

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

**SECOND APPEAL NO. 734 OF 2015
WITH
CIVIL APPLICATION NO. 16247 OF 2015**

Prabhawati Rajnikant Sabde
Age: 63 years, Occu. Pensioner,
R/o Plot No.25, N-4, H-Sector,
CIDCO, Tal. And Dist. Aurangabad

...APPELLANT
(Ori. Plaintiff)

Versus

Chitra Shardhanand Yangad
Age: 76 years, Occu: Household,
R/o. Plot No.51, Vidyaniketan Colony,
Jalna road, Taluka and District-Aurangabad
At present 163, Anand-Shradha,
Nandanvan Colony, Taluka and
District – Aurangabad

...RESPONDENT
(Ori. Defendant)

.....
Mr. Rajendrraa S. Deshmukkh, Advocate for appellant
Mr. K.F. Shingare, Advocate for respondent
.....

**CORAM : SUNIL P. DESHMUKH, J.
DATED : 9th FEBRUARY, 2016.**

ORAL JUDGMENT :-

1. Heard learned counsel for parties.
2. This is plaintiff's second appeal against judgment and decree dated 3rd October, 2015 in regular civil appeal No. 360 of 2012, passed by District Judge- 7, Aurangabad, at the appellate stage granting relief of specific performance claimed in the counter-claim by the defendant in the suit. Plaintiff had claimed possession of the suit property referring to various events that had occurred. The defendant while resisting suit had filed counter-claim for specific performance of contract of 1990.

3. The trial court under judgment and decree dated 05-05-2012 decreed the suit of the plaintiff for possession and dismissed the defendant's counter-claim for specific performance. Against said judgment and decree, the defendant had preferred regular civil appeal No. 360 of 2012 seeking specific performance against dismissal of counter-claim and possession.

4. The plaintiff, in defendant's regular civil appeal had filed cross - objection in respect of certain findings against him and paid requisite court fees therefor. While deciding the appeal, it appears that the appellate court had completely missed out on cross-objection pending before it and had not decided the same.

5. Learned counsel Mr. Shingare, appearing for respondent though has reservations, but reluctantly concedes to that he is not in a position to deny the veracity of the submissions of Mr. R. S. Deshmukh as emerging from record.

6. Mr. R. S. Deshmukh refers to a decision in the case of *Jitendra Prasad Nayak vs. Anant Kumar Sah* reported in 1997-12-59 = to AIR (SCW)-1990-0-4746/SCC-1998-9-383/ARC-1998-2-566 wherein the Supreme Court Bench comprising three judges has considered that while cross objection appears to have been missed out by the High Court resultantly there was no decision on the same and held that the impugned judgement was not sustainable.

7. According to learned counsel, similar position subsists in the present matter as the issues which were required to be considered under the cross objection could not be considered, as said cross objection was missed out on while deciding civil appeal No. 360 of 2012.

8. He further refers to a decision in the case of *Hari Shankar Rastogi vs. Shri Sham Manohar and others* reported in 2005(2) *Mh.L.J.* 1158, in which it has been considered that even if an appeal wherein cross objection has been filed is withdrawn or dismissed, yet, it is incumbent that cross objection needs to be heard and decided.

9. Perusal of the decision impugned in the second appeal, does not at all disclose that the cross objection lodged by the appellant had fallen for consideration of the appellate judge. The appellate court was oblivious of existence of the cross objection.

10. Having regard to aforesaid, and the legal position as emerging from the two decisions cited on behalf of the appellant by Mr. Deshmukh, it would be appropriate and expedient that the matter is remitted for reconsideration to the appellate court as had been done by the Hon'ble Supreme Court in the case of *Jitendra Prasad Nayak vs. Anant Kumar Sah (supra)*.

11. As such, the impugned judgment and decree passed by the appellate court in Regular Civil Appeal No. 360 of 2012 is set aside. Said regular civil appeal is restored to its position as had been subsisting immediately before hearing of the same. The appellate court

to reconsider the appeal along with the cross objection filed by the present appellant – original plaintiff giving opportunity of hearing to the parties concerned. Said exercise be carried out as expeditiously as possible preferably within a period of six months from the date of receipt of writ of this order.

12. Accordingly, Second Appeal succeeds to aforesaid extent and stands disposed of.

13. In view of disposal of second appeal, pending civil application does not survive and stands disposed of.

(SUNIL P. DESHMUKH, J.)

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