

Sequeira

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

SECOND APPEAL NO. 278 OF 2014

Baban Laxman Mandekar (deceased)
Through legal representative
Droupadibai Baban Mandekar & ors. ... Appellants

V/s.

Shri Popat Genu Khanekar & ors. ... Respondents.

Mr.S.P.Thorat, for Appellants.
Mr.Uday Warunjikar, for Respondent Nos.1, 7, 8.

***Coram : N.M. Jamdar, J.
Wednesday 16 June, 2016.***

P.C. :-

On 13 June 2014, following order was passed by this Court.

'Learned counsel for the appellants submits that there is no adjudication on cross-objections filed by the appellants before the lower appellate court. In view of this, issue notice for final disposal of the matter on the following substantial question of law:

'Whether the judgment delivered by the lower appellate Court suffers from an error of law, on account of failure, to consider the cross-objections?'

Since the question of law is already framed, the Second Appeal is taken up for final disposal as per the order dated 13 June 2014.

2. The Appeal is filed by the original Applicant who had filed proceedings under order XX rule 12 of the C.P.C.(Code of Civil Procedure) seeking mesne profits pursuant to the Judgment and Decree in R.C.S No.693 of 1981. The suit was filed for possession. The decree was confirmed by the District Court as well as by this Court. After the dismissal of the Second Appeal, the possession was received. The learned Civil Judge by his Judgment and order dated 1 March 2013 disposed of the Application for mesne profits and directed that the Respondent No.1 through his heirs shall pay mesne profits at the rate of Rs.2,472/- from 18 April 1981 till 10 February 2009 with an interest at the rate of 6 % p.a. A Civil Appeal No.349 of 2013 was filed by the Respondents in District Court, Pune. The learned District Judge, Pune by the Judgment and Order dated 21 January 2014, set aside the order passed by the learned Civil Judge and the Application for mesne profits was remanded to the trial Court. The learned District Judge concluded that the learned Civil Judge had not considered the exact income of profit that was received and it would have been received by due diligence. Against this order present Second Appeal has been filed.

3. It is the submission of the learned counsel for the Appellant that the Appellant had filed cross-objections which were not decided by the learned District Judge and were also not taken into consideration before passing the impugned order. The Appeal was adjourned and the Record and Proceedings were called for. The Record and Proceedings have been received. The learned counsel for the parties have taken inspection

thereof. Cross-objections have been filed by the Appellants wherein detailed submissions have been made by the Appellants. The cross-objections are filed on 11 July 2014. In the cross-objections the Appellants had asked the mesne profits to be enhanced to Rs.5,000/- per year.

4. Once both the parties have approached the first appellate Court, the Respondents by way of an appeal and the Appellant by way of cross-objections, both ought to have been disposed of together by the learned Judge. There is absolutely no reference to the cross-objections and for non-consideration of the cross-objections and the case of the Appellants stated therein, the impugned Judgment and order which only decides the Appeal will have to be quashed and set aside and the proceedings will have to be remanded to the first Appellate Court for *de novo* consideration. Accordingly the Judgment and Order passed by the learned District Judge, Pune dated 21 January 2014 is quashed and set aside.

5. The Civil Appeal No.349 of 2013 filed by the Respondents stands restored to file. The cross-objections filed by the Appellants in the said Appeal which have not been disposed of by the learned District Judge, will be decided along with the Appeal. Both the Appeal as well as the cross-objections will be considered on their own merits. It is open to the Respondents to file reply to the cross-objections.

6. Since the remand is necessitated because cross-objections have not been disposed of, the learned District Judge will consider giving priority

to the disposal of the proceedings. The Registry will return the Record and Proceedings to the learned District Judge, Pune forthwith.

7. The Second Appeal is accordingly disposed of in above terms. No costs.

(N.M. Jamdar, J.)