

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

WRIT PETITION NO.93 OF 2017

Nelufer Behram Irani

And Others

... Petitioners

Versus

Asha R. Kotian

And Others

... Respondents

.....

Mr. R.M. Vasudeo for the Petitioners.

Ms. K.C. Nichani i/b Ms. Deepa Kamath for the Respondents.

.....

CORAM : S.C. GUPTE, J.

DATE : 6 SEPTEMBER 2019

(Oral Judgement)

. Heard learned Counsel for the parties.

2 **Rule.** Rule taken up for hearing forthwith by consent of learned Counsel for the parties.

3 This writ petition challenges an order passed by the Appellate Bench of the Court of Small Causes at Mumbai. The impugned order was passed on an application of the Petitioners herein (who were appellants before the Appellate Bench and original plaintiffs in the eviction suit) for conversion of their appeal into cross objection.

4 The Petitioners, as co-owners of the suit premises, filed the present suit (R.A.E. Suit No.366/543 of 2010) for eviction of the

Respondents herein (original defendant nos.1 to 3). The eviction was sought on two grounds, namely, unauthorized change of user and unlawful subletting of the suit premises. A decree was passed in favour of the Petitioners on the ground of unlawful subletting, but so far as the ground of change of user was concerned, the trial court held against the Petitioners. The eviction decree was challenged by the Respondents-tenants before the Appellate Bench. Sometime later, the Petitioners herein filed their own appeal challenging rejection of their suit based on unauthorized change of user by the tenants. That appeal was sought to be converted into a cross objection. By the impugned order, the Appellate Bench rejected that application as not maintainable. That rejection is the subject matter of challenge in the present petition.

5 Though the impugned order of the Appellate Bench by no means makes the basis of the rejection clear, it probably suggests that the application was rejected on the footing that provisions of Order 41 Rule 22 of the Code of Civil Procedure, 1908 (“Code”) could not have been invoked by the Petitioners, since they were before the court as appellants. The Court held that the right to file a cross-objection was not available to the Petitioners, in whose favour a decree was passed, the application having been made in their own appeal.

5 The impugned order suffers from serious misdirection in law. What the Petitioners applied to the court was to convert their appeal

into a cross objection in the Respondents' appeal, and not in their own appeal. The Respondents were aggrieved by a decree of eviction passed against them by the trial court and filed an appeal challenging it. The Petitioners were respondents to that appeal. If, as respondents, they were aggrieved by any finding of the trial court in its judgement, though the judgment was in their favour, they could, under Order 41 Rule 22 of the Code, file cross objection in respect of the decree in so far as it was based on that finding. This right to file a cross objection is in lieu of preferring of a separate appeal. What the provision requires is that any respondent, though he may not have appealed from any part of the decree, may not only support the decree, but may also challenge any finding against him in the court below on any issue, which, had it been decided in his favour, would have given him a decree, though the decision of the court below on the other issue or issues in his favour was sufficient to sustain the decree. In other words, he may, by means of a cross-objection, take exception to a decree, which he could have taken by way of an appeal, though the decree was in his favour on other considerations and need not have been appealed from by him. On these provisions, surely the Petitioners were within their right to have applied for conversion of their appeal into a cross objection in the Respondents' appeal. That would have indeed facilitated a better and more comprehensive hearing of the Respondents' appeal, in the light of the Petitioners' own challenge to that part of the decree, which they were aggrieved by.

6 Ms. Nichani, learned Counsel appearing for the Respondents, relies on the judgment of the Supreme Court in the case of **Ravinder Kumar Sharma Vs. The State of Assam**.¹ The Supreme Court has, in **Ravinder Kumar Sharma's** case, explained the purport of the modification of Order 41 Rule 22 of the Code by the amendment of 1976. The 1976 amendment added an explanation below Order 41 Rule 22. The Explanation is in the following terms :

“Explanation : A respondent aggrieved by a finding of the court in the judgment on which the decree appealed against is based may, under this rule, file cross objection in respect of the decree in so far as it is based on that finding, notwithstanding that by reason of the decision of the Court on any other finding which is sufficient for the decision of the suit, the decree is, wholly or in part, in favour of that respondent”.

Apropos this explanation, the court has explained that by means of this provision, the respondent to an appeal has been empowered to file cross objection against any finding adverse to him. That would mean that what was provided was a right to file a cross-objection, though it was not obligatory to do so; that is why the word ‘may’ was used. The court explained that what it meant was that the provision for filing cross-objection against a finding was only an enabling provision. Ms. Nichani submits that if a cross-objection

1 Supreme Court of India, decided on 14 September 1999

under Order 41 Rule 22 of the Code was merely permissible and not obligatory, there was nothing wrong with the order. She submits that in this case, the cross-objection was not necessary, as the Petitioners could have argued the point anyway. There is no merit in the contention. If Order 41 Rule 22 of the Code enables the party to file a cross-objection, such cross-objection can be rejected as not maintainable only on some legitimate ground showing either that the Applicant's case does not fall within Order 41 Rule 22, as explained by the Explanation to that Rule, or that there is some other valid reason why the cross-objection should not be permitted. As explained above, there is no such case here. On the other hand, there is an imminent case here for allowing filing of a cross-objection. That would also be in keeping with the powers of the court under section 151 of the Code.

7 The Appellate Bench of the Court appears to have also considered various judgments cited at the Bar on the applicability of Section 151 of the Code. The court held that the provisions of Section 151 could be invoked, only when there was no specific provision to deal with the issue. Though the relevance of this principle has not been fully stated by the court in the context of the issue at hand, the emphasis appears to be on the fact that there is a specific provision, namely, Order 41 Rule 22 of the Code, whereunder the respondent to an appeal could file a cross objection; that provision did not provide for conversion of an appeal into a cross-objection; and therefore, there was no scope to allow conversion

of the present appeal into a cross-objection. No doubt there is no specific provision to permit this, but there is equally no specific provision barring the court from ordering such conversion. Since a cross-objection was anyway maintainable and there was no specific provision barring conversion of an appeal into cross-objection, there was a legitimate case for invoking the provisions of Section 151 of the Code and ordering such conversion. The provisions exist for enabling civil courts to do complete justice, when a particular course seems to be advisable or just, but there is no specific provision to allow such course. The provision cannot be resorted to, however, when a specific provision of law bars such a course, either expressly or by implication.

8 Accordingly, the impugned order of the Appellate Court cannot be sustained. Rule is made absolute and the writ petition is allowed by quashing and setting aside the impugned order and allowing the Petitioners' application, being Exhibit '10'. No order as to costs.

(S.C. GUPTE, J.)