Heard Mr.P.M.Arjunwadkar, learned Counsel for the applicant and Mr.M.L.Patil, learned Counsel for respondent No.1 at length.

2. By this application, the applicant has prayed for stay of the judgment and decree dated 04/01/2012 passed by the learned District Judge – 1, Jaysingpur in Regular Civil Appeal No. 2 of 2008 as also the judgment and decree dated 20/12/2007 passed by the learned Civil Judge, Senior Division in Regular Civil Suit No.70 of in 2006.

Before considering this application, it is necessary to briefly indicate the controversy between the parties.

3. Respondent No.1, hereinafter referred to as plaintiff, instituted suit for perpetual and mandatory injunction against the applicant and respondents No. 2 to 8, hereinafter referred to as defendants. During the pendency of the suit, the plaintiff took out application at Exhibit 5 and prayed for injunction restraining the defendants from causing any obstruction to user of the disputed road. By order dated 20/02/2004, the learned trial Judge dismissed the application. Aggrieved by that decision, the plaintiff preferred Misc. Civil Appeal before the District Court. By order dated 12/07/2006, the learned Additional District Judge, Jaisingpur dismissed the appeal. Aggrieved by this decision, plaintiff instituted Writ Petition No. 6350 of 2006 in this Court. On 16/03/2007, after hearing both sides, this Court allowed the Writ Petition and granted interim injunction in terms of prayer clause (c) which reads as under:

“Pending the hearing and final disposal of the aforesaid Writ Petition the Respondents, their Agents and Servants be restrained by an order of temporary injunction from obstructing or prohibiting the Petitioner, its members, their employees and visitors from using and repairing/upgrading the disputed road for vehicular traffic.”

4. Aggrieved by this decision, defendant No.1 preferred Special Leave Petition before the Apex Court. By order dated 27/04/2007, the Apex Court modified the High Court's order to the extent that during the pendency of the suit, plaintiff and other defendants shall be permitted to only use the road and no further steps shall be taken by them upon the tender already floated. It is

common ground between the parties that plaintiff had floated tender for tarring the road. The Apex Court also directed the trial Court to decide the suit in a time bound schedule.

5. By the judgment and decree dated 20/12/2007, the learned trial Judge partly decreed the suit. The learned trial Judge declared that plaintiff has right over the suit road as easement by way of prescription. The defendants were permanently restrained from obstructing user of the plaintiff from its right over the suit road as easement by way of prescription. Aggrieved by that decision, defendant No.1 preferred appeal before the District Court. It is not disputed and rather it is evident from record that plaintiff did not file cross objections. By order dated 04/01/2012, the learned District Judge dismissed the appeal. The learned District Judge, however, allowed the cross objections of the plaintiff challenging the refusal of an injunction against the defendants restraining them from obstructing it from carrying out necessary repairs to the suit road and in addition to the declaration and relief of injunction granted by the trial Court, defendants were further restrained from obstructing the plaintiff from carrying out the necessary repairs only to the suit road. Aggrieved by that decision, defendant No.1 has preferred the Second Appeal. On 11/02/2013, this Court admitted the appeal as it raises substantial question of law. On the Civil Application, rule was issued and till the disposal of the Civil Application, the plaintiff is restrained

from performing any act which will mean that it is trying to maintain the said road in respect of which easementary right is granted. The application is heard today for confirmation of ad-interim order.

6. In support of this application, Mr. Arjunwadkar has taken me through the impugned orders as also interim orders that were passed by the trial Court, the District Court, the High Court and finally by the Apex Court. He submitted that after hearing the contesting parties, this Court has admitted the appeal as it raises substantial question of law. It is, therefore, necessary to grant relief claimed in this application.

7. On the other hand, Mr. Patil submitted that in view of sections 24, 25 & 27 of the Indian Easements Act, 1882 (for short 'Act'), the Courts below having recognised plaintiff's right over the suit road as easement by way of prescription, the plaintiff is entitled to carry out repairs as also entitled to tar suit road. He submitted that the learned District Judge has rightly answered point No.4 in favour of the plaintiff and held that plaintiff is entitled to issuance of injunction against the defendants from obstructing the plaintiff from carrying out repairs to the suit road. He submitted that plaintiff though has not filed cross objections, while supporting the decree can assail the findings recorded by the trial Court against it. He submitted the learned trial Judge recorded a finding to the effect that plaintiff is not entitled to injunction restraining defendants from

obstructing it from carrying out repairs as also from tarring the suit road. He therefore, submitted that defendant No.1 is not entitled to stay of the impugned decree. In any case, he submitted that plaintiff is entitled to carry out repairs as also entitled to tar the suit road in view of sections 24, 25 & 27 of the Act. Finally he submitted that at any rate, defendant No.1 cannot claim stay which will virtually amount to allowing the appeal at an interlocutory stage.

8. I have considered the rival submissions made by the learned Counsel appearing for the parties. I have also perused the material on record. As noted earlier, the plaintiff has instituted suit for declaration and injunction. The reliefs claimed by the plaintiff in the suit are as under :

- a) for declaration that plaintiff has easementary right by way of prescription in respect of suit road;
- b) for perpetual injunction restraining the defendants, their agents, servants or anyone from obstructing the members of the plaintiff as also the persons visiting the plaintiff from using the suit road as also restraining the defendants from obstructing the plaintiff from tarring the suit road as also for incidentally maintaining the suit road.

9. By the judgment and decree dated 20/12/2007, the learned trial Judge declared that the plaintiff has right over the suit road as easement by way of prescription. The learned trial Judge also issued injunction restraining the defendants from obstructing user of the plaintiff from its right over the suit road as easement by

way of prescription.

10. Aggrieved by this decision, defendant No.1 preferred appeal. Mr.Arjunwadkar submitted that during the pendency of the appeal, the plaintiff issued tender on 07/04/2007 in Daily Lokmat inviting offers for repairs of the suit road. Defendant No.1 took out application Exhibit 8. By order dated 12/02/2008, the learned District Judge allowed the application and directed both parties to maintain status quo in respect of suit road as directed by the Apex Court till hearing and final disposal of the appeal. With this condition, the learned District Judge stayed the decree passed by the trial Court till the decision of the appeal.

11. Aggrieved by this decision, the plaintiff instituted Writ Petition No. 4123 of 2008. In paragraph 3, this Court considered the statement of the plaintiff that it may be permitted to carry out nominal repairs of the road as and when required so as to maintain the road properly for beneficial user. The said argument was specifically turned down reserving liberty to take out appropriate application, if so advised before the Appellate Court to effectuate the observations made in paragraph 65 of the trial Court's order dated 20/12/2007.

12. As noted earlier, though the plaintiff had claimed perpetual injunction restraining the defendants from obstructing it from maintaining the road as also tarring the road, the said relief

was not granted. The plaintiff did not file cross objections in the appeal preferred by the defendant No.1. Mr.Patil submitted that the plaintiff's suit is decreed. Since the finding is recorded against the plaintiff as regards injunction, it is not necessary to file cross objections. The plaintiff can assail the said findings while supporting the decree. Prima facie, it is not possible to accept this submission. The trial Court did not decree the relief of injunction. In my opinion, the plaintiff ought to have filed cross objections.

13. In the case of *Banarsi and others Vs. Ram Phal*, (2003) 9 SCC 606, the Apex Court observed in paragraphs 9 to 11 as under :

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 the 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 the 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 V. Special Dy. Collector, Ahmednagar* 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-objection 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 the well-settled position of law under the unamended CPC.

10. The 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 the 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 the 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.

14. The learned District Judge while allowing the cross objections has observed in paragraphs 30 to 32 that in view of Order 41 Rule 22 of C.P.C., there is no bar to raise such a plea in the absence of cross objections. Prima facie, the learned District Judge was not justified in modifying the trial Court's decree in the absence of cross objections.

15. That apart, perusal of the order of the Apex Court dated 27/04/2007 also shows that during the pendency of the suit, the Apex Court modified this Court's order and permitted the plaintiff and other defendants to only use the road and no further steps was ordered to be taken upon the tender already floated. The said order was passed without prejudice to the rights of the parties in the suit.

16. Mr.Arjunwadkar invited my attention to the photographs at pages No. 114 to 120 and submitted that just adjacent to the suit

road, there is a tar road. He submitted that as the plaintiff and others have alternate road, the applicant – defendant No.1 has made out a case for granting stay to the impugned decrees.

17. Mr.Patil submitted that the Courts below have decreed the suit and declared that plaintiff has right over the suit road as easement by way of prescription. The Courts below also restrained the defendants from obstructing user of the plaintiff from its right over the suit road as easement by way of prescription. If stay as prayed by applicant – defendant No.1 is granted, appeal would stand allowed at this stage. During the pendency of the appeal also, the trial Court's decree was not stayed and the learned District Judge by order dated 12/02/2008 directed the parties to maintain the status quo in respect of the suit road as directed by the Apex Court.

18. In the light of the above discussion, Civil Application is disposed of in the following terms.

- i) The plaintiff shall be permitted to only use the suit road as per the Apex Court's order dated 27/04/2007. In other words, they are not permitted to either maintain the road or tar the disputed road.
- ii) By way of abundant caution, it is clarified that this Court has not stayed the trial Court's decree and has stayed only clause (2) of the operative part of the District Court's decree dated 04/01/2012 which reads as under :

“The cross-objections of the respondent No.1/plaintiff, challenging the refusal of an injunction against the defendants

for restraining them for obstructing him from carrying out the necessary repairs to the suit road, are allowed and in addition to the declaration and the relief of injunction granted by the learned lower Court, the defendants are further restrained from obstructing the plaintiff from carrying out the necessary repairs only to the suit road.”

(R. G. KETKAR, J.)