

IN THE HIGH COURT OF JUDICATURE AT MUMBAI
CIVIL APPELLATE JURISDICTION
CIVIL REVISION APPLICATION NO.327 OF 2016

M/s. Shree Sidhivinayak Textiles and another ... Applicants
Vs.
M/s. Maneklal and Sons and others ... Respondents

WITH
CIVIL REVISION APPLICATION NO.328 OF 2016

Balkrishan Swarupji Dave, Prop. of M/s. Siddhi
Vinayak Textiles ... Applicant
Vs.
Sanjay Maneklal Gandhi ... Respondent

WITH
CIVIL REVISION APPLICATION (ST.) NO.20161 OF 2016

Sanjay Maneklal Gandhi ... Applicant
Vs.
Balkrishan Swarupji Dave, Prop. of M/s. Siddhi
Vinayak Textiles ... Respondent

WITH
CIVIL REVISION APPLICATION (ST.) NO.20161 OF 2016

Sanjay Maneklal Gandhi ... Applicant
Vs.
Balkrishan Swarupji Dave, Prop. of M/s. Siddhi
Vinayak Textiles ... Respondent

Mr. Udayan S. Jain a/w. Mr. Swapnil Narkar for Applicant in
C.R.A.No.327 of 2016 and C.R.A.No.328 of 2016 and for Respondent
in C.R.A.(St.) No.20161 of 2016.

Mr. Suneel D. Mogre a/w. Mr. Anil Mishra for Respondent in
C.R.A.No.327 of 2016 and C.R.A.No.328 of 2016 and for Applicant in
C.R.A.(St.) No.20161 of 2016.

CORAM : R. G. KETKAR, J.
DATE : AUGUST 09 & 10, 2016

ORDER :

Heard Mr. Jain, learned Counsel for applicant in C.R.A.No.327 of

2016 and C.R.A.No.328 of 2016 and for respondent in C.R.A.(St.) No.20161 of 2016 and Mr. Mogre, learned Counsel for respondent in C.R.A.No.327 of 2016 and C.R.A.No.328 of 2016 and for applicant in C.R.A.(St.) No.20161 of 2016 at length. At the request and by consent of the parties as also in view of the order dated 20.07.2016, though C.R.A.(St.) No.20161 of 2016 is not on Board, the same is also taken up for admission.

2. C.R.A.No.327 of 2016 is preferred by the applicants-defendants M/s. Shree Sidhivinayak Textiles and another (for short 'Sidhivinayak Textiles') challenging the judgment and decree dated 31.03.2016 passed by the Appellate Bench of the Small Causes Court in PSCC Appeal No.349 of 2014. By that order, the appellate Court allowed the appeal preferred by the respondents-plaintiffs M/s. Maneklal & Sons and others (for short 'Maneklal & Sons') and quashed and set aside the judgment and decree dated 08.05.2014 passed by the learned Judge presiding over Court Room No.25 of the Court of Small Causes at Mumbai in L.E.&C. Suit No.134/162 of 2012 and decreed that Suit. The Appellate Court directed the defendants to handover the vacant and peaceful possession of shop No.201, 201/L, Ghadiyal Gulli, Corner of 3rd Lane, Mangaldas Market, Mumbai 400 002 (for short 'suit premises') to the plaintiffs within 90 days from the date of the order subject to defendants neither parting with possession nor creating third party interest in respect of the suit premises.

3. C.R.A.No.328 of 2016 is preferred by original plaintiff - Balkrishan Swarupji Dave, proprietor of Siddhivinayak Textiles challenging the judgment and decree dated 31.03.2016 passed by the Appellate Bench of the Small Causes Court at Mumbai in R.Appeal No.176 of 2015. By that order, the appellate Court though dismissed the

Appeal preferred by defendant - Sanjay Maneklal Gandhi and maintained the judgment and decree dated 29.10.2014 passed by the learned Judge presiding over Court Room No.25 of the Court of Small Causes at Mumbai in R.A.D. Suit No.20 of 2012, answered point No.1 against the plaintiff. Plaintiff has preferred Civil Revision Application challenging finding against him recorded by the appellate Court in respect of point No.1. The learned trial Judge had decreed the Suit instituted by the plaintiff and issued injunction restraining the defendant Sanjay Gandhi from interfering with possession of the plaintiff in respect of the suit premises till October 2015. Defendant was also restrained from evicting the plaintiff Balkrishan Swarupji Dave without following due process of law.

4. C.R.A.(St.) No.20161 of 2016 is instituted by original defendant - Sanjay Maneklal Gandhi challenging the judgment and decree dated 31.03.2016 passed by the learned Appellate Bench of the Small Causes Court at Mumbai in R.Appeal No.176 of 2015 as though the appellate Court answered point No.1 in favour of the defendant namely, whether the plaintiff - Balkrishan Dave established that he is a tenant in respect of the suit premises in the negative, instead of allowing the appeal, the appellate Court dismissed the appeal. As the common questions of law and fact arise in these Applications between the same parties, the same can conveniently be disposed of by this common order.

5. Balkrishan Dave had instituted R.A.D. Suit No.20 of 2012 inter alia praying for following reliefs:

- “A) Direct defendant by a decree, order or direction in the nature of mandatory injunction not to interfere with possession of the plaintiff from the suit property i.e. shop No.201, Ground Floor, 3rd Lane, Ghadial Gali, Mangaldas Market, Mumbai 400 002 either through herself or through the agent, servants or any body on her behalf.
- B) Direct the defendant or his agent's Servant's or any body

on his behalf by an order direction, decree of perpetual injunction from disturbing the possession of the plaintiff in respect of the suit property.”

6. Defendant in that Suit, Sanjay Maneklal Gandhi resisted the Suit by filing written statement inter alia contending that plaintiff had earlier instituted Suit No.2066 of 2009 in the City Civil Court, Mumbai. By order dated 23.09.2009, the plaint was returned for presentation of Suit before the Small Causes Court, Mumbai. Instead of presenting the plaint in the Small Causes Court, plaintiff instituted fresh Suit. It was contended that Bombay Cloth Market Company Limited, the landlords of Mangaldas Market issued share certificate on 09.06.1970 in favour of original allottees, namely, Jamnadas Laldas, Gordhandas Laldas and Chandrasen Laldas. They were allotted suit premises. On 02.07.1990, share certificate was transferred in favour of defendant jointly with his father, Maneklal Narandas Gandhi and mother Smt. Vasumati Maneklal Gandhi and accepted defendant, his father as tenants in respect of the suit premises. Defendant further contended that his sisters Manisha Maneklal Gandhi and Veena Maneklal Gandhi became partners with the plaintiff, Manoharlal Himmatlalji Trivedi, Kanaiyalal Amrutlalji Raval and Bansilal Shivilalji Dave by and under the Deed of Partnership dated 13.11.1991. The said partnership firm started business in the name and style of 'Siddhivinayak Textiles'. The sisters of defendant had share of 10% each in the said firm. As the sisters of the defendant were partners in Siddhivinayak Textiles, the defendant and his father had permitted the said partnership firm to use the suit premises without charging any amount. Reference was made to Clause 4 of the partnership deed dated 13.11.1991. Prior to 13.04.2006, Manoharlal Trivedi and Bansilal Dave retired from the partnership. With effect from 01.04.2006, defendant's sisters also retired and to that effect, retirement-cum-partnership deed dated 13.04.2006 was executed between the plaintiff, Kanaiyalal Amrutlalji Raval and sisters of the defendant. Reference was also made

to the Commission Agreement dated 15.02.2007 as also correspondence exchanged between the parties.

7. The learned trial Judge decreed the Suit as indicated earlier. Aggrieved by that decision, defendant Sanjay Gandhi preferred appeal. Point No.1 and the finding recorded against it read thus,

Sr.	POINT	FINDING
1	Has it been established by the plaintiff that he is the tenant in respect of the suit premises?	In the negative.

8. Though the appellate Court held that plaintiff Balkrishan Dave failed to establish that he is a tenant in respect of the suit premises, nonetheless, the appellate Court proceeded to dismiss the appeal. Aggrieved by this order, defendant has preferred C.R.A.(St.) No.20161 of 2016 and plaintiff has instituted C.R.A.No.328 of 2016 challenging the finding recorded against point No.1.

9. Maneklal & Sons had instituted L.E.&C. Suit No.134/162 of 2012 against Siddhivinayak Textiles and its two partners for recovery of possession of the suit premises inter alia on the ground that the suit premises was given to Siddhivinayak Textiles as a gratuitous licensee. Defendants No.1 and 2 resisted the Suit by filing written statement inter alia contending that they are inducted as tenants in the suit premises and that plaintiffs have recovered rent of the suit premises from 1991 onwards.

10. The learned trial Judge dismissed the Suit inter alia holding that defendant was neither the gratuitous licensee nor sub-tenant and the agreements executed between the parties are for conducting the business. Aggrieved by that order, plaintiffs preferred appeal, which as

indicated earlier was allowed by the appellate Court. Against that order, Siddhivinayak Textiles have instituted C.R.A.No.327 of 2016.

11. In support of C.R.A.No.327 of 2016, Mr. Jain strenuously contended that the appellate Court has not discussed the entire evidence on record. The appellate Court being the last fact finding Court is obliged to consider the entire evidence and record independent findings. In the present case, the appellate Court has not appreciated the entire evidence on record and came to the conclusion that defendants are gratuitous licensees. In fact both the Suits should have been clubbed together and common evidence should have been recorded. The Suit should have been disposed of by the common judgment. He has taken me through the various agreements executed between the parties as also correspondence on record. He submitted that the impugned order may be set aside thereby restoring the appeal for deciding the same *denovo* by issuing appropriate directions.

12. As against this, Mr. Mogre submitted that the learned trial Judge while decreeing the Suit held that the agreements executed between the parties were for conducting the business and not for leave and licence. Defendant also cannot claim sub-tenancy. He submitted that it was nobody's case that agreements were for conducting business. He submitted that perusal of the agreements as also correspondence between the parties will clearly indicate that Siddhivinayak Textiles were inducted as a gratuitous licensee. He submitted that the appellate Court rightly held that Siddhivinayak Textiles were inducted as a gratuitous licensee and he supported the impugned order.

13. In support of C.R.A. No.328 of 2016, Mr. Jain submitted that the appellate Court was not justified in holding that plaintiff Balkrishan

Dave did not establish that he is a tenant in respect of the suit premises. Plaintiff has challenged the said finding though the Appellate court has dismissed the appeal.

14. On the other hand, Mr. Mogre submitted that C.R.A., itself, is not maintainable for challenging the finding recorded by the appellate Court against point No.1. He, therefore, submitted that C.R.A. is liable to be dismissed.

15. In support of C.R.A.(St.) No.20161 of 2016, Mr. Mogre submitted that after answering point No.1 in favour of defendant Sanjay Gandhi, the appellate Court should have allowed the appeal. The operative order is inconsistent with the reasoning given by the appellate Court. The impugned order, therefore, deserves to be modified thereby allowing Appeal No.176 of 2015.

16. I have considered the rival submissions advanced by the learned Counsel appearing for the parties. I have also perused the material on record. C.R.A.No.328 of 2016 arises from R.A.D.Suit No.20 of 2012. I have already referred to the prayers made by Balkrishan Dave in R.A.D.Suit No.20 of 2012. Perusal of the prayers clearly indicates that though the Suit is styled as Declaratory Suit, plaintiff Dave has not prayed for declaration of his tenancy rights in the suit premises. The reliefs claimed are for mandatory injunction as also for perpetual injunction. Though no such declaration of tenancy rights was claimed, the learned trial Judge proceeded to hold that the suit premises was given on rent to the plaintiff on the basis of 5% commission on total sales as rent. Perusal of the operative order shows that the learned trial Judge however issued injunction restraining the defendant Sanjay Gandhi from interfering with the possession of Balkrishan Dave till

October 2015 and that is on the basis of letter issued by plaintiff Dave that he will handover vacant possession by October 2015. The learned trial Judge also issued injunction restraining the defendant from evicting the plaintiff Balkrishan Dave without following due process of law.

17. As far as the finding recorded by the learned trial Judge that the suit premises was given to the plaintiff on rent is concerned, the said finding was based solely upon the admission given by D.W.1 to the effect that from 01.04.2006 to 06.11.2007, the suit premises was given on rent to the plaintiff on the basis of 5% commission on total sales as rent. It is in that context, now, one has to consider deposition of D.W.1. D.W.1 Sanjay Maneklal Gandhi during the course of cross-examination in R.A.D.Suit No.20 of 2012 deposed thus,

“It is true say that from 01.04.2006 to 06.11.2007, I gave the suit premises on rent to the plaintiff on the basis of 5% commission on total sale as a rent. ... It is true that I further continued the earlier agreement of 5% commission on total sales as a rent from 08.11.2007 to 26.10.2008.”

18. In order to consider whether Siddhivinayak Textiles was inducted as a gratuitous licensee or a tenant, it is necessary to refer to the agreements executed between the parties as also the correspondence exchanged between the parties. Clause (4) of agreement dated 13.11.1991 reads thus,

“(4) PLACE: The Partnership business shall be carried on at Ghadyal Galli, 3rd Lane, Corder Shop No.201, 201/L, Mangaldas Market, Bombay -2 and / or such other place or places as the partners may mutually agree upon from time to time.

The right, title, interest, tenancy rights of the place of business at 201, 201/L, Ghadyal Galli, Corner of 3rd Lane, Mangaldas Market, Bombay - 400 002 belong to Shri Sanjay Maneklal Gandhi and Shri Maneklal Narandas Gandhi and neither the Partnership firm nor the partners shall have any right, title, interest, share etc. in the tenancy of the said place of business at 201, 201/L, Ghadyal Galli, nor shall they claim any in future. It is clarified here that their relatives, the party of the Fifth part and the

party of the Sixth part are partners in said firm, said Shri Sanjay Maneklal Gandhi and Shri Maneklal N. Gandhi have granted gratuitous permission to the partnership to carry on business in his said shop.

The right, title, interest, tenancy right in respect of the place of business at 201, 201/L Gadhyal Galli, Corner of 3rd Lane, Mangaldas Market, Bombay - 400 002 shall belong to Shri Sanjay Maneklal Gandhi, Shri Maneklal Narandas Gandhi, who has a right to arrive at agreement or agreements with any person, firm or association for carrying on business at some portion of the said business place, either accepting compensation or without compensation and also to withdraw and cancel the aforesaid agreement or agreements.

At the time of closing of business in the evening the keys of the said shop will be handed over to Shri Sanjay Maneklal Gandhi and / or Shri Maneklal N. Gandhi, who will have custody over them.”

19. Clause 7 of the agreement dated 15.02.2007 reads thus,

“7] In consideration of getting services, facilities and assistance, as aforesaid, the party of the Other Part has agreed to pay and shall pay Commission to the party of the One Part at the rate of 5% on the total amount of sales of its goods effected by the Partners and / or representatives of the party of the One Part or by the partners, representatives or agents of the party of the Other Part at and from the portion of the said premises. The account of commission of the party of the One Part shall be made up between the parties hereto immediately on expiry or early termination of this Agreement and the party of the Other Part shall thereupon forthwith pay up in full the sum of Commission that shall be ascertained as payable by it to the party of the One part after deducting therefrom the amount, if any paid in the meanwhile, towards and on account of Commission by the party of the Other Part to the party of the One Part payable hereunder for the period stipulated in this Agreement and during the subsistence of this Agreement.”

20. On 15.02.2007, Siddivinayak Textiles addressed a letter to Maneklal & Sons. The said letter sets out that Siddhivinayak Textiles agreed and assured to pay to Maneklal & Sons “commission” @ 5% that would become payable on the sale of their goods, namely, suitings, shirtings and dress material from Chaitra Sud 13th S.Y. 2062, corresponding to 01.04.2006 till Aso Vad 12th S.Y. 2063, corresponding

to 06.11.2007. On 07.03.2007, Siddhivinayak Textiles addressed a letter to Maneklal & Sons setting out therein that they have agreed to pay commission @ 5% on amount of sales of their goods to Maneklal & Sons. It is further set out that overall possession and entire control over the suit premises is with Maneklal & Sons and they are putting their locks on the doors of the said premises. Siddhivinayak Textiles and their representatives have ingress and egress to and from the suit premises only when it is kept open by Maneklal & Sons.

21. Clause 7 of the agreement dated 03.01.2008 reads thus,

“7] In consideration of getting services, facilities and assistance, as aforesaid, the party of the Other Part has agreed to pay and shall pay Commission to the party of the One Part at the rate of 5% on the total amount of sales of its goods effected by the Partners and / or representatives of the party of the One Part or by the partners, representatives or agents of the party of the Other Part at and from the portion of the said premises. The account of commission of the party of the One Part shall be made up between the parties hereto immediately on expiry or early termination of this Agreement and the party of the Other Part shall thereupon forthwith pay up in full the sum of Commission that shall be ascertained as payable by it to the party of the One part after deducting therefrom the amount, if any paid in the meanwhile, towards and on account of Commission by the party of the Other Part to the party of the One Part payable hereunder for the period stipulated in this Agreement and during the subsistence of this Agreement.”

22. On 03.01.2008, Siddhivinayak Textiles addressed two letters which are identical with the letters dated 15.02.2007 and 07.03.2007, save and except the period. In the letter dated 03.01.2008, the period is 10.11.2007 to 26.10.2008. Thus, perusal of the above clauses as also correspondence leave no room for doubt that the suit premises was given to Siddhivinayak Textiles as licensee. Amounts agreed to be paid were towards the commission as Maneklal & Sons and their representatives also were helping and assisting Siddhivinayak Textiles in selling their goods. Thus, it was not towards license fees. In other

words, Siddhivinayak Textiles were inducted as gratuitous licensee. Section 52 of the Indian Easements Act, 1882 reads thus,

“52. 'License' defined.- Where one person grants to another, or to a definite number of other persons, a right to do, or continue to do, in or upon the immovable property of the grantor, something which would, in the absence of such right, be unlawful and such right does not amount to an easement or an interest in the property, the right is called a license.”

23. As noted earlier, in R.A.D. Suit, no relief was claimed by the plaintiff for declaration of his tenancy rights. The learned trial Judge however, proceeded to observe that defendant therein was charging rent to the plaintiff. Section 34 of the Specific Relief Act, 1963 lays down that any person entitled to any legal character or to any right as to any property, may institute a suit against any person denying, or interested to deny, his title to such character or right, and the Court may in its discretion make therein a declaration that he is so entitled, and the plaintiff need not in such suit ask for any relief.

24. In the case of *Anathula Sudhakar Vs. P. Buchi Reddy*, (2008) 4 SCC 594, the Apex Court has laid down general principles as to when a mere Suit for permanent injunction will lie and when it is necessary to file a Suit for declaration and / or possession with injunction as a consequential relief. In paragraphs 13.3 and 14, it was observed thus,

13.3. Where the plaintiff is in possession, but his title to the property is in dispute, or under a cloud, or where the defendant asserts title thereto and there is also a threat of dispossession from defendant, the plaintiff will have to sue for declaration of title and the consequential relief of injunction. ...

14. We may however clarify that a prayer for declaration will be necessary only if the denial of title by the defendant or challenge to plaintiff's title raises a cloud on the title of plaintiff to the property. A cloud is said to raise over a person's title, when some apparent defect in his title to a property, or when some prima facie right of a third party over it, is made out or shown. An action for declaration, is the remedy to remove the cloud on the

title to the property. On the other hand, where the plaintiff has clear title supported by documents, if a trespasser without any claim to title or an interloper without any apparent title, merely denies the plaintiff's title, it does not amount to raising a cloud over the title of the plaintiff and it will not be necessary for the plaintiff to sue for declaration and a suit for injunction may be sufficient. Where the plaintiff, believing that defendant is only a trespasser or a wrongful claimant without title, files a mere suit for injunction, and in such a suit, the defendant discloses in his defence the details of the right or title claimed by him, which raises a serious dispute or cloud over plaintiff's title, then there is a need for the plaintiff, to amend the plaint and convert the suit into one for declaration. Alternatively, he may withdraw the suit for bare injunction, with permission of the court to file a comprehensive suit for declaration and injunction. He may file the suit for declaration with consequential relief, even after the suit for injunction is dismissed, where the suit raised only the issue of possession and not any issue of title."

25. In the present case, admittedly, plaintiff did not seek declaration of his tenancy rights. There is a serious dispute about status of the plaintiff - Balkrishan Dave. On one hand, plaintiff claims to be a tenant. On the other, defendant contends that he is a gratuitous licensee. The plaintiff ought to have prayed for declaration of his tenancy rights. In my opinion, the Suit so instituted, itself, was wholly misconceived. As the plaintiff had sought relief of injunction as well, the learned trial Judge was justified to the extent of issuing injunction restraining the defendant from evicting the plaintiff without following due process of law. The learned trial Judge however issued further injunction restraining the defendant from interfering with the possession of plaintiff in respect of the suit premises till October 2015 only on the basis of letter addressed by the plaintiff that he will vacate the premises in October 2015.

26. As far as the appellate Court is concerned, while answering the point No.1, the appellate Court rightly held that plaintiff Balkrishan Dave did not establish that he is a tenant in respect of the suit premises.

In my opinion, Siddhivinayak Textiles were inducted as a gratuitous licensee. Mr. Jain made feeble attempt to contend that there is a practice in the business community to execute tenancy agreements as per agreements dated 13.11.1991, 15.02.2007 and 03.01.2008. In effect and substance, these documents are the tenancy agreements. However, no evidence was adduced for establishing such practice. In the absence of any evidence on record, it is not possible to accept submission of Mr. Jain that in effect and in substance, agreements dated 13.11.1991, 15.02.2007 and 03.01.2008 are tenancy agreements. Thus, C.R.A.No.328 of 2016 is liable to be dismissed. Apart from this, it is also liable to be dismissed on the ground of maintainability.

27. In the case of ***Banarsi Vs. Ramphal*, 2003 (9) SCC 606**, the Apex Court has observed in paragraphs 9 to 11 thus,

“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 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 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 Deputy Collector, Ahmednagar and Anr.*, [1971] 1 SCR 146 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 well-settled position of law under the unamended CPC.

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.”

28. Plaintiff was not in a position to demonstrate that the findings recorded by the appellate Court are perverse being based upon no evidence or that they are contrary to the evidence on record. Plaintiff was also not in a position to demonstrate that no reasonable or prudent person would have reached the conclusion arrived at by the appellate Court. Plaintiff cannot claim to be a tenant in respect of the suit premises and was inducted as a gratuitous licensee. C.R.A.No.328 of 2016 is, therefore, liable to be dismissed, both, on merits as also on the ground of maintainability.

29. As far as C.R.A.No.327 of 2016 is concerned, it arises out of L.E.&C. Suit No.134/162 of 2012. As noted earlier, the learned trial Judge, after considering the agreements and correspondence observed that agreements are for conducting the business and not for leave and licence. In fact, that was nobody's case. While deciding C.R.A.No.328 of 2016, I have already held that Siddhivinayak Textiles is a gratuitous licensee of which Balkrishan Dave is a proprietor. The appellate Court rightly held that Siddhivinayak Textiles are gratuitous licensee. Defendants were not in a position to demonstrate that the findings recorded by the appellate Court are perverse being based upon no evidence or that they are contrary to the evidence on record. Defendants were also not in a position to demonstrate that no reasonable or prudent person would have reached the conclusion arrived at by the appellate Court. In view thereof, I do not find any merit in C.R.A.No.327 of 2016.

The appellate Court was fully justified in decreeing the Suit instituted by Maneklal & Sons. C.R.A.No.327 of 2016 is, therefore, liable to be dismissed.

30. As far as C.R.A.(St.) No.20166 of 2016 is concerned, as noted earlier, the appellate Court, while deciding point No.1 in Appeal No.176 of 2015, held that plaintiff Balkrishan Dave did not establish that he is a tenant in respect of the suit premises. However, it proceeded to dismiss the Appeal preferred by the defendant. In my opinion, having answered point No.1 in favour of the defendant and against the plaintiff, the appellate Court ought to have allowed the Appeal. I have already held that defendant in this Suit was inducted as a gratuitous licensee. Defendant was not in a position to demonstrate that the findings recorded by the appellate Court are perverse being based upon no evidence or that they are contrary to the evidence on record. Defendant was also not in a position to demonstrate that no reasonable or prudent person would have reached the conclusion arrived at by the appellate Court. In view thereof, C.R.A.(St.) No.20166 of 2016 deserves to be allowed thereby modifying the order passed by the appellate Court by allowing the Appeal No.176 of 2015.

31. In the light of the aforesaid discussion:

- a. C.R.A.No.327 of 2016 and C.R.A.No.328 of 2016 are dismissed;
- b. C.R.A.(St.) No.20161 of 2016 is allowed.

32. At this stage, Mr. Jain orally applies for stay of this order for a period of 12 weeks from today. He states that only the proprietor of Siddhivinayak Textiles is using the suit premises and nobody else is using the suit premises and that he will file usual undertaking with

advance copy to the other side within 2 weeks, incorporating therein that,

- i) he is in possession and nobody else is in possession of the suit premises;
- ii) he has neither created third party interest nor parted with possession of the suit premises;
- iii) he will hereafter neither create third party interest nor part with possession of the suit premises;
- iv) he will pay up-to-date arrears of rent, if any, to the original defendant within two weeks from today;
- v) in case they are unable to obtain suitable orders from the higher Court within twelve weeks from today, they will vacate and handover vacant and peaceful possession of the suit premises to the original defendant;

33. Subject to proprietor of Siddhivinayak Textiles filing undertaking in the aforesaid terms within two weeks from today after giving advance copy to the other side, decree shall not be executed for a period of 12 weeks from today. It is made clear that in case he does not file undertaking within two weeks from today, the interim order shall stand vacated without further reference to the Court.

34. List the Applications for 'reporting compliance' after three weeks.

(R. G. KETKAR, J.)

Minal Parab