

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

APPEAL FROM ORDER 7 OF 2016

1. Ashok Bhanudas Choudhari
Age : Major, Occ : Service & Agri,
R/o. Chanda, Tq. Newasa,
Dist. Ahmednagar
2. Ganpat Patilba Chavan
Age : Major, Occu : Service & Agri.,
R/o. Newasa Fata, Tq. Newasa,
Dist. Ahmednagar
3. Babasaheb Bansi Kale,
Age : Major, Occu : Agri.,
R/o. Behind Mukindpur
Irrigation Colony
Near Sent Meri Schook Newasa Fata,
Tq. Newasa, Dist. Ahmednagar
4. Digambar Padmakar Kulkarni,
Age : Major, Occu : Service.
R/o. Behind Mukindpur Irrigation
Colony, New Sent Meri Schook,
Newasa Fata, Tq. Newasa,
Dist. Ahmednagar
5. Nivrutti Bhanudas Lokhande
Age : Major, Occu : Agri
R/o. Behind Mukindpur
Irrigation Colony,
Near Sent Meri School,
Newasa Fata, Tq. Newasa,
Dist. Ahmednagar
6. Kashinath Rangnath Dahale
Age : Major, Occu : Agri
R/o. Newasa Bk.,
Tq. Newasa, Dist. Ahmednagar
7. Bramhanath Pandurang Pawar

Age : Major, Occu : Service,
R/o. Behind Mukindpur
Irrigation Colony,
Near Sent Meri School,
Newasa Fata, Tq. Newasa,
Dist. Ahmednagar

8. Vasant Vitthal Jape
Age : Major, Occu : Agri.,
R/o. Newasa Bk.,
Tq. Newasa, Dist. Ahmednagar
9. Latabai Tukaram Pawar,
Age : Major, Occu : Household,
R/o. Newasa Bk.,
Tq. Newasa, Dist. Ahmednagar,
10. Chaburao Shahadu Panmand
Age : Major, Occu : Agri.
R/o. Behind Mukindpur
Irrigation Colony,
Near Sent Meri School,
Newasa Fata,
Tq. Newasa Dist. Ahmednagar

= **APPELLANTS**
(Ori. Defendants)

VERSUS

1. Kashinath Vishwanath Gade
Age : 72 years, Occu. Agri.,
R/o. Mukindpur, Tq. Newasa,
Dist. Ahmednagar
 2. Shahabuddin Riyaj Mahammad
Age : Major Occu. Service
R/o. Newasa Fata, Tq. Newasa,
Dist. Ahmednagar
- (Resp.No.2 Deleted as per Court
order dated 07.10.2016.)
3. Prayagabai Bhausahab Kale
Age: Major, Occu.: Household,
both R/o. Behind Mukindpur
Irrigation Colony Near St. Merry

School, Newasa Phata,
Tq. Newasa, Dist. Ahmednagar. = **RESPONDENTS**
(orig. Plaintiffs)

Mr. Ajeet B.Kale, Advocate for Appellants;
Mr. AD Shinde, Adv. for Respondent No.1.;
Respondent No.2 deleted;
Respondent No.3 served;

CORAM : P.R.BORA, J.

DATE : 17th July, 2017.

ORAL JUDGMENT:

1) Heard. The present appeal is filed taking exception to the order passed by the District Judge, Newasa on 19th September, 2014 in Regular Civil Appeal No.241/2014.

2) A short question falls for my consideration in the facts of the present appeal is, - whether the first Appellate court could have disposed of the appeal finally, without deciding the cross objection filed therein by the present appellants, i.e. original respondents ?

3) The aforesaid appeal was filed by

present Respondent No.1, challenging the judgment and decree dated 28th January, 2013 passed by Joint Civil Judge Junior Division, Newasa in Regular Civil Suit No.273/2000. In the aforesaid appeal the present appellants filed the cross-objection with the following prayers, -

" Therefore, the Respondents pray that by considering the entire evidence on record, facts and circumstances of the case, the findings recorded by the learned trial Court on issue Nos. 3 and 8 may kindly be modified and those issues may kindly be answered in the negative and the suit of the Appellant may kindly be dismissed throughout with costs."

4) The learned District Judge, vide the impugned judgment and order, has allowed the aforesaid appeal filed by the present respondent and has remitted the matter to the civil court for deciding it afresh by setting aside the judgment and decree passed in the Regular Civil Suit. Aggrieved by, the present appeal is filed.

5) Shri Kale, learned Counsel appearing for the appellants, submitted that the appellate court has manifestly erred in passing the impugned order without passing any order on cross-objections or deciding the cross-objections filed by the appellants. The learned Counsel submitted that in view of the provisions under Order 41 Rule 22 of the Code of Civil Procedure, the first appellate court was bound to decide the cross-objections either way and could not decided the main appeal leaving the cross-objection undecided.

. The learned Counsel in order to support his contentions, relied upon two judgments of the Hon'ble Apex Court, first in the case of Assistant Commissioner and Land Acquisition Officer, Gulbarga Vs. Chandrashekhhar Shivlingappa Balgundgi - AIR 1996 Karnataka 110, and the other in the case of Hari Shankar Rastogi Vs. Shri Sham Manohar and Ors. - 2005 (2) Mh.L.J. 1158.

6) Shri Shinde, learned counsel appearing for the respondent, vehemently opposed the submissions made on behalf of the learned Counsel appearing for the appellants. The learned Counsel submitted that merely because it is not mentioned in the impugned judgment and order that the cross objection filed by the present appeal and is dismissed or rejected, no such inference can be drawn that the first appellate court has not considered the cross-objection or the issues raised by the appellants in the said cross objection while deciding the appeal and passing the impugned order. The learned Counsel submitted that the judgments relied upon by the appellants may not be applicable in the facts of the present case.

7) The learned Counsel further submitted that even otherwise, the finding which is much opposed and alleging that the relief of perpetual injunction has been wrongly granted is to be now re-considered by the trial Court in view of the

impugned order and full opportunity will be to the present appellants also to put forth their case and even to adduce the necessary evidence there for and as such, no prejudice is likely to be caused to the present appellants by the impugned order.

8) The learned Counsel further submitted that a clinching evidence has come on record showing that though the present Respondent is owner of the land admeasuring 1 hectare and 58 Are land, he is in actual possession of 1 hectare and 43 Are land and the present appellant, though, is owner of the land admeasuring 60 Are land, presently he is in actual possession of 75 Are land. The learned Counsel submitted that since beginning, a very specific case has been pleaded by the respondent that the present appellants have encroached upon 15 Are portion belonging to them.

9) The learned Counsel further submitted

that since clause 3 of the order passed by the Trial Court directing appointment of T.I.L.R. and get the measurements done of the suit land, is not challenged by the present appellants, the same has been executed and necessary orders in that regard have been by the Executing Court for carrying out the measurements of the said land through T.I.L.R. And accordingly the actual measurements have also been done and report is submitted to the Court which in unequivocal terms indicate that the present appellants have encroached upon 15 Are land belonging to present respondent No.1. The learned Counsel submitted that there is no merit in the appeal and therefore prayed for its dismissal.

10) Perusal of the impugned judgment and order reveals that the first Appellate court has not even referred to the objections raised by the respondents, i.e. present appellants in their cross objection. Though it may not be appropriate, at this stage, to make any comment

or to make a detail discussion on the merits of the issues raised in the cross objection, it cannot be said that no issues were raised in the cross objection so that the first appellate court even did not refer to the said objections and straight way decided the appeal finally without deciding the said cross objection.

11) The Hon'ble Apex Court in the case of Assistant Commissioner and Land Acquisition Officer (cited supra) has held that it is always desirable that the appeal and the cross objection are considered and disposed of together. As has been held in the said matter, the Hon'ble Apex court there may be cases in which some times while disposing of the appeal, the court may omit to consider and dispose of the cross objection either by inadvertence or by any other reason. It is further held that disposal of the appeal on merits does not preclude the Court from considering the cross objection filed in the court independently even if the appeal is disposed of. In the instant case, the said

course also has not been adopted by the first Appellate Court.

12) In the case of Hari Shankar (cited supra), the Hon'ble Apex has laid down certain principles referring to Order 41 Rule 22 of the Code of Civil Procedure, which are thus, -

"(1) Appeal is a substantive right. It is a creation of the statute. Right to appeal does not exist unless it is specifically conferred.

(2) Cross-objection is like an appeal. It has all the trappings of an appeal. It is filed in the form of memorandum and the provisions of Rule 1 of Order 41 of the Code, so far as these relate to the form and contents of the memorandum of appeal apply to cross-objection as well.

(3) Court fee is payable on cross-objection like that on the memorandum of appeal. Provisions relating to appeal by an indigent person also apply to cross-objection.

(4) Even where the appeal is withdrawn or is dismissed for default, cross-objection may nevertheless be heard and determined.

(5) The respondent even though he has not appealed may support the decree on any other ground but if he wants to modify it, he has to file cross-objection to the decree which objections he could have taken earlier by filing an appeal. Time for filing objection which is in the nature of appeal is extended by one month after service of notice on him of the day fixed for hearing the appeal. This time could also be extended by the court like in appeal.

(6) Cross-objection is nothing but an appeal, a cross-appeal at that. It may be that the respondent wanted to give a quietus to the whole litigation by his accepting the judgment and decree and order even if it was partly against his interest. When, however, the other party challenged the same by filing an appeal the statute gave the respondent a second chance to file an appeal by way of cross-objection if he still felt aggrieved by the judgment and decree or order."

13) In view of the law laid down, as above, it appears to me that the first Appellate court has erred in not deciding the cross objection filed by the present appellants in either way. The impugned order, therefore, will have to be quashed and set aside and is accordingly quashed

and set aside. The matter is remitted back to the first Appellate court to decide the appeal as well as the cross objection afresh in accordance with law and on its own merits.

. Though from the record it appears that the appeal was fully heard by the first Appellate court, in view of the remand, it would be advisable for the first appellate court to again hear the appellants and the respondents briefly on the merits of the appeal as well as the cross objection. In view of the fact that the parties are litigating since last fifteen years, I deem it appropriate to direct the first appellate court to decide the appeal as well as cross objection afresh on its own merits, as expeditiously as possible and preferably within the period of two months from the date of this order.

. The parties to appear before the first appellate court on 25th July, 2017 without any notice from the first appellate court.

14) The first appeal stands allowed in the aforesaid terms. Pending civil application, if any, stands disposed of.

(P . R . BORA)
JUDGE

bdv/