

Vidya Amin

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

**APPEAL FROM ORDER NO. 1279 OF 2013
WITH
CIVIL APPLICATION NO. 1529 OF 2013 IN A.O. NO. 1279 OF 2013**

Kisan Mana Gadge & Anr. ... Appellants/Applicants
Vs.
Kundanmal Chandarmal Marwadi & Ors. ... Respondents

Mr. S.P. Nikam i/b. Mr. Abhijit B. Kadam, Advocate for the appellants/applicants.
Mr. A.S. Khandeparkar i/b. M/s. Khandeparkar & Associates, Advocate for respondent nos. 1 and 2.

CORAM: MRS.MRIDULA BHATKAR, J.
DATE: 8th February, 2016.

P.C.:

The order of remand dated 12th September, 2012 passed by the learned District Judge, Pune in Civil Appeal No. 759 of 2005 is challenged. Respondent nos. 1 and 2 in the present appeal have filed a Suit bearing no. 156 of 1987 before the Civil Judge Junior Division, Junnar for declaration of the sale deed executed by the original defendant no. 4 in favour of defendant no. 1/appellant. The counter claim was filed by the defendants. The said suit was dismissed, so also the counter claim filed by the defendants was also dismissed by the judgment and order dated 13th September, 2005 passed by the learned Civil Judge Junior Division, Junnar, against which respondent nos. 1 and 2/original plaintiffs filed Civil Appeal No. 759 of 2005. While hearing the said Appeal, the learned District Judge

remanded the said matter to Civil Judge Junior Division for fresh trial. The said order of remand is hereby challenged by the appellants in this Appeal.

2. The learned counsel for the appellants while arguing has pointed out that the respondent nos. 1 and 2/plaintiffs have moved an application at Exhibit 76 for amendment of the plaint. The said Application was rejected by the trial Court, against which Civil Revision Application was moved before the High Court. The High Court disposed of the said Civil Revision Application by saying that Civil Revision Application is not maintainable, however, kept all the contentions open. The learned counsel for the appellants read over the operative portion of the said order of remand passed by the learned District Judge and submitted that the Appellate Court had allowed the Application Exhibit 76 and accordingly the plaintiffs were allowed to carry out the amendment and the opportunity is given to them to file written statements to that effect. He submitted that the order in respect of clause no. 7 is illegal wherein the District Judge has observed that the Appeal is not preferred against the dismissal of counter claim and so the counter claim of defendant nos. 1, 4A and 4B cannot be allowed, as it is not a subject matter of Appeal. The learned counsel submitted that the view taken by the learned District Judge is erroneous, as cross-objection filed on dismissal of counter claim is to be decided by the same Appellate

Court and no separate Appeal is required. The Appellate Court has not considered the cross-objection. He also insisted that the cross-objection filed is, therefore, to be decided by the Appellate Court and to that extent, order of remand is to be set aside.

3. The learned counsel Mr. Khandeparkar has supported the order of remand passed by the learned District Judge. He submitted that though the order of dismissal of Application for amendment of the plaint was not subsequently challenged in the Writ Petition by the plaintiffs, the said interlocutory order was a ground of challenge in the First Appeal and, therefore, the learned District Judge has considered it and passed the order of remand.

4. Perused the judgment and order passed by the learned District Judge. In the suit, counter claim was filed by way of written statement by the appellants. The suit as well as counter claim both were dismissed by way of a common order by the learned trial Court. So, the First Appeal is filed by respondent nos. 1 and 2/plaintiffs and in the First Appeal, original defendants/present appellants filed cross-objection. A question is whether on dismissal of counter claim, cross-objection filed by the defendants/appellants can be treated as First Appeal.

5. The learned District Judge has taken a view that cross-objection though filed by the appellants/defendants, it will not suffice the purpose and a separate First Appeal challenging the order of dismissal of the counter claim is required to be filed. This view taken by the learned District Judge is not correct in view of Rule 22 Order XLI of Civil Procedure Code. The cross-objection filed in First Appeal is always in the form of memorandum. I place reliance on Rule 22(2), which reads as under:

“Form of objection and provisions applicable thereto. - Such cross-objection shall be in the form of a memorandum, and the provisions of rule 1, so far as they relate to the form and contents of the memorandum of appeal, shall apply thereto.”

The cross-objection is nothing by an appeal and in fact a cross-appeal and right to file cross-objection is substantive. Therefore, it is not necessary for appellants/defendants to file a separate First Appeal when both the parties challenge the same order of dismissal of suit as well as counter claim. Thus, there is a challenge given by the appellants/defendants to the finding of dismissal of counter claim and therefore, the order passed by the learned District Judge of remand is maintained except the following directions:

- (i) It is to be noted that clause no. 7 is maintained in respect of defendant nos. 4A and 4B as they did not file cross-objection, however, defendant nos. 1 and 2 has filed cross-objection and therefore, that is to be considered.
- (ii) The trial Court also to consider the counter claim filed by

defendants while deciding the matter and the issues which are reframed.

- (iii) The evidence tendered by both the parties earlier can be maintained and read over in fresh trial in order to avoid repetition subject to discretion of the trial Court. Moreover, both the parties are allowed to tender further evidence especially in view of the amendment and written statement in view of Application Exhibit 76.

6. Thus, the Appeal is partly allowed.

(MRIDULA BHATKAR, J.)