

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH : NAGPUR.

Misc. Civil Application No. 1222/2014
in
First Appeal No.295/2012
(M/s Multicon Builders, Nagpur through Shri Suryakanat Gendasingh Thakur
.vs. Smt. Sumandevi wd/o Shankarrao Deshmukh and ors.)

Office Notes, Office Memoranda of Coram,
appearances, Court's orders or directions
and Registrar's orders

Court's or Judge's orders.

Mr. A.G. Gharote, Advocate for Applicant.
Mr. D.K. Dubey, Advocate for Respondents 1,4,6,7 and 8.
Mr. Anand Parchure, Advocate for Respondent no.3.
Mr. E.W. Nawab, Advocate for Respondent no.5.
Mr. M.A. Vishwapure, Advocate for Respondent no.9.

CORAM : A.V. Nirgude, J.
DATED : April 24, 2015.

Heard.

2. This review application deserves to be dismissed.

3. The learned counsel for the applicant tried to indicate that the decree passed by me in this appeal was beyond the scope of Order 41 Rule 33 of the Code of Civil Procedure. Indeed the parameters of Rule 33 of Order 41 C.P.C. were not discussed in my judgment. I used the powers under Rule 33 for passing this decree which in a way is very drastic and harsh at least for applicant/defendant no.9. During the pendency of this suit for partition, construction was made and I held that this construction should be demolished so that the suit property could be made available to the parties as it stood on the day of suit. According to the learned counsel, the decree directing demolition of the building

was not permissible. The facts relevant to the issue are as under:-

Respondent/plaintiff filed this suit for partition and separate possession of her share in joint family property. The immediate cause of action for the suit was that her younger brother was trying to alienate the suit property claiming it to be his exclusive property. As stated above, during the pendency of the suit despite orders by this Court, the purchaser/applicant/defendant no.9 continued construction work. During the pendency of the suit, respondent/original plaintiff arrived at a compromise with the defendant no.9/applicant etc. This prompted other defendants No. 1, 3 and 4 to 8 to carry on with the suit. They filed counter claim seeking demolition of the building. On facts I confirmed finding that the construction was unauthorized because it was made without having regard to the shares of other sharers etc. It so happened that at trial stage the learned Judge of the trial Court did not issue such drastic order but rather hesitatingly ordered that part of the offending building which was not as per the permission of the Municipal Corporation should be demolished. I held in the judgment that this order was incorrect and required correction and accordingly I pass the impugned order. The learned counsel for the applicant/defendant no.9 brought before me various judgments in support of his contention that I could not have passed this order. Pointing out to me that the appeal was filed only by defendant no.9, and not filed by other defendants who had filed counter claim who did not get the desired order of entire demolition, he said in an appeal of this nature

at the most I could have utilized the powers of Rule 33 for giving more reliefs to the appellant and not to the respondent/original plaintiff etc. In order to substantiate this submission, the learned counsel placed reliance on the judgment of Supreme Court in the case of **Banarsi .vs. Ram Phal** reported in **AIR 2003 Supreme Court 1989**. Following paragraphs of this judgment are relevant for his discussion. I quote them below:-

"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 & 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.

12. *The fact remains that to the extent to which the decree is against the respondent and he wishes to get rid of it he should have either filed an appeal of his own or taken cross objection failing which the decree to that extent cannot be insisted on by the respondent for being interfered, set aside or modified to his advantage. The law continues to remain so post-1976 amendment. In a suit seeking specific performance of an agreement to sell governed by the provisions of the Specific Relief Act, 1963 the Court has a discretion to decree specific performance of the agreement. The plaintiff may also claim compensation under Section 21 or any other relief to which he may be entitled including the refund of money or deposit paid or made by him in case his claim for specific performance is refused. No compensation or any other relief including the relief of refund shall be granted by the Court unless it has been specifically claimed in the plaint by the plaintiff. Certainly the relief of specific performance is a larger relief for the plaintiff and more onerous to the defendant compared with the relief for compensation or refund of money. The relief of compensation or refund of money is a relief smaller than the relief of specific performance. A plaintiff who files a suit for specific performance claiming*

compensation in lieu of or in addition to the relief of specific performance or any other relief including the refund of any money has a right to file an appeal against the original decree if the relief of specific performance is refused and other relief is granted. The plaintiff would be a person aggrieved by the decree in spite of one of the alternative reliefs having been allowed to him because what has been allowed to him is the smaller relief and the larger relief has been denied to him. A defendant against whom a suit for specific performance has been decreed may file an appeal seeking relief of specific performance being denied to the plaintiff and instead a decree of smaller relief such as that of compensation or refund of money or any other relief being granted to the plaintiff for the former is larger relief and the latter is smaller relief. The defendant would be the person aggrieved to that extent. It follows as a necessary corollary from the abovesaid statement of law that in an appeal filed by the defendant laying challenge to the relief of compensation or refund of money or any other relief while decree for specific performance was denied to the plaintiff, the plaintiff as a respondent cannot seek the relief of specific performance of contract or modification of the impugned decree except by filing an appeal of his own or by taking cross objection.

13. We are, therefore, of the opinion that in the absence of cross appeal preferred or cross objection taken by the plaintiff-respondent the First Appellate Court did not have jurisdiction to modify the decree in

the manner in which it has done. Within the scope of appeals preferred by the appellants the First Appellate Court could have either allowed the appeals and dismissed the suit filed by the respondent in its entirety or could have deleted the latter part of the decree which granted the decree for specific performance conditional upon failure of the defendant to deposit the money in terms of the decree or could have maintained the decree as it was passed by dismissing the appeals. What the First Appellate Court has done is not only to set aside the decree to the extent to which it was in favour of the appellants but also granted an absolute and out and out decree for specific performance of agreement to sell which is to the prejudice of the appellants and to the advantage of the respondent who has neither filed an appeal nor taken any cross objection.

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 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 or order coming into existence. The overriding consideration is achieving the ends of justice. Wider the power, higher the need for caution and care 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 that for the reason of the latter portion being 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.

17. *In Rameshwar Prasad and Ors. v. Shambahari Lal Jagannath and Anr., [1964] 3 SCR 549, the three-Judge Bench speaking through Raghubar Dayal, J. observed that Rule 33 really provides as to what the Appellate Court can find the appellant entitled to and empowers the Appellate Court to pass any decree and make any order which ought to have been passed or made in the proceedings before it and thus could have reference only to the nature of the decree or order in so far as it affects the rights of the appellant. It further empowers the Appellate Court to pass or make such further or other, decree or order, as the case may require. The Court is thus given wide discretion to pass such decrees and orders as the interests of justice demand. Such a power is to be exercised in exceptional cases when its non-exercise will lead to difficulties in the adjustment of rights of the various parties, (vide Para 17, emphasis supplied)"*

4. There cannot be any quarrel with the

principles laid down by the Supreme Court in this judgment. These principles would guide the appellate Court as to how the powers are required to be utilized. Indeed this power being a drastic one is required to be utilized with judicious circumspection. Similar views are expressed by the Supreme Court in two more judgments which are shown to me by the learned counsel for the applicant. They are as under:-

(i) **Rameshwar Prasad and ors. .vs. Shambehari Lal Jagannath and another - AIR 1963 Supreme Court 1901**

(ii) **Choudhary Sahu (Dead) by Lrs. .vs. State of Bihar- AIR 1982 Supreme Court 98.**

5. I was constrained to examine my own order to find out whether I had crossed any limit while using the powers under Rule 33. The answer is in negative. The facts are very drastic which required a drastic order. I was convinced that in a suit of this nature, in the circumstances through which the parties to this suit went during the pendency of the suit, the order passed is the only solace. It is in my view just and necessary.

6. The learned counsel for the applicant then tried to contend that counter claim filed by defendants No. 1 and 4 to 8 was filed beyond limitation. This aspect of the case is already discussed in the judgment and I cannot examine the correctness of the findings while exercising powers under Order 47 Rule 1 of the C.P.C. The learned counsel for the applicant then pointed to me that apparently at the time of hearing of the appeal I

was not shown certain judgments of this Court in Contempt Petition No.78/2003. According to him this judgment is binding on parties as well as the Courts. I am afraid, this submission is not correct at all. The contempt petition arose because an interim order was allegedly violated by the applicant/defendant no.9 and he was taken before the Court in this contempt petition. The Court held that he did not violate the order and, therefore, no action was required. I am of the considered view that interim order and the findings on contempt petition both were not relevant when the Court decides the suit finally. The findings recorded at an interim stage are of *prima facie* nature. The findings recorded by the trial Court as well as this Court in appeal are not based on *prima facie* evidence. They are based on entire evidence which has come before the Court. In any case what happened at interim stage is in a way irrelevant while deciding the suit finally and deciding the appeal finally.

7. The learned counsel for the applicant also pointed out, may be as a last attempt, that the building which is constructed can still be subjected to partition and there is lot of area in the building which can be given to the decree holders in satisfaction of the decree. In other words he suggested that instead of demolishing the building, the same can be divided between the parties, so that the substantial loss would be avoided. This aspect of the case was examined when the appeal was heard. I allowed the parties to explore this possibility but when the parties came back without any

success, I took up the appeal for final hearing. Therefore, now raising this point is rather irrelevant.

8. The learned counsel also contended that the counter claim of original defendants No. 1 and 4 to 8 was not maintainable in view of Order 8 Rule 6-A of the C.P.C. because it was directed against one of the defendants and not against the plaintiff. This aspect is already examined in the judgment and I have given a clear finding that in a suit for partition, the defendants are also plaintiffs. In order to elaborate what I said in my judgment, I would add that in a suit for partition, all the co-sharers are plaintiffs as well as the defendants at the same time. However, if an outsider is made party to a suit, he would always be the defendant. Original defendants No. 1 and 4 to 8 could have even filed suit independently for the relief they claimed in the counter claim. Such a suit being connected to this suit, would have been tagged with this litigation and the result would have been the same. The learned counsel for the applicant did not show me any judgment proving my view expressed in the judgment that Rule 6-A of Order 8 of C.P.C. is not exclusively applicable in a suit for partition.

9. The review application should fail. Dismissed. Request for time is rejected.

JUDGE