

IN THE HIGH COURT OF JUDICATURE AT BOMBAY  
CIVIL APPELLATE JURISDICTION  
CIVIL REVISION APPLICATION (ST.) NO.24533 OF 2015  
ALONG WITH  
CIVIL APPLICATION (ST.) NO.24537 OF 2015  
AND  
CIVIL APPLICATION NO.110 OF 2019  
IN  
CIVIL REVISION APPLICATION (ST.) NO.24533 OF 2015

Karamshi Avichal Patel and others                      ...      Applicants  
Vs.  
Vasantibai Lalji Dharamshi and others                      ...      Respondents

Mr. N. D. Jaywant i/b. Mr. Shailesh Shukla for Applicants.  
Mr. R. D. Vora for Respondents.

**CORAM : R. G. KETKAR, J.**  
**DATE : JULY 23, 2019**

**P.C. :**

Heard Mr. Jaywant, learned Counsel for the applicants and  
Mr. Vora, learned Counsel for the respondents at length.

2. By this Application under Section 115 of the Code of Civil Procedure, 1908 (for short 'C.P.C.'), applicants, hereinafter referred to as 'defendants No.3 to 8', have challenged the judgment and decree dated 28.11.2014 passed by the Appellate Bench of the Small Causes Court in (2a) Appeal No.248 of 2010. By that order, the Appellate Court partly allowed the appeal preferred by the respondents No.1 to 3(c), hereinafter referred to as 'plaintiffs', and set aside the judgment and decree dated 03.04.2010 passed by the learned trial Judge in R.A.E.&R.Suit No.155/264 of 1999. The Appellate Court partly decreed the Suit and directed the respondent No.6, hereinafter referred to as 'defendant No.2' and defendants No.3 to 8 to deliver vacant and peaceful possession of Rooms No.21 and 22, 2<sup>nd</sup> floor, Avichal Liladhar Patel Building No.2, Plot No.7, Sanghani Estate, Ghatkopar, Mumbai 400 086 (for short 'suit

premises') to the plaintiffs. The Appellate Court also ordered separate enquiry into mesne profits under Order XX, Rule 12 of C.P.C. from the date of the order i.e. 28.11.2014 till delivery of possession of the suit premises by the defendants to the plaintiffs.

3. The Application was heard by this Court on 14.10.2015. By order dated 14.10.2015, record and proceedings in Appeal No.248 of 2010 as well as R.A.E. & R. Suit No.155/264 of 1999 were called for as categorical statement was made on behalf of the defendants No.3 to 8 that they were not served in the Appellate Court and therefore, they had no knowledge about the proceedings before the Appellate Court. The matter was thereafter heard on 25.10.2016. A reference was made to order dated 14.10.2015 as also to grounds No.12 and 13 where the defendants No.3 to 8 asserted that the proceedings of appeal were not served on them. The Appellate Court passed the impugned order without the knowledge of defendants No.3 to 8.

4. The matter was thereafter heard on 10.10.2018. In paragraph 4 of that order, it was observed that the Appellate Court in paragraph 13 recorded that it heard Mr. Vora for the plaintiffs and none was present on behalf of the defendants to argue the appeal. The Appellate Court however did not record any categoric finding as regards service on the appellant. As this was the main contention advanced on behalf of the applicants, R & P was called for. After hearing the parties, this Court exercised power under Order XLI, Rule 25 of C.P.C. and invited findings of the Appellate Court on this question.

5. In pursuance thereof, on 28.11.2018, the Appellate Court, after hearing the learned Counsel for the parties, recorded findings to the effect that defendants were served with the appeal proceedings and

transmitted the findings to this Court. Defendants No.3 to 8 were granted leave to amend the application so as to raise challenge to the findings recorded in the order dated 28.11.2018. The defendants have accordingly amended the application and have challenged the findings recorded in the order dated 28.11.2018.

6. In support of this Application, Mr. Jaywant submitted that the Suit instituted by the plaintiffs on itself was not maintainable. He submitted that plaintiffs instituted Suit against defendant No.1-Hiralaxmi Harishankar. Defendant No.1 died on 14.05.1992. Defendant No.2-Navneetbhai H. Doshi filed written statement dated 16.06.2001 enclosing therewith a copy of the death certificate dated 06.06.1992 of defendant No.1 showing that defendant No.1 died on 14.05.1992. As the Suit was instituted against the dead person, it was liable to be dismissed on the ground of maintainability.

7. Mr. Jaywant further submitted that predecessor-in-title of defendants No.3 to 8 were the owners of the suit property. They mortgaged the suit property in favour of the plaintiffs. Under the Mortgage Deed, plaintiffs were entitled to recover rents from the tenants. Defendants No.3 to 8 instituted Suit in the City Civil Court. During the pendency of the Suit, Court Receiver was appointed. The plaintiffs filed Appeal from Order No.501 of 1989 in this Court challenging the appointment of the Court Receiver. By order dated 19.07.1989, this Court dismissed the appeal. Mr. Vora, on the other hand, submitted that Suit instituted by defendants No.3 to 8 herein was eventually dismissed.

8. Mr. Jaywant submitted that defendants No.3 to 8 thereafter instituted Suit No.1172 of 2000 in the City Civil Court. He invited my

attention to issues No.1 and 4 and the findings recorded by the learned trial Judge against these issues, which are to the following effect:

**ISSUES**

**FINDINGS**

- |                                                                                                                                                                                                                                                      |              |
|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------------|
| 1. Whether the plaintiffs prove that the Mortgage dated 21 <sup>st</sup> January 1952 and 13 <sup>th</sup> September 1956 stands fully redeemed in respect of the suit property and no amount is due or payable by the plaintiffs to the defendants? | In negative. |
| 4. Whether the defendants prove that they became the absolute owners of the suit property?                                                                                                                                                           | In negative. |

9. He submitted that the plaintiffs herein were the defendants in that Suit. The learned trial Judge held that defendants (plaintiffs herein) failed to prove that they became absolute owners of the suit property. He submitted that the learned trial Judge decreed the Suit on 29.08.2009 in terms of prayer clause (a) and other reliefs were refused. Aggrieved by this decision, defendants No.3 to 8 have preferred appeal in this Court and the same is pending for admission. He submitted that the plaintiffs have not challenged finding recorded by the learned trial Judge against issue No.4. Thus, the findings recorded by the learned trial Judge that the plaintiffs herein are not absolute owners of the suit property has attained finality. The plaintiffs, therefore, could not have filed Suit for recovery of possession and consequently, the Appellate Court could not have decreed the Suit.

10. Mr. Jaywant also invited my attention to the cross-examination of P.W.1 - Pradeep Lalji Dharamsi (plaintiff No.3). In the cross-examination conducted by the defendants No.3 to 8, he deposed thus,

“It is true that I am not seeking decree of eviction in respect to the suit premises against defendant Nos.3 to 8 by way of present suit. Witness volunteers that after the defendant No.2 vacated the suit premises, he had put defendant Nos.3 to 8 in possession of the suit premises. I do not have any

documentary proof to show that defendant No.2 has handed over the possession of the suit premises to defendant Nos.3 to 8.”

11. Relying upon the above extracted portion, Mr. Jaywant submitted that defendant No.2 handed over possession to the plaintiffs. The plaintiffs, in turn, inducted defendants No.3 to 8. He submitted that the trial Court, after considering the evidence on record, dismissed the Suit. As against this, the Appellate Court decreed the Suit. He has also taken me through the findings recorded by the Appellate Court in the order dated 28.11.2018 to contend that the defendants No.3 to 8 were attempted to be served at the address of 89/2666, Rajani Gang Co-op. Housing Society, Pant Nagar, Ghatkopar (East), Mumbai, and not at the address of the suit premises. For all these reasons, he submitted that Application requires consideration.

12. On the other hand, Mr. Vora supported the impugned order. He submitted that the contention based upon the finding recorded by the learned trial Judge against issue No.4 in Suit No.1172 of 2000 does not advance the case of the defendants No.3 to 8. He invited my attention to the order dated 28.11.2000 passed by this Court (Coram: D. K. Deshmukh, J.) in Writ Petition No.6502 of 2000. This Court also noted contention that the decree passed in eviction suit was a nullity as the plaintiffs who had instituted the Suit were not the owners of the property. The Court noted that according to the plaintiffs, they were mortgagees in possession and under the deed of mortgage, they were only entitled to recover rent. In paragraph 3, this Court noted that under the mortgage deed, plaintiffs were entitled to recover the rent and therefore, in accordance with the provisions of the Bombay Rent Act, they were landlords and were entitled to institute the Suit for decree of eviction against the tenant. He, therefore, submitted that the issue

between the same parties is concluded by order dated 28.11.2000 passed by this Court.

13. He further submitted that the Appellate Court, after considering the material on record, concluded that in the appeal, defendants No.3 to 8 were properly served and despite that, they did not appear when the appeal was decided on 28.11.2014. In so far as the contention that the Suit was instituted against dead person i.e. defendant No.1 is concerned, the plaint was suitably amended and the Registrar of the City Civil Court was brought on record. He, therefore, submitted that no case is made out for interfering with the impugned order.

14. I have considered the rival submissions advanced by the learned Counsel appearing for the parties. I have also perused the material on record. In so far as the contention that the Suit was instituted against the dead person is concerned, I do not find any merit in this submission. A perusal of the record shows that defendant No.1a and 1b were added on account of the death of defendant No.1-Hira Laxmi Harishankar. Thus, the estate of the defendant No.1 was duly represented. The added defendants No.1a and 1b are as under:

- 1(a) The Registrar, Small Causes Court, Mumbai as Representative of any other heirs and legal representatives of deceased Hira Laxmi Harishankar, Room Nos.21 and 22, 2<sup>nd</sup> floor, Avchal Liladhar Patel Building No.2, Plot No.7, Sanghani Estate, Ghatkopar (W), Mumbai 400 086.
- 1(b) Any other heirs and legal representatives of Hira Laxmi Harishankar, Room Nos.21 and 22, 2<sup>nd</sup> floor, Avchal Liladhar Patel Building No.2, Plot No.7, Sanghani Estate, Ghatkopar (West), Mumbai 400 086.

15. Section 21 of the Indian Limitation Act, 1963 reads thus,

**“21. Effect of substituting or adding new plaintiff or defendant.-**

(1) Where after the institution of a suit, a new plaintiff or, defendant is substituted or added, the suit shall, as regards him, be deemed to have been instituted when he was so made a party:

Provided that where the court is satisfied that the omission to include a new plaintiff or defendant was due to a mistake made in good faith it may direct that the suit as regards such plaintiff or defendant shall be deemed to have been instituted on any earlier date.

(2) Nothing in sub-section (1) shall apply to a case where a party is added or substituted owing to assignment or devolution of any interest during the pendency of a suit or where a plaintiff is made a defendant or a defendant is made a plaintiff.”

16. In view thereof as also in view of the decision of the Apex Court in *Karuppaswamy Vs C. Ramamurthy*, AIR 1993 SC 2324, it cannot be said that the Suit filed against the dead person was not maintainable. The proviso to Section 21(1) of the Limitation Act permits correction of errors which have been committed due to a mistake made in good faith but only when the court permits correction of such mistake. In that event its effect is not to begin from the date on which the application for the purpose was made, or from the date of permission but from the date of the suit, deeming it to have been correctly instituted on an earlier date than the date of making the application. The proviso to sub-section (1) of Section 21 is obviously in line with the spirit and thought of some other provisions in Part III of the Act such as Section 14 providing exclusion of time of proceedings bona fide in court without jurisdiction, when computing the period of limitation for any suit, and Section 17(1) providing a different period of limitation starting when discovering a fraud or mistake instead of the commission of fraud or mistake. While invoking the beneficial provision to sub-section (1) of Section 21 an averment that a mistake was made in good faith by impleading a dead defendant in the suit should be made and the court must on proof be

satisfied that the motion to include the right defendant by substitution or addition was just and proper, the mistake having occurred in good faith. The court's satisfaction alone breaths life in the suit.

17. In so far as the contention raised on the basis of order dated 19.07.1989 passed by this Court in Appeal from Order No.501 of 1989 is concerned, it is not disputed by defendants No.3 to 8 that the Suit was eventually dismissed. In view thereof, nothing turns on appointment of Court Receiver during the pendency of the Suit. Though defendants No.3 to 8 have challenged that order by filing First Appeal in this Court, no interim order is granted.

18. In so far as the finding recorded by the learned trial Judge against issue No.4 in Suit No.1172 of 2000 is concerned, a perusal of the order dated 29.08.2009 passed by the learned trial Judge in that Suit shows that the relief claimed by defendants No.3 to 8 (plaintiffs in that Suit) in terms of prayer clause (d) was granted. Suit No.1172 of 2000 was instituted for redemption of mortgages praying for following reliefs:

“a. that it be declared that no amount whatsoever is due and payable by the plaintiffs to the Defendants (herein) under the mortgage dated 21<sup>st</sup> January 1952, being Exh.B” annexed hereto and mortgage deed dated 13<sup>th</sup> September 1956 being Exh. 'C' annexed hereto and that the mortgage stands fully redeemed in respect of the suit property.

Viz: All that piece or parcel of land or ground situate at Ghatkopar on the West side of Bombay Agra Road in Greater Bombay in the Registration Sub-District of Bandra in the Bombay Suburban District being Plot no.7, containing by admeasuerment 700 square yards or thereabouts bearing Survey No.31, Hissa No.2 (Part), Survey No.154, Hissa No.10 (Part), and Survey No.31, Hissa No.1 (part), more particularly described in the schedule annexed and marked Exhibit 'A';

b. that the defendants be ordered and decreed to forthwith recover and transfer the suit property described in prayer (a) above to the Plaintiffs or their nominee/s;

- c. the defendants be ordered and decreed to pay to the plaintiffs a sum of Rs.18,118.60/- or such other amount as this Hon'ble Court deems fit and proper being the excess amount collected by the Defendants over the mortgage debt in respect of the suit property described in prayer (a) above, as per particulars of claim annexed hereto and marked Exhibit 'G'.
- d. in the alternative to prayer (c), the defendants be ordered and decreed to render, true, correct, accurate and faithful accounts in respect of the amounts recovered and realised by them under the said Mortgage dated 21<sup>st</sup> January, 1952, and Mortgage Deed dated 13.9.1956, being Ex. "B" and "C" respectively of the rents, income and profits of the said property, on the basis of wilful default and on such accounts being rendered by the Defendants the defendants be ordered and decreed to pay to the Plaintiffs the amount recovered and received by them in excess of the mortgage debt with interest thereon at the rate of 18% per cent per annum, from the date of filing of the suit till payment of realisation;
- e. that without prejudice and in the alternative to prayers (b) and (c) above, an usual preliminary Mortgage Decree for redemption and thereafter a final decree be passed, ordering and directing the defendants to render accounts in respect of the said mortgage and the recoveries and realisation made by them from the said property, and on such account being rendered, in the event of it being found that the Plaintiffs are liable to pay any amount to the defendants, a date be fixed by this Hon'ble Court for payment of the amount so ascertained to be due and payable by the Plaintiffs to the defendants;
- f. that upon such payment being made by the Plaintiffs to the defendants, the defendants be ordered and decreed to recover and transfer to the plaintiffs or their nominee or nominees the said property described in the Schedule (being Ex. A annexed hereto) free of the said mortgage.
- g. that for all purposes aforesaid, such orders be passed, directions be given and enquiries made and accounts taken as this Hon'ble Court may deem fit and proper;
- h. that pending the hearing and final disposal of the suit, the Court Receiver, High Court, Bombay, or some other fit and proper person be appointed Receiver of the said

property described in the Schedule (being Exhibit 'A' hereto) with all powers under Order XL, Rule 1 of the Code of Civil Procedure 1908, including the power to recover and realise all rents, income and profits of the said property and the plaintiffs be appointed an Agent of the Court Receiver;

- i. that pending the hearing and final disposal of the suit, the defendant by themselves, their servants and agents or otherwise however, be restrained by an Order and Injunction of this Hon'ble Court, from in any manner dealing with or disposing off, or parting with possession of or alienating or encumbering or transferring or creating any right, title and interest in favour of any one else or including anyone else or including anyone into or transferring or creating any new tenancy in, or recovering or realising any rent, income or profits of the said property described in the Schedule (being Ex. A hereto), or any part thereof; and from filing any suit against the tenants or claim to be owners or recover rent or any amount whatsoever;
- j. for ad-interim reliefs in terms of prayers (h) and (i) above;
- k. for costs of the suit; and
- l. for such further and other reliefs as the nature and circumstances of the case may require.”

19. By order dated 29.08.2009, the learned trial Judge decreed the Suit only in terms of prayer clause (d) and subsequently, declined rest of the reliefs. Mr. Jaywant submitted that aggrieved by this decision, defendants No.3 to 8 have preferred appeal in this Court and the said appeal is pending for admission. Plaintiffs herein have not challenged the findings recorded against issue No.4 where it is held that plaintiffs herein are not absolute owners of the suit property. I do not find any merit in this submission for more than one reason. Firstly, as mentioned earlier, the relief in terms of prayer clause (d) directing the defendants therein to render, true, correct, accurate and faithful accounts in respect of the amounts recovered and realized by them under the Mortgage

Deed dated 21.01.1952 and Mortgage Deed dated 13.09.1956 was granted and rest of the prayers, namely, declaration that no amount whatsoever is due and payable by the defendants No.3 to 8 to the plaintiffs herein under the Mortgage Deed dated 21.01.1952 and Mortgage Deed dated 13.09.1956 and that the suit property stood fully redeemed were turned down by the trial Court. As the decree is not passed against the plaintiffs herein, there was no question of the plaintiffs challenging the finding recorded against issue No.4.

20. Under Section 96 of C.P.C., the appeal can be filed against a decree and not against the finding. Mr. Vora submitted that the appeal filed by the defendants No.3 to 8 against the trial Court's decree is pending for admission and as and when notice is issued, plaintiffs herein will consider filing cross-objections. Be that as it may, at present, relief in terms of prayer clause (a) is not granted to the defendants No.3 to 8.

21. In the case of ***Banarsi 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.”

22. Mr. Jaywant contended that defendant No.2 handed over possession to the plaintiffs and P.W.1, in turn, inducted defendants No.3 to 8. I have already extracted the relevant portion of the cross-examination of P.W.1. P.W.1 deposed that it is defendant No.2, who had inducted defendants No.3 to 8. In view thereof, I do not find any merit in this submission. Lastly, he submitted that defendants No.3 to 8 have not been served with the proceedings of the appeal and they were attempted to be served at the address of 89/2666, Rajani Gang Co-op. Housing Society, Pant Nagar, Ghatkopar (East), Mumbai, and not at the address of the suit premises. The Appellate Court has considered this aspect in detail from paragraph 11 onwards, and ultimately, in paragraph 15 concluded that defendants No.3 to 8 were properly served with the appeal proceedings. In paragraph 14, the Appellate Court noted that

defendant No.4(a) Deviben Patel had never said on oath that the address of the defendants No.3 to 8 changed from 89/2666, Rajani Gang Co-op. Housing Society, Pant Nagar, Ghatkopar (East), Mumbai to c/o. Karsanjasa Patel, 15/16, Karsanjasa Building, 2<sup>nd</sup> floor, Room No.27, Sainath Nagar, L.B.S.Marg, Ghatkopar, Mumbai 400 086.

23. In view thereof, it cannot be said that the defendants No.3 to 8 were not served with the appeal proceedings. As mentioned earlier, in paragraph 12 of the order dated 28.11.2014, the Appellate Court had recorded that none was present on behalf of the defendants to argue the appeal. In the order dated 28.11.2018, the Appellate Court recorded findings that defendants No.3 to 8 were duly served with the appeal proceedings. Thus, despite service, defendants No.3 to 8 chose not to appear before the Appellate Court. In view thereof, I do not find that any case is made out to interfere with the impugned order. Defendants No.3 to 8 were not in a position to demonstrate that the findings recorded by the Appellate Court are perverse, being based upon no evidence or that they are contrary to the evidence on record. Defendants No.3 to 8 were also not in a position to demonstrate that no reasonable person would have arrived at the conclusions other than arrived by the Courts below. Hence, Application fails and the same is dismissed.

24. In view of the dismissal of the Civil Revision Application, nothing survives in C.A.No.110 of 2019 and C.A.(St.) No.24537 of 2015 and the same are disposed of accordingly.

**(R. G. KETKAR, J.)**