

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

**SECOND APPEAL NO. 539 OF 2014
WITH
CIVIL APPLICATION NO. 1308 OF 2014**

Bhau Dada Girmal
since deceased through his legal heir
Kallappa Bhau Girmal .. Appellant

V/s
Vyankatachary Krishnachary Ramanujam
Gadwalkar & Ors. .. Respondents

Mr. Ajay Joshi for the appellant.
Ms. Manjiri Parasnis for respondent nos.1 to 4.

CORAM: R.D. DHANUKA, J.

DATE : 16TH DECEMBER 2015

P.C.:

1. By this Second Appeal, the appellant has impugned the order passed by the learned District Judge-1, Jaysingpur allowing the appeal filed by the respondent (original plaintiff) against the order passed by the learned Civil Judge, Junior Division, Kurundwad dismissing an application for final decree filed by the respondent. The lower Appellate Court has also passed an order in respect of mesne profit under Order 20 Rule 12 of the Code of Civil Procedure (for short "CPC") and had directed the appellant to retransfer and hand over actual possession of the mortgaged property.

2. Learned counsel for the appellant submits that the lower Appellate Court could not have passed the order of impleadment of

the six legal heirs of original defendant no.5. He submits that even if that order was correct, the lower Appellate Court ought to have remanded the matter back to the learned Trial Judge for the purpose of giving an opportunity to the newly added parties. He submits that since there was no prayer for mesne profits in the suit filed by the respondents and the only prayer was about redemption of mortgage, the lower Appellate Court could not have passed such an order for conducting an inquiry under Order 20 Rule 12 of the CPC. In support of this submission, learned counsel for the appellant placed reliance on Order 20 Rule 12, Order 34 Rule 7, Order 34 Rule 10 of the CPC and section 63 of the Transfer of Property Act.

3. Learned counsel for the respondents, on the other hand, submits that the respondents had applied for impleadment of the legal heirs of the original defendant no.5 before the Trial Court which was vehemently opposed by the learned counsel for the appellant herein. She submits that the learned Trial Judge rejected the said application for impleadment and at the same time dismissed the application filed by the respondent for final decree on the ground that the suit was bad for non-joinder of necessary parties. She further submits that the respondents herein accordingly made an application before the lower Appellate Court for impleadment of parties which application was allowed by the lower Appellate Court. She submits that those newly added parties have not filed any appeal against the said order of impleadment of the lower Appellate Court.

The appellant herein cannot make any grievance in respect of such impleadment of those parties in the proceedings before the lower Appellate Court.

4. In response to the other issue raised by the learned counsel for the appellant whether the lower Appellate Court ought to have given an opportunity to those newly added parties by remanding the matter to the Trial Court, it is submitted that since those parties have not filed any appeal against the order of impleadment, the appellant cannot urge this ground. She submits that in any event no such ground was raised before the lower Appellate Court. She submits that the submission of the learned counsel for the appellant on this issue is contrary to the submission made before the learned Trial Judge when an application was made for impleadment of those parties.

5. Learned counsel for the respondents also placed reliance on the provisions of Order 34 Rule 7 and Order 34 Rule 10 of the CPC, and particularly the Bombay Amendment to the said provisions. She submits that the respondents have already made payment pursuant to the preliminary decree passed by the Lower Court which decree was upheld by the lower Appellate Court in an appeal filed by the appellant herein.

6. Insofar as the submission of the learned counsel for appellant that the lower Appellate Court could not have passed an

order for conducting an inquiry under Order 20 Rule 12 of the CPC is concerned, on instructions from Constituted Attorney of the respondents who is present in Court, she states that she has no objection if the said part of the order directing an inquiry under Order 20 Rule 12 of the CPC passed by the lower Appellate Court is set aside.

7. Insofar as the submission of the learned counsel for the appellant that the lower Appellate Court ought to have remanded the matter to the learned Trial Judge for passing a final decree after rendering an opportunity to those newly added parties is concerned, a perusal of the record clearly indicates that the respondents had made an application for impleadment of those legal heirs of the defendant no.5 which was opposed by the appellant herein. In view of the objection raised by the appellant, the learned Trial Judge had rejected the application for impleadment of six parties. Though the learned Trial Judge had rejected the said application for impleadment of those parties, at the same time, learned Trial Judge has dismissed the application filed by the respondents herein for final decree on the ground that the said application was bad for non-joinder of parties. In my view, the lower Appellate Court is right in passing the order of impleadment of those newly added parties under Order 1 Rule 10. It is common ground that those newly added parties did not impugn the order of impleadment passed by the lower Appellate Court and also the final order passed by the

lower Appellate Court and are not even present today. In my view, there is thus no merit in this submission of the learned counsel for the appellant.

8. Insofar as the submission of the learned counsel for the appellant that the lower Appellate Court could not have passed a final decree and ought to have remanded the matter back to the learned Trial Judge for passing a final decree is concerned, a persusal of the order passed by the lower Appellate Court in the earlier round of litigation in which the appellant herein had impugned the preliminary decree passed by the Trial Court in favour of the original plaintiff, indicates that by the said order dated 11th October 1972 the Trial Court had declared that the sum of Rs.300/- only was due under the suit mortgage and on payment of same within six months, the defendants shall transfer the possession of the suit land to the plaintiff free of encumbrance. It was also ordered that the decree of redemption in the proper form as provided in Order 34 Rule 7 of the CPC to be drawn. The appellant has not impugned the said order dated 11th October 1972 passed by the District Judge and the same has attained the finality. It is not in dispute that the respondents herein had also made payment as contemplated under Order 34 Rule 10 of the CPC. The lower Appellate Court has ample power to pass such order which is impugned by the appellant in the present appeal. There is thus no merit in this submission of the learned counsel for the appellant.

9. Insofar as the last submission of the learned counsel for the appellant that the lower Appellate Court could not have passed an order for conducting an inquiry under Order 20 Rule 12 of the CPC is concerned, in view of the statement made by the learned counsel for the respondents that the respondents have no objection if the said part of the order is set aside, I am inclined to set aside that part of the order and decree passed by the lower Appellate Court.

10. In my view, there is no merit in the appeal. No substantial question of law arises in this appeal. The impugned order dated 26th March 2014 is upheld except the direction rendered in para (4) of the operative order whereby the learned lower Appellate Court has directed an inquiry to be conducted in respect of mesne profit under Order 20 Rule 12 of the CPC. The learned Trial Judge is not required to conduct any inquiry as ordered in the impugned order. Rest of the order passed by the lower Appellate Court is upheld.

11. Second Appeal is disposed of in the aforesaid terms. In view of disposal of the appeal, the Civil Application does not survive and is disposed of.

(R.D. DHANUKA, J.)