

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

**SECOND APPEAL NO. 866 OF 2012
WITH
CIVIL APPLICATION NO. 1700 OF 2012**

Bhimrao Gunaji Tambe Appellant
Versus
Namohar Shivram Tambe & Ors. Respondents

Mr. Dilip Bodake a/w Sharad Bhosale, for Appellant/Applicant.
S. M. Railkar, for Respondent Nos. 1, 2, 3A to 3E.

***CORAM : N. M. Jamdar J.
Wednesday 20 July, 2016***

ORAL ORDER

. By order dated 13 November, 2013, the notice was issued to the respondents stating that the matter will be decided at the stage of admission. The respondents are served. The appeal is taken up for final disposal.

2. **Admit** on following question of law :

“Whether the proceedings need to be remanded to the Appellate Court as the Appellate Court has reversed the finding of the learned Trial Court on the ground of possession relying on non germane documents on record.”

The filing of Paper Book is dispensed with.

3. The respondents filed a Civil Suit seeking a declaration of ownership and consequently relief of injunction and for possession. The appellant opposed the grant of prayers in the suit by filing written statement. Stand was taken that the land was originally in the name of one Sudkya Devnak Mahar and $\frac{1}{2}$ share was entered in the name of his son and another $\frac{1}{2}$ was taken up by Pandnak Punnak Mahar by redemption of mortgage. It was contended that father of respondent no. 4 has sold $\frac{1}{2}$ share by registered sale-deed and he is in possession of the suit land. Defendant No. 2 supported the case of the respondent/plaintiff.

4. The learned Civil Judge, Junior Division, Khed by the Judgment and Order dated 29 March, 2006 dismissed the suit. However, the learned Civil Judge answered the issue of title in favour of the respondent/plaintiff. The learned Civil Judge did not grant the relief of injunction holding that the appellant is in possession. Thereafter the respondent/plaintiff filed a Civil Appeal No. 22 of 2006 in the Court of District Judge, Khed. The learned District Judge reversed the finding of the learned Civil Judge as regard possession and held that it was respondent/plaintiff who was in possession. The learned District Judge held that the appellant had neither filed any cross-appeal nor cross-objections challenging the findings as regard ownership of the respondent/plaintiff. Accordingly, by the Judgment and Order

dated 26 June, 2012, the learned District Judge allowed the appeal and confirmed the finding of ownership and injuncted the appellant from restraining the possession of the respondent/plaintiff. Thereafter the present Second Appeal is filed.

5. The learned Counsel for the appellant made two folds submission. Firstly, he contended that even though the appellant had filed cross-objections and it is incorrect observation by the learned District Judge that no cross-objections were filed. He submitted that even otherwise the Court has power under Order 41 Rule 22 of the Code of Civil Procedure to set-aside a finding and hold in favour of the respondent in the appeal.

6. As far as the first contention is concerned, I have gone through the so called cross-objections. The cross-objections are in turn of a reply. There is no court-fee paid on this reply. This document is only a reply to the appeal. It deals with contentions of the appellant in the appeal memo challenging the finding of the learned Civil Judge on the ground of possession. Though this reply is filed in person by the appellant in the District Court, subsequently Advocate was engaged and the appeal was contested through an Advocate. Even assuming any latitude is to be given to the party in person, by no stretch of imagination the document sought to be referred as cross-objections can be held to be so. Hardly any contentions taken in this document/reply challenging the finding of

the learned Civil Judge on merits as regard title. Therefore, even assuming this document is to be stated as cross-objection, except few lines, no adequate grounds have been taken therein.

7. As regard the contention based on Order 41 Rule 22 of CPC, the learned Counsel for the appellant relied on the decision of the learned Single Judge in the case of *State of Goa & Ors. V/s Shri Gurudas Timblo & Ors., 2004(3) ALL MR 418* to contend that the respondent can challenge an adverse finding by raising objections orally at the time of hearing of the appeal. Firstly taking such alternate contention is not fair to the respondent. Once having taken a stand that cross-objections were filed and that turn out to be incorrect, at this stage the Judgment and order cannot be set aside solely on the ground of existence of the power in the District Court. It is not necessary to go further into this aspect as on the other issue I am inclined to set aside the impugned order and remand the proceedings to the learned District Judge for denovo consideration of the appeal, and the learned Counsel for the appellant accepts that upon remand new cross-objections will be filed.

8. The reason for remand is the manner in which the conclusion is reached by the learned District Judge as regard the possession over the suit land. The learned District Judge while

granting an order of injunction in favour of the respondent/plaintiff for the first time, ought to have looked into all the pieces of evidence which were on record. It is submitted by the learned Counsel for the appellant that the learned District Judge relied upon 7/12 extracts at Exh. 7, 8 and 9 to hold in favour of the respondents that the respondents are in possession of the property. The other document i.e. Botkhat Exh. 62 was relied upon for the finding of ownership, and the primary documents relied upon are the 7/12 extracts, the learned Counsel for the appellant pointed out that these 7/12 extracts do not refer to the suit property and it does not state exclusive possession of the respondent/plaintiff. Therefore, the reasoning of the learned District Judge while arriving at the conclusion as regard possession over the suit property based on these documents alone is unsatisfactory. This is not to hold in favour of the appellant that he is in possession, but to highlight that there is no discussion at all on the issue of possession before granting injunction in favour of one party. Case therefore is made out for remand of the proceedings to the learned District Judge for consideration of the appeal.

9. The appellant will file cross-objections in the appeal so that both the appeals and cross-objections can be heard by the learned District Judge. There is no particular reason to show as to why the course of action by filing cross-objections need not be

resorted to by the appellant. Accordingly, the appeal is disposed of as under :

(A) The Judgment and Order passed by the learned District Judge dated 26 June, 2012 in RCA No. 22/06 is quashed and set aside.

(B) R. C .A. No. 22 of 2006 stands restored to file to be disposed of on its own merits.

(C) The parties will appear before the learned District Judge on 8 August, 2016.

(D) It will be open to the appellant to file cross-objections as per law.

(E) All contentions of the parties in the appeal and cross-objections, if any, are kept open to be decided on merits.

(F) Considering the fact that the appeal has been remanded to the District Court because of lack of reasoning, the learned District Judge will make an endeavour to give priority in disposal of the appeal.

(G) All concerned to act on the authenticated copy.

(N. M. Jamdar, J.)