

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

WRIT PETITION NO. 8891 OF 2016

Vinayak Shankar Joshi

Petitioner

Vs

Bhagyashri Devidas Atre and
Ors.

.. Respondents

Mr. Rajesh S. Datar, Advocate for Petitioner.
Mr. Jaydeep Deo, Advocate for Respondents.

CORAM : R.G.KETKAR,J.
DATE : 04/08/2016

PC:

1. Heard Mr. Rajesh Datar, learned counsel for the petitioner and Mr. Jaydeep Deo, learned counsel for respondents at length.
2. Rule. Mr. Deo waives service for the respondents. At the request and by consent of the parties, Rule is made returnable forthwith and petition is taken up for final hearing.
3. By this Petition under Article 227 of the Constitution of India, the petitioner, hereinafter referred to as 'defendant', has challenged the Judgment and decree dated 14.8.2015 passed by the learned District Judge-1, Pune, in Civil Appeal No. 16 of 2013. By that order, the learned District Judge allowed the Appeal preferred by the respondents, hereinafter referred to as 'plaintiffs', and quashed and set aside the Judgment and decree dated 28.9.2012 passed by the learned 5th Addl. Judge, Small Causes Court, Pune in Civil Suit No. 436 of 2009. The learned District Judge decreed the suit instituted by the plaintiffs under

section 16(1)(g) of the Maharashtra Rent Control Act, 1999 (for short, 'Act') and directed the defendant to hand over vacant possession of Outhouse-cum-garage admeasuring about 200 sq.ft situate in South-West corner of one storeyed bungalow by name 'Laxmi', situate on C.T.S.No.484/81, Mitramandal Colony, Parvati Pune. (for short, 'suit premises'), within two months from the date of the order.

4. Plaintiffs have instituted suit against the defendant for recovery of possession of the suit premises on the grounds of nonuser, as contemplated under Section 16(1)(n) and bonafide and reasonable requirement as contemplated under section 16(1)(g) of the Act. The defendant filed written statement at Exh.13, inter alia, contending that his father was the original tenant in the suit premises. His father died leaving behind defendant and two brothers - Bhalchandra and Rajendra. Suit is bad for nonjoinder of Bhalchandra and Rajendra. On the basis of pleadings of the parties, the learned trial Judge framed necessary issues. Parties led evidence. The learned trial Judge dismissed the suit. Learned trial Judge held that the suit is bad for nonjoinder of necessary party as also the plaintiffs failed to prove that the defendant did not use the suit premises since more than six months immediately preceding the date of filing of the suit (16(1)(n)). The learned trial Judge held that the plaintiffs have established that they require the suit premises reasonably

and bonafide (section 16(1)(g)). The learned trial Judge also held that greater hardship will be caused to the plaintiffs in the event of refusal to pass eviction decree.

5. Aggrieved by that decision, the plaintiffs preferred Appeal before the District Court. By the impugned order, the learned District Judge allowed the Appeal. It is against this order, the defendant has instituted the present petition.

6. In support of this Petition, Mr. Datar has invited my attention to paragraph 8 of the impugned order. In paragraph 8, the learned District Judge observed that the trial Court has accepted the ground under section 16(1)(g) of the Act made out by the plaintiffs. Those findings have not been challenged by the defendant by filing separate appeal or cross objection and, therefore, this finding became final and binding on the parties. Mr. Datar submitted that this finding is not sustainable as the learned trial Judge has dismissed the suit. Defendant can support the decree and challenge the findings recorded by the courts below against the defendant without filing either appeal or cross objection. In support of this, he relied upon the decision of the Apex Court in the case of Banarsi Das Vs Ram Phal (2003) 9 SCC 606.

7. Mr. Datar further submitted that the learned District Judge committed error in holding that the suit is not bad for nonjoinder of necessary party. He has taken me through the pleadings,

evidence on record and the findings recorded by the learned District Judge in that regard.

8. On the other hand, Mr Deo supported the impugned order. He submitted that having regard to the written statement as also the admissions given by defendant no.1 during the course of cross examination, the learned trial Judge was not justified in dismissing the suit on the ground of non joinder of party. He submitted that the learned District Judge has rightly held that the suit is not bad for non joinder of necessary party. He also supported the findings recorded in paragraph 8 of the impugned order.

9. I have considered the rival submissions advanced by the learned counsel appearing for the parties. I have also perused the material on record. As far as the aspect of non joinder of necessary party is concerned, in paragraph 15 of the written statement filed by the defendant, the defendant contended that the suit is instituted against him only on the basis of rent receipts standing in his name. In the cross examination, the defendant admitted that since 1971 during the lifetime of his father, rent receipts were issued in his name. The defendant's father died in the year 1986. During his lifetime, father and other brothers Bhalchandra and Rajendra did not raise any objection for issuing rent receipts in his name. He further admitted that the rent receipt was never issued in the name of either Bhalchandra or

Rajendra. The learned trial Judge, however, glossed over paragraph 15 of the written statement as also the admissions given by the defendant in the cross examination and held that the suit is bad for non-joinder of necessary party. In paragraph 10, the learned trial Judge held that the suit is bad for nonjoinder of necessary party, viz. Rajendra.

10. As against this, the learned District Judge has considered the admissions given by the defendant in the cross examination in paragraph 11 and ultimately held in paragraph 14 that the learned trial Judge committed apparent error in dismissing the suit on the ground that it is bad for nonjoinder of necessary party. After considering the material on record, I do not find that the learned District Judge has committed any error in that regard. The suit cannot be said to be bad for nonjoinder of necessary party. The findings recorded by the learned District Judge in that regard is confirmed.

11. This brings me to the question as to whether without filing appeal or cross objection, whether the defendant can support the decree and challenge the findings which are recorded by the trial Court against him.

12. In paragraph 8, the learned District Judge observed thus;

“8. It is to be noted that the trial Court has given findings in favour of plaintiffs regarding the requirement of suit premises on account of reasonable and bonafide need and also held that they would suffer hardship. These findings have not been challenged by the defendant by filing

separate appeal or cross objection. Therefore, these findings have become final and binding on the parties.”

13. In the case of *Banarsi Das 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."

14. Applying the tests laid down to the facts of the present case, the findings recorded by the learned District Judge in paragraph 8, extracted herein above, cannot be sustained. That apart, it is not disputed by the learned counsel appearing for the parties that suit is instituted also on the ground of non user as contemplated by section 16(1)(n). The learned District Judge has not recorded any findings as regards this ground. On this ground also, the impugned order cannot be sustained. Hence, the following order.

- (i) Impugned order dated 14.8.2015 passed by the learned District Judge-1, Pune is partly quashed and set aside. The findings recorded by the learned District Judge on the issue of non joinder of party is upheld. In other words, the findings of the learned District Judge that the suit is not bad for nonjoinder of party, is maintained. Civil Appeal No. 16 of 2013 is restored to the file of the District

Court. By way of abundant caution, it is clarified that the findings recorded by the learned District Judge that the suit is not bad for non joinder of party, shall not be agitated before the District Court.

- (ii) Defendant is permitted to challenge the findings recorded by the learned trial Judge against issues: whether the plaintiffs require the suit premises reasonably and bonafie and to whom greater hardship will be caused, without filing appeal or cross objections.
- (iii) Learned District Judge will deal with grounds raised by the plaintiffs, namely, Section 16(1)(g) and 16(1)(n) of the Act.
- (iv) Parties agree that they will appear before the learned District Judge on 22.8.2016 and for that purpose no fresh notice be issued to them. Learned District Judge is requested to dispose of the appeal as expeditiously as possible and in any case within three months from the date of appearance of the parties.
- (v) All contentions of the parties on merits are expressly kept open. Rule is made partly absolute in the aforesaid terms with no order as to costs.

(R.G.KETKAR, J.)