

C.O. 1092 of 2020

**M/s. Clyde Stores Pvt. Ltd.
-Versus-
Sri Arun Kumar Gupta & Ors.**

(Through Video Conference)

Mr. Subhasis Sen Gupta,
Mr. Sarosij Das Gupta,
Ms. Subhra Das,

...for the Petitioner

Mr. Tanmoy Mukherjee,
Mr. Sounak Bhattacharya,
Mr. Sounak Mondal,
Mr. Souvik Das,
Mr. Rudranil Das,
Mr. K.R. Ahmed,

...for the opposite parties

The present application under Article 227 of the Constitution of India is at the instance of the plaintiff being aggrieved by the order passed by the learned Judge, 4th Bench, City Civil Court, at Calcutta in Title Appeal No. 112 of 2011 on 26.02.2020 whereby learned Appellate Court has been pleased to allow the respondent's application dated 29.08.2019 granting them liberty to advance argument in respect of issue no. 5 and 6 though no cross objection has been filed to that effect.

The fact which is necessary for determination of the present application in gist is that plaintiffs/opposite parties/the landlord owners have filed an Ejectment Suit no. 297 of 2004 before the 5th Bench, Presidency Small Causes Court for eviction of the defendant/petitioner on the ground of reasonable requirement for subletting and for causing addition and alteration works in the disputed tenanted premises. The

said suit was decreed only on the ground of a reasonable requirement on 29.07.2011.

Being aggrieved by the decree of eviction the defendant/tenant preferred Title Appeal being no. 112 of 2011. The learned First Appellate Court below was pleased to set aside the judgment and decree dated 29.07.2011 and send back the case on remand with a direction to provide opportunities to the parties to take necessary steps for conducting Commission in respect of 10/C/ Janaki Saha Road vide its judgment dated 30.09.2013.

The plaintiffs/landlords being aggrieved by the order passed by the First Appellate Court preferred Miscellaneous Appeal being no. FMA 1435 of 2014 before this Hon'ble High Court. The said FMA was disposed of by an order dated 26.08.2016 wherein learned First Appellate Court was directed to take into consideration the pendency of cross appeal while deciding the appeal to dispose of cross appeal if the same is maintainable after giving reasonable opportunity to the other side to adduce evidence, if required.

It was found that no cross appeal was ever preferred by the plaintiffs for dismissal of their prayer for eviction of the defendant/tenant on the ground of subletting and for effecting addition and alteration works in the tenanted premises. Consequently, the plaintiffs filed an application under Section 151 C.P.C. along with a true copy of purported cross objection for disposal with regard to issue no. 5 and 6. Xerox copy of cross objection filed by the plaintiff in respect of issue no. 5

and 6 was kept pending subject to decision of the Hon'ble High Court in pending C.O no 4167 of 2017.

Hon'ble High Court in CO. No. 4167 of 2017 inter alia observed that no conclusive proof of filing cross objection by the plaintiffs has been produced at any stage, be it in the form of a filing slip or an entry no., filing no. or the like. Mere service of a copy of a purported cross objection, could not be equated with filing of a cross objection. However, the plaintiffs who have not filed formal cross objection should be allowed to make submission in respect of cross objection and decide the objection along with appeal.

From the impugned order it appears that in-compliance of the direction given by the Hon'ble High Court in CO. No. 4167 of 2017 the learned Appellate Court below has given liberty to the plaintiffs to advance their argument in respect of issue no. 5 and 6 though no formal objection has been filed to that effect.

Therefore, the only question that requires determination in the present revisional application is whether without filing formal cross objection in respect of issue no. 5 and 6 which have gone against the plaintiff though they have obtained a decree of eviction against the petitioner/defendant on the ground of reasonable requirement can be allowed to advance their argument on those two issues?

It has been contended by the learned advocate for the petitioner that in view of Order 41 Rule 22 and Rule 33 C.P.C. the plaintiffs/landlords though who have obtained decree of

eviction against the defendant/petitioner on the ground of reasonable requirement when their case for eviction fails on the ground of subletting and for causing addition and alteration works in the disputed tenancy then the plaintiffs/landlords have to file cross objection/ cross appeal against those two issues and without written cross objection or cross appeal they cannot raise the issue before the Appellate Court.

He in support referred to Hardevinder Singh vs Paramjit Singh and others reported in (2013) 9 SCC 261, where Hon'ble Supreme Court after taking into consideration Banarshi and others vs Ram Phal reported in (2003) 9 SCC 606 held that "after the 1976 Amendment of Order 41 Rule 22, the insertion made in sub-rule (1) makes it permissible to file a cross-objection against a finding. The difference is basically that a respondent may defend himself without taking recourse to file a cross-objection to the extent the decree stands in his favour, but if he intends to assail any part of the decree, it is obligatory on his part to file the cross- objection. In Banarsi and Others v. Ram Phal , it has been observed that the amendment inserted in 1976 is clarificatory and three situations have been adverted to therein. Category No. 1 deals with the impugned decree which is partly in favour of the appellant and partly in favour of the respondent. Dealing with such a situation, the Bench observed that in such a case, it is 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 he is entitled to support that part of the decree which is in his favour without taking any cross-objection. In respect of two other categories which deal with a decree entirely in favour of the respondent though an issue had been decided against him or a decree entirely in favour of the respondent where all the issues had been answered in his favour but there is a finding in the judgment which goes against him, in the pre-amendment stage, he could not take any cross-objection as he was not a person aggrieved by the decree. But post-amendment, read in the light of explanation to sub-rule (1), 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, yet he may support the decree without cross-objection. It gives him the right to take cross-objection to a finding recorded against him either while answering an issue or while dealing with an issue. It is apt to note that after the amendment in the Code, if the appeal stands withdrawn or dismissed for default, the cross-objection taken to a finding by the respondent would still be adjudicated upon on merits which remedy was not available to the respondent under the unamended Code”.

Learned advocate for the petitioner also referred to State of Andhra Pradesh and Others vs B. Ranga Reddy (D) By LRS and Others reported in (2020) 15 SCC 681 in support of his contention.

On the other hand learned advocate appearing for the opposite parties referred to Saurav Jain and Another vs A.B.P. Designs and Another reported in 2021 SCC Online SC 552 and submitted that the decree is entirely in favour of the opposite parties/ respondents though two issues have been decided against them and as such the case of the opposite parties does not fall under the post amended provision of Order 41 Rule 22 of C.P.C rather it falls under the provisions pre amendment of Order 41 Rule 22 C.P.C and which does not permit the respondent to take any cross objection as they were not the persons aggrieved by the decree. Under the amended C.P.C read in the light of the explanation, though it is still not necessary for the opposite parties to take any cross objection laying challenge to any finding adverse to them as the decree is entirely in their favour and they may support the decree without cross objection. The amendment gives them a right to take cross objection to a finding recorded against them either while answering an issue or while dealing with an issue.

Perused the judgment passed by the learned Trial Court in Ejectment Suit No.297 of 2004. The issue no.5 which reads “whether the defendant has illegally transferred, assigned or sublet the suit premises?” On such issue, the learned Trial Court held that defendant Company has not transferred the tenancy to any third person; rather they sold the shares of the Company to the persons who are still continuing the said business under the same name and style and decided the issue against the plaintiffs.

Issue no. 6 deals “whether the defendant is guilty of making addition and alteration in the suit premises without the consent of the landlord?” On such issue the learned Trial Court held that the plaintiffs have failed to prove addition and alteration work being carried out in the disputed tenanted premises by the defendant and decided the issue against the plaintiffs.

Now, a question arise in the mind of this Court that in case the Appellate Court hold that plaintiffs do not require the disputed tenanted premises for their own use and occupation as held by the trial court then the case of the plaintiffs fails in its entirety. So plaintiffs to safeguard their interest they on their own interest ought to have filed cross appeal/ cross objection to the extent to which the decree is against them. They in order to get rid of the issues that have been decided against them they ought to have either filed cross appeal on their own or should have taken cross objection. That without filing cross objection against issue no.5 and 6 the plaintiffs cannot insist for hearing on those issues to their advantage.

It is true Order 41 Rule 33 C.P.C conferred very wide powers on Appellate Court to do complete justice between parties but such power cannot be exercised by ignoring any legal interdict. Therefore, this Court is of view the plaintiffs who have failed to file written cross objection in the form of a memorandum under Order 41 Rule 22 C.P.C within one month of service of notice of appeal in respect of issue no. 5 and issue no.6 which have been decided against them, then

Appellate Court under no circumstances can give them relief under provision of Order 41 Rule 33 C.P.C.

The Hon'ble Coordinate Bench of this Hon'ble High Court while disposing C.O No.4167 of 2017 on 26.06.2019 has passed an order to the effect that "petitioners will be free to urge such contention before the Appellate Court and in the event Appellate Court is satisfied with such contention, it will be open to the first Appellate Court to permit the petitioners to take such cross objection to the judgment and decree assailed in the appeal and decide such objection along with the appeal itself."

It appears from the impugned order that learned Appellate Court below in view of the order passed by Hon'ble Coordinate Bench of this Hon'ble High Court in C.O No. 4167 of 2017 and on being satisfied with the contention made by the parties has given liberty to the petitioner to advance their argument in respect of issue no.5 and 6 though no cross objection has been filed by them.

Though first Appellate Court who has been vested with wide powers to re appreciate evidence and have power to pass decree or order, in favour of all or any of the parties even though appeal is as to part of only of decree and such party may not have filed appeal, but under no circumstances can give relief under Order 41 Rule 33 of C.P.C to a party who have failed to file memorandum of cross objection under Order 41 Rule 22 C.P.C or cross appeal.

Therefore, in view of the discussion made above this Court holds the impugned order suffers from material irregularity and liable to be set aside.

Accordingly, C.O. 1092 of 2020 is allowed.

Connected application, if any, is disposed of.

Interim order, if any, stands discharged.

There will be no order as to costs.

All parties are directed to act on a server copy of this order duly downloaded from the official website of this Court.

Urgent Photostat certified copies of this order, if applied for, be given to the parties upon compliance of all requisite formalities.

(Kesang Doma Bhutia, J.)