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IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

SECOND APPEAL NO.542 OF 2012

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| 1. | Anantrao s/o Vinayakrao Joshi
Age – 65 years, Occ – Retired
R/o Asarjan, Taluka and District – Nanded | APPELLANTS |
| 2. | Harishchandra s/o Madhavrao Tribhuvan,
Age – 66 years, Occ – Retired
R/o Bisen Nagar, VIP road, Nanded | |

VERSUS

- | | | |
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| 1. | Govind s/o Ambadasrao Kulkarni,
Age – 58 years, Occ – Advocate,
R/o Somesh Colony, Behind Kalamandir,
Nanded | RESPONDENTS |
| 2. | Nalini w/o Govind Kulkarni,
Age – 56 years, Occ – Teacher,
R/o As above | |
| 3. | Devprakash s/o Devidas Tuganwar,
Age – 45 years, Occ – Service
R/o Somesh Colony, Behind Kalamandir
Nanded | |

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Mr. C. V. Korhalkar h/f Mr. Vijay Sharma, Advocate for appellants
Mr. H. I. Pathan, Advocate for respondents No. 1 and 2

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[CORAM : SUNIL P. DESHMUKH, J.]

DATE : 24th APRIL, 2017

ORAL JUDGMENT :

1. Heard Mr. C. V. Korhalkar, learned advocate holding for Mr. Vijay Sharma, appearing on behalf of the appellants and Mr. H. I.

Pathan, learned advocate for respondents No. 1 and 2.

2. Appellants are before this court in second appeal aggrieved by order dated 1st October, 2011 passed by District Judge – 1, Nanded on applications Exhibits – 4, 11 and 15 in Regular Civil Appeal No. 57 of 2010.

3. Applications Exhibits – 4 and 11 question maintainability of Regular Civil Appeal No. 57 of 2010 with reference to Order XLI, Rule 11 and section 11 of the Civil Procedure Code and for appellant No. 2 is said not to be possessing power for appellant No. 1 while lodging of appeal, since no power of attorney had been filed along with the appeal. Exhibit – 15 is application for grant of stay operation of decree during appeal.

4. Parties hereto for convenience would be referred to by their status in regular civil suit No. 358 of 2000 *viz.*, respondents No. 1 and 2 as plaintiffs No. 1 and 2, appellants No. 1 and 2 as defendants No. 1 and 2 and respondent No. 3 as defendant No.3.

5. Succinct reference to background would facilitate proper appreciation of the matter. Regular Civil Suit No. 358 of 2000 had been instituted by plaintiffs – present respondents No. 1 and

2 seeking declaration that respondents are owners and in possession of suit property as well as proceedings before rent controller bearing No. 3 of 2000 for restoration and other proceedings for possession of suit house by defendants – present appellants were without jurisdiction and would not bind plaintiffs and for mandatory injunction against defendant No. 3.

6. Plaintiffs have asserted, defendant No. 1 had issued a notice dated 10th January, 1987 claiming that plaintiffs No. 1 and 2 who have occupied suit premises as trespassers, after expiry of two months from 1st June, 1984. In reply to the notice, plaintiffs purported to deny title of defendant No. 1 to suit property claiming possession of plaintiffs over suit house being adverse to the knowledge of defendant No. 1. Ownership of defendant No. 1 stood extinguished and the plaintiffs in the process, had acquired ownership over suit house by adverse possession. It is further claimed that sale deed executed by defendant No. 1 in favour of defendant No. 2 dated 19th November, 1987, is with the knowledge of possession of plaintiffs over suit premises running adverse. It is denied that there is transfer of title under the sale deed to defendant No. 2. Suit having not been instituted within twelve years from 1st August, 1984 or for that matter from 19th November, 1987, the right of

defendant No. 2 to recover possession stands extinguished, plaintiffs having become owners by adverse possession to the knowledge of defendants No. 1 and 2. Defendant No. 2 is not a *bona fide* purchaser. The plaintiffs have instituted proceeding for specific performance which is pending in appeal. Yet situation about defendants No. 1 and 2 claiming plaintiffs to be trespassers does not get altered and the claim in the other litigation, referred to hereinbefore, is different. The plaintiffs have further averred that defendant No. 3 has constructed a building, keeping ventilators illegally on the common wall, which has been causing nuisance and, as such, a relief of mandatory injunction for closing ventilators was also sought.

7. Plaintiffs have averred about and referred to certain other litigations before different fori and have claimed that right of possession of the defendants in the process having been extinguished and the other proceedings pending are without jurisdiction.

8. Defendant No. 3 (present respondent No. 3) has not filed written statement.

9. Defendants No. 1 and 2 have resisted the suit by filing written statement and have made a counter claim.

10. Defendants No.1 and 2 have denied the pleadings of the plaintiffs and have averred that defendant No. 1 had been owner of suit property who has sold the same in favour of defendant No. 2 for a valuable consideration, under registered title transfer deed dated 19th November, 1987 and since then, defendant No.2 is the owner. Defendant No. 2 had instituted proceedings for eviction of plaintiff No. 2 before rent controller. Plaintiff No. 1 had filed a false suit for specific performance, which has been dismissed and appeal therefrom has been dismissed in default. During pendency of said appeal, the plaintiffs had filed application for amendment, but the same was rejected. Defendant No. 1 had filed suit against plaintiff No. 1 for recovery of arrears of rent, which came to be decreed. Defendant No. 1 had filed petition for eviction against plaintiff No. 1 but during its pendency, sold suit house to defendant No. 2 and defendant No. 2 had independently filed eviction proceedings against plaintiff No. 1. They have denied that plaintiffs have become owners by adverse possession and have further denied that their ownership got extinguished. It was averred that plaintiffs have no right of ownership over suit property and the suit could not have been instituted by them. Defendants, as such, prayed for dismissal of the suit.

11. Defendants No.1 and 2 have made a counter claim seeking possession of the suit property and mesne profits. It is avered, cause of action for counter claim arose around 2000 referring to certain events.

12. In their written statement to counter claim, plaintiffs denied claims of the defendants, *inter alia*, stating that the right to recover possession of suit property stands extinguished and that other litigation in respect of specific performance does not impinge on the rights of the plaintiffs in present suit. It is claimed that dismissal of suit by plaintiffs against defendant No. 1 for specific performance is not final and does not operate as *res judicata* against the plaintiffs. Defendants are not entitled to mesne profits as claimed. There is disparity in the price of suit house as mentioned in the counter claim and as contended in written statement and thus prayed for dismissal of the counter claim.

13. Trial court framed following issues and recorded finding against the same.

	<i>ISSUES</i>	<i>FINDINGS</i>
01	<i>Whether plaintiffs are owners in possession of suit house ?</i>	<i>The plaintiff is owner in possession of suit house against the defendant No.1</i>
02	<i>Whether plaintiffs are entitled to relief of</i>	<i>In affirmative against</i>

	<i>declaration that they are in possession of suit house ?</i>	<i>defendant No.1 and in negative against defendant No.1</i>
03	<i>Whether plaintiffs are entitled for relief of perpetual injunction restraining defendants from causing interference and obstruction over suit house ?</i>	<i>Affirmative</i>
04	<i>Whether the rent controller, Nanded has no jurisdiction to consider restoration case No. 3/2000 ?</i>	<i>Negative</i>
05	<i>Whether plaintiffs are entitled for declaration that rent control proceeding No. 3/2000 is without jurisdiction ?</i>	<i>Negative</i>
06	<i>Whether plaintiffs are entitled for relief of perpetual injunction restraining defendants No. 1 and 2 to alienate or create any kind of encumbrance over the suit house ?</i>	<i>Affirmative</i>
07	<i>Whether plaintiffs are entitled for relief of mandatory injunction as claimed ?</i>	<i>Affirmative</i>
08	<i>Whether Counter Claim of defendants No. 1 and 2 is barred by Article 67 of Limitation Act ?</i>	<i>Dose not survive</i>
09	<i>Whether right to property of defendants No.1 and 2 is extinguished under Sect. 27 of Limitation Act ?</i>	<i>Affirmative against defendant No.1 and in negative against defendant No.2</i>
10	<i>Whether counter claim of defendants is barred due to adopting remedy through rent controller for relief of possession of suit house ?</i>	<i>Doest not survive</i>
11	<i>Whether defendants are entitled for recovery of possession of suit house ?</i>	<i>Does not survive</i>
12	<i>Whether defendants are entitled for mesne profits as claimed ?</i>	<i>Does not survive</i>
13	<i>What order and decree ?</i>	<i>Suit of plaintiff is decreed partly with costs</i>

14. Trial court has decreed the suit partly. Operative order dated 30th August, 2007 reads as under

ORDER

1. *The suit of plaintiff is decreed partly with costs as under.*
2. *The defendant No. 3 is hereby directed to close the ventilation kept at the common wall side of the suit house No. 2-9-102 situated at Somesh Colony behind Kalamandir, Nanded.*
3. *Defendants are hereby perpetually restrained from causing any obstruction and interference in the possession of plaintiff over the suit house.*
4. *Defendants No. 1 and 2 are hereby perpetually restrained from selling or creating any encumbrance over the suit house ?*
5. *It is hereby declared against defendant No. 1 that the plaintiff No. 1 is owner in possession of suit house.*
6. *The claim of plaintiff of declaration of ownership against defendant No. 2 is hereby dismissed.*
7. ***The claim of plaintiff for declaration that Rent Control Proceeding No. 3/2000 for restoration or any other proceeding for possession of the suit house is without jurisdiction and is not binding upon the plaintiffs is hereby dismissed.***
8. *Decree be drawn up accordingly.*
9. ***Counter-Claim of defendant Nos. 1 and 2 is dismissed in default.***

15. Aggrieved by aforesaid decision of the trial court, original defendants No. 1 and 2 had preferred appeal with some delay, which appears to have been condoned and the same is bearing

Regular Civil Appeal No.57 of 2010. Original plaintiffs have put in their appearance in the appeal.

16. Original plaintiffs – present respondents No. 1 and 2 have questioned maintainability of appeal by filing applications Exhibits – 4 and 11 as referred to above, contending that counter claim had been filed by present appellants claiming relief of possession and the same had been dismissed. There is no appeal against dismissal of counter claim. Under operative order and findings recorded on issues No. 6 to 9, it has been considered that appellants have not proved their title on the basis of sale deed and have further failed to prove relationship of landlord and tenant. It is claimed, it has been declared under the decree that respondents No. 1 and 2 (original plaintiffs) to be owners and that relationship of landlord – tenant is not established, which according to them is particularly with reference to the counter claim. Thus, finding given against appellants in the absence of appeal against counter claim would operate as *res judicata* based on common judgment. Madras High Court decision in the case of “*Arumugha Nainar V/s Lokshmana Perumal*” reported in *AIR 1992 Madras 280* had been referred to and relied on. In the applications it had been contended that issues of counter claim have been not answered in favour of appellants,

as such, it should be treated to have been refused and in the absence of appeal against dismissal of counter claim, present appeal has been, under the circumstances, rendered not maintainable. It further has been claimed that decree of dismissal in Suit No. 124 of 1989 for specific performance being not final as well as decision in suit No. 230 of 1987 being not enforceable, findings recorded therein do not go against plaintiffs – respondents and, as such, it has been urged to consider that appeal is not maintainable.

17. Appellate court while deciding said two applications has considered that appellant No. 2 has failed to prove his ownership and possession of suit premises, since having failed to prove his alleged sale deed. Although judgment of the counter claim is shown to be as dismissal in default, however, having gone through entire evidence and findings on the other issues, some of the issues were held by the trial court appear to be not surviving as appellant No. 2 has not proved sale deed, therefore, issues were not decided. It further appears to have been considered that appellants sought relief of possession, which was denied and as per section 11 explanation V of the Civil Procedure Code, any relief claimed in the plaint, which is not expressly granted by the decree, shall be deemed to have been refused.

No appeal has been filed by the appellants against denial of relief under the counter claim. Finding recorded by lower court in respect of those issues, having not survived, have in the process become final. Appellate court further has referred to an order in second appeal No.1231 of 2004 of this high court. According to learned advocate Mr. Pathan, it is held in said judgment that two separate appeals, from decision in suit and counter claim, ought to be preferred and in the absence of challenge in separate appeal against decision of counter claim, decision in the same had been rendered final and as such, the appeal against decree in suit would not be maintainable.

18. Appellate court has further observed that photo copy of general power of attorney had been filed and original document had not been before the court. As such, it cannot be considered that any appeal is preferred by appellant No. 1 and as such, issues decided against appellant No. 1 cannot be considered in appeal filed by appellant No. 2.

19. Considering aforesaid, applications Exhibits – 4 and 11 were allowed and the appeal came to be dismissed holding the same to be not maintainable.

20. Mr. Korhalkar, learned advocate contends that the appeal

could not have been dismissed as not maintainable for the reasons as are given. According to learned advocate, once appeal has been filed and notices are issued, those are liable to be decided according to the prescribed procedure under the Civil Procedure Code and not otherwise. He submits, in particular, if it is assumed as contended on behalf of plaintiffs No. 1 and 2 that appeal has been preferred against the judgment in the suit, having regard to the issues as were framed and the counter claim as had been filed, dismissal of the counter claim in the present matter would not impinge upon prosecution against decree passed in the suit. He submits, perusal of the issues and the operative order, reproduced hereinbefore, would show that the counter claim has been dismissed in default and there is no decision on merits so far as issues which relate to the counter claim. He, therefore, submits that issues on which findings have been recorded against defendants No. 1 and 2 in the suit, are amenable decision in the appeal preferred against the decree in suit and would circumscribe incidental observations therein. Appellate court is a higher court and issues and findings thereon are not reexamined by the higher forum. Thus, question of findings having become final in absence of express challenge to the decree in counter claim is inconceivable proposition in the

facts and circumstances of the case. Findings against appellants are matter of challenge and focus in the appeal and thus contention on behalf of plaintiffs No. 1 and 2 with reference to Madras High Court judgment would absolutely have no application to the present case, nor can any analogy be drawn from the judgment of the Madras High Court as would be applicable to the facts of the present case. He, therefore, submits that the question of maintainability of appeal on that count even does not arise in the present matter. However, appellate court has failed to appreciate these vital aspects required to be considered in the matter. He submits, the appeal has been preferred by defendants No. 1 and 2, who had filed joint written statement. Furthermore, he submits that defendants No. 1 and 2 during the course of appeal have indeed filed a photo copy of power of attorney. He submits that the fact of appeal being by defendants No. 1 and 2 i.e. present appellants No. 1 and 2 gets endorsed by the act of filing present second appeal by both the appellants. In the circumstances, objection being taken about appeal being not by defendant No. 1 is an objection of very technical nature, however, there is no substance in the same in the given facts and circumstances of the case.

21. Over and above, he submits that as stated aforesaid, there is no intervening stage contemplated to decide maintainability of appeal and if at all maintainability of appeal is to be questioned, hearing about the same has to take place along with hearing of appeal itself. No separate stage is envisaged nor can it be resorted to while appeal is being decided.

22. He purports to point out that decision relied on of the Madras High Court has different factual background and observations of the court are in the background of the facts and circumstances of the case, wherein, in the two suits there appeared to be common questions with regard to title, and were decided separately against the respondent before high court and challenge to the decision on the issue with regard to title had been posed before first appellate court only in respect of one of the suits. It is in that circumstances decision appears to have been rendered by Madras High Court.

23. In the present matter, according to him, even if it is assumed that issues in the suit have been decided against interest of the defendants, yet defendants have challenged findings in the appeal. It is not a case wherein a decision in the counter claim has been a decision on merits to which no

challenge ostensibly has been posed. Decision in counter claim being not on merits would seldom be a case giving rise to application of doctrine of *res judicata*.

24. Countering aforesaid submissions, Mr. Pathan, learned advocate appearing for respondents No. 1 and 2 – plaintiffs, submits that in the present matter it is an admitted position that there is no challenge posed to dismissal of counter claim by appellants No. 1 and 2. The trial court has held that defendant No. 2 could not have title to suit property. Decision in respect of the same gives an indication of that the claim by defendant No. 2 in the counter claim to quite a large extent having discussed and decided. He, therefore, submits that since there is no challenge to dismissal of counter claim, decision given by the trial court in the suit would intervene and create an embargo on consideration of appeal and operate as *res judicata*.

25. Mr. Pathan submits that counter claim is as good as a cross / separate suit and in the circumstances, decision of the Supreme Court in the case of “*Sheodan Singh V/s Daryao Kunwar*” reported in *AIR 1966 SC 1332* would hold sway over present matter. For said purpose, he refers to and relies on head note “C”, reading, thus -

“ C. Civil P. C. (5 of 1908), S. 11 – Heard and finally decided – Two suits having common issues – Suits decided by trial Court on merits – Two appeals filed therefrom – One of them dismissed on ground of limitation or default printing – decision of Appeal Court will be res judicata.

Where the trial Court has decided two suits having common issues on the merits and there are two appeals therefrom and one of them is dismissed on some preliminary ground, like limitation or default in printing, with the result that the trial court's decision stands confirmed, the decision of the appeal court will be res judicata and the appeal court must be deemed to have heard and finally decided the matter. In such a case the result of the decision of the appeal court is to confirm the decision of the trial court given on merits, and if that is so, the decision of the appeal court will be res judicata. ”

26. In addition to aforesaid, he contends that judgment of the Madras High Court, referred to *supra* had been properly considered by the appellate court and would apply to the facts of the present case.

27. During the course of submissions, learned advocate Mr. Pathan has referred to an order, namely second appeal No. 1231 of 2004 in order to support his contention that appeal would not be maintainable, which has been referred to by the appellate court.

28. After hearing learned advocates for the parties, following question may substantially arise for consideration in the second

appeal-

“ Whether in the facts and circumstances of the case, the matter is liable to be remanded to the appellate court for consideration of regular civil appeal on merits, afresh ? ”

29. Plaintiffs' pleadings show, they claim ownership over suit property claiming themselves to be in adverse possession and also claim extinguishment of rights of defendants in the suit property. They claim, while in the notice by defendant No. 1, possession of plaintiffs has been referred to by defendants as that of trespassers and them having not instituted proceedings within twelve years, plaintiffs acquire rights of ownership over suit property and rights of defendants get extinguished. While this is their case, plaintiffs have referred to quite a few proceedings pending among parties to the suit and over and above the same, also claim that those proceedings to be out of jurisdiction of the courts concerned. With reference to the same, issues No. 4 and 5 had been framed and the same had been held against interest of plaintiffs giving a negative finding. That apart, plaintiffs' pleadings also further refer to proceeding at their own instance for specific performance, which appears to have been instituted after notice in 1987 by defendants to plaintiffs. Plaintiffs' suit for specific performance in the court of first

instance has met with failure. It is contended on behalf of the plaintiffs that an appeal therefrom is pending and an application for amendment on their behalf has been rejected.

30. It is not disputed that defendant No. 1 has had instituted proceedings after 1984 for recovery of rent and eviction and also proceedings have been instituted by defendants No. 1 and 2 for eviction and / or possession. Some of them are pending.

31. The appellate court does not appear to have dwelt on the very concept of ownership by adverse possession, whether mere lapse of twelve years would result into ownership of the occupier or alleged statement in the notice would clinch the issue or plaintiffs have ever asserted ownership in hostility to title of defendants or for that matter, the subsequent proceedings, events and occurrences are absolutely insignificant.

32. Claim of adverse possession will have to be adjudged also with reference to legal position as to whether plaintiffs can lay claim by a suit for such declaration, looking at the decision of the Supreme Court in the case of *Gurudwara Sahib vs Gram Panchayat Village Sirthala and Another*, reported in (2014) 1 SCC 669.

33. A reference will have to be made to that issues framed, as

quoted hereinabove, wherein issues in respect of defendants' counter claim appear to have been held to be not surviving and the counter claim stands dismissed in default.

34. Burden had been on the plaintiff to be discharged, it appears, in respect of issues No. 1 to 10, albeit, issues No. 8 and 10 are held to be not surviving. Issues No.11 and 12, which appear to pertain to counter claim have been held to be not surviving. It is not the case of the plaintiffs - respondents that there is no appeal by defendants / appellants against the decree passed in the suit by plaintiffs.

35. Appellate court appears to have considered that appellant No. 2 has failed to prove ownership and possession over suit property. No particular issue in this regard appears to have been framed.

36. Appellate court appears to have considered that the appellants' case stands debarred from being prosecuted in appeal on the principles analogous to *res-judicata*.

37. The situation, it appears, clearly emerges that there is no decision on merits at all, so far as counter claim is concerned. Claim of the defendants, as such, for recovery of possession

appears not to have been considered due to default of appearance on behalf of the defendants. In the circumstances, it is difficult to conceive that decision so rendered in their absence can be a decision on merits of the case. As such, efficacy and sustainability of the decision, though contended to be against the interest of defendants No. 1 and 2, would not be determinative about maintainability of appeal on the grounds agitated on behalf of appellants – defendants No. 1 and 2.

38. While the appellate court appears to have considered in the absence of challenge to dismissal of counter claim, findings recorded and decision in the suit would operate as *res judicata* with regard to claims of defendants – appellants. Here also, one may have to consider that the decision in the suit on merits has not reached finality while appeal is pending. In the present matter decisions hitherto would show that the trial court has considered while deciding issues No. 4 and 5, proceedings are not liable to be declared as outside jurisdiction of the concerned courts which have been instituted by the defendants claiming property and as such, dismissal of counter claim in default would not foreclose decision in those proceedings. Appellate court has not considered this salient aspect.

39. Ostensibly may be it is a case that the regular civil appeal takes under focus the decree passed in the suit, while counter claim has been dismissed in default, it can hardly be said that dismissal of counterclaim not being challenged, decision on the issues as not surviving would operate as *res-judicata* so far as appeal is concerned.

40. Even if it is assumed that case for resistance to maintain the appeal may arise, yet one will have to consider that an issue of *res-judicata* is a mixed question of facts and law. In the present matter, it does not appear to be a case where a particular point in this respect had been framed and parties were allowed to lead evidence on the same.

41. Appellate court has assumed, in the absence of appeal on behalf of the appellant No. 1, the issues decided against appellant No. 1, cannot be challenged in the appeal filed by appellant No. 2.

42. Appellate court has missed out on that appellant No. 2 is purchaser of the property and he was defendant No. 2 in the suit and he is aggrieved by decision rendered by the trial court in the suit. He along with defendant No. 1 – appellant No. 1 is shown to have lodged the appeal challenging decree passed in the suit.

Even if for the sake of arguments, it is considered that the appeal is not by appellant No. 1, yet appellant No. 2, as a aggrieved party, would be able to lay challenge to decree passed in the suit. Appellant No. 2 cannot be said to be precluded from challenging decision in the suit, in the absence of appellant No. 1, in respect of findings against appellant No. 1.

43. The other aspect that will have to be considered which appears to have weighed with the appellate court is about empowerment of appellant No. 2 to prosecute the matter along with appellant No. 1 in the absence of any power of attorney. It appears to be a case, may be while appeal had been preferred appellant No. 2 had not placed on record authorization to lodge and prosecute the appeal on behalf of appellant No. 1, yet subsequently this deficiency, to quite some extent, at this stage, appears to have been removed by submitting a photocopy of power of attorney. Empowerment / authorization of appellant No. 2 gets further re-enforced by filing present second appeal by appellant No.2 along with appellant No. 1. In this background, the objection on that count appears to be technical in nature.

44. Learned advocate for the respondents relied on a decision of the Supreme Court in the case of *"Sheodan Singh V/s Daryao*

Kunwar” reported in *AIR 1966 SC 1332*, which is a case wherein four suits having quite a few common issues were decided on merits. One of the common issues related to rights of parties to suit properties. Common issue relating to right of suit property was decided in favour of the respondent (before Apex Court) in four suits. Four appeals therefrom had been preferred. Two of them had been dismissed on some preliminary ground like limitation or failure to remove office objection.

45. Thereupon, an application came to be filed on behalf of the respondents to dismiss remaining two appeals. Matters were referred by Single Judge to Full Bench for decision. Full bench held that there were four appeals originally before High Court, two of them had been dismissed and the very same issue arise in the remaining two appeals and considered that situation was covered by section 11 of the Civil Procedure Code and as such, the remaining two appeals were considered to be barred by *res judicata*. The Supreme Court has endorsed the view of the Full Bench. Apart from that in the matter concerned before the Supreme Court it is not in dispute that the decision had been rendered on merits in the suits. However, in the present matter such is not the situation. Thus, the Supreme Court had been dealing with in an entirely different scenario. In the present

case, it is not the case that the counter-claim of the appellants has been decided on merits. As such, no analogy can be drawn from the Supreme Court case as would be applicable in the present facts and circumstances.

46. Another judgment referred to learned advocate is the case of *“Arumugha Nainar V/s Lakshmana Perumal and Others”* reported in *AIR 1992 Madras 280*, was also a case wherein common issues were involved in two suits amongst same parties, including the issue about title to the property. In one of the suits, title of the plaintiff had been upheld while in the other suit by the defendant wherein she was plaintiff, her claim to title had been negated. Defendant had filed only one appeal against declaration of title of plaintiff and had not filed appeal against dismissal of her claim to the title. It is in that context, it has been considered that the appeal filed by defendant against the decision upholding title of the plaintiff would incur a bar of section 11 of the Civil Procedure Code. This judgment as well is hardly of any assistance to the respondents for, decision in counter-claim of the appellant is not a decision on merits.

47. An order in Second Appeal No.1231 of 2004 dated 29th July, 2005 of this Court referred to and relied on by learned

advocate for the respondents is in the context that appellant had filed suit for specific performance of contract and permanent injunction in respect of suit property. In the same defendant had filed counter-claim for possession and *mesne* profits. Suit had been partly decreed granting relief of refund of earnest amount with interest as well as counter-claim had been decreed giving possession of the suit land to the defendant – respondent. An appeal came to be preferred only against refund of amount. In the circumstances, an application had been moved by the respondent objecting to maintainability of appeal, which is in that context it appears an order came to be passed holding appeal to be not maintainable, for decree in counter-claim had been unchallenged. The scenario there had been different than the one in the present case. In the present matter, may be ostensibly, appeal is said not to pose challenge to dismissal of counter-claim, yet, it cannot be overlooked that decision in counter-claim is not a decision on merits, which would foreclose the prosecution of appeal filed against the decree assailed. Coupled with that there have been certain other proceedings pending for eviction / possession on behalf of the appellants. Thus, it does not appear that cited decisions would be able to circumscribe scope of the regular civil appeal filed by the

appellants and will have to be proceeded with on merits.

48. It is not a case of plaintiffs No. 1 and 2 (respondents No. 1 and 2 herein) that the appeal preferred by present appellants is not against the decree in the suit and consequently, the findings given by the trial court on the issues in the suit are wide open for application of mind, consideration of issues and re-appreciation of evidence.

49. In the circumstances, if it is considered that challenge in appeal is confined only to decision in the suit, then merits of the plaintiffs' case will have to be re-examined and re-appreciated in the appeal and the findings of the trial court, in the circumstances, would merge into decision of appellate court. It would not be a case, in such a case, that dismissal of counter claim for possession in default, would be able to overwhelm the decision in the appeal against decision in the suit. The appellate court has also not considered that landlord – tenant relationship is not a province of decision by court in the suit, as filed by the plaintiffs. Jurisdiction in respect of the same rests with a court acting under the provisions of relevant enactment. The court ought to have considered that dismissal of the counter-claim in default being not a decision on merit, would not operate as *res*

judicata on the findings recorded in the suit. As such, appellate court's observation that explanation 5 of section 11 of the Civil Procedure Code would apply in the matter is an erroneous one.

50. It cannot be said to be a case wherein appellate court has reconsidered and re-appreciated the case in the suit of the plaintiffs on merits or has applied its mind to the case pleaded and the evidence in respect of the same.

51. Appellate court has committed an error in disregarding appeal absolutely. It had been incumbent in the facts and circumstances of the case, to consider the appeal on merits, and had been in error in considering that principle underlying explanation 5 of section 11 of the Civil Procedure Code would dis-entitle appellants from challenging decree in the suit. Appellate court would be required to apply its mind as well as to whether appellate court would exercise power under Order XLI, Rule 11 of the Civil Procedure Code as well. It was an error on the part of appellate court to allow applications and dismiss the appeal. As such, situation calls for remand of the matter for decision of the appeal on merits, afresh.

52. In the circumstances, matter, in such case, will have to be viewed on merits, whereas action about entitlement of the

plaintiffs to the reliefs with reference to the issues framed.

53. In such a scenario, the decision rendered appears to be rather cursory. It would not be conclusively said in the present matter that due to dismissal of the counter claim, the decision in the suit would acquire finality. On the whole, it emerges that the appellate court has misconceived the appeal and the applications.

54. In view of aforesaid, it appears to be expedient that the order dated 1st October, 2011 impugned in the present second appeal be set aside, relegating parties to the appellate court for reconsideration of regular civil appeal No. 57 of 2008 in *extenso* along with applications for maintainability of the appeal.

55. The matter deserves to be remanded to the appellate court and the substantial question of law stands answered accordingly. Further, the appellate court to proceed with the appeal as expeditiously as possible and decide the same on merits within a period of six months from the date of receipt of writ of this order.

56. As such, order dated 1st October, 2011 in regular civil appeal No. 57 of 2008 impugned in the present second appeal

stands set aside. The matter is remitted to appellate court for decision on merits as well as on applications Exhibits - 4 and 11. Applications Exhibits - 4 and 11 be decided along with appeal. The matter be taken up as expeditiously as possible and be disposed of preferably within a period of six months from the date of receipt of writ of this order. Application Exhibit-15 stands restored for decision afresh.

57. In the circumstances, the second appeal stands allowed as aforesaid.

58. Learned advocate Mr. Pathan for the respondents - plaintiffs seeks indulgence to stay operation of this order for a period of six weeks. The operation of this order, as such, shall stand deferred till a period of six weeks from the date of reopening of Apex Court after ensuing summer vacation.

[SUNIL P. DESHMUKH, J.]