

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

**SECOND APPEAL NO.77 OF 2023
WITH CA/2513/2023 IN SA/77/2023**

**LAXMAN BHAGWANRAO DAK
VERSUS
KISANRAO MAROTIRAO DAK DIED THROUGH LRS**

Mr. S. R. Sapkal, Advocate for the appellant
Mr. A. V. Lavte, Advocate for the respondent No.1B (Caveator)

CORAM : R. M. JOSHI, J.

DATE : 29th MARCH, 2023

PER COURT :-

1. Heard.
2. Following substantial question of law is framed, whether the First Appellate Court has committed error in refusing to consider the challenge of appellant/original defendant to the findings recorded against him on the ground of non filing of separate appeal or cross objection?
3. By consent of both sides this appeal is decided finally at the stage of admission.
4. Learned counsel for the appellant states that the First Appellate Court has committed error in not considering the challenge raised by the appellant herein to the findings recorded against him

though ultimately suit was dismissed by the Trial Court. According to him once the suit is dismissed no remedy of filing of appeal is available with present appellant. He placed reliance on the judgment of Hon'ble Apex Court in case of State of ***State of Andhra Pradesh V. B. Ranga Reddy (D) By Lrs, (2019) 2 CLR 721 SC.***

5. Learned counsel for the respondent opposed the said contentions with submission that the First Appellate Court has not committed any error of law in while passing the impugned judgment and decree and therefore, no interference is caused therein.

6. Perusal of the judgment of the First Appellate Court clearly shows that the original defendant has raised challenge to the findings recorded by the Trial Court against him. However, only on the ground that no appeal or cross objection has been filed, First Appellant Court has refused to entertain the said challenge. The question arises for consideration in this appeal is as to whether it is open for the First Appellate Court to decline respondent to challenge the findings recorded against him by the Trial Court when suit is dismissed in his favour. It would be relevant to take note of Order XLI Rule 22 which provides for manner of challenge to the decree and findings and reads thus:

"22. Upon hearing, respondent may object to decree as if he had preferred a separate appeal.-(1) Any respondent, though

he may not have appealed from any part of the decree, may not only support the decree [but may also state that the finding against him in the Court below in respect of any issue ought to have been in his favour; and may also take any cross- objection] to the decree which he could have taken by way of appeal, provided he has filed such objection in the Appellate Court within one month from the date of service on him or his pleader of notice of the day fixed for hearing the appeal, or within such further time as the Appellate Court may see fit to allow.

[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.]

(2) Form of objection and provisions applicable thereto.- *Such cross-objection shall be in the form of a memorandum, and the provisions of rule 1, so far as they relate to the form and contents of the memorandum of appeal, shall apply thereto.*

*[***]*

(4) *Where, in any case in which any respondent has under this rule filed a memorandum of objection, the original appeal is withdrawn or is dismissed for default, the objection so filed may nevertheless be heard and determined after such notice to the other parties as the Court thinks fit.*

(5) *The provisions relating to pauper appeals shall, so far as they can be made applicable, apply to an objection under this rule."*

7. Aforesaid provision makes it implicitly clear that it is open for the respondent in an appeal to not only support the decree but may also challenge findings against him in respect of any issue. It further provides that he may also take any cross objection to the decree which he could

have taken by way of appeal. This make it further clear that when objection to decree i.e. reversal of decree is sought, cross objection would be necessary. Explanation to the rule by way of amendment is only enabling a respondent to even challenge findings recorded against him. This however does not take away his right to challenge finding recorded adverse to him, to support the decree.

8. The Hon'ble Apex Court in case of **State of Andhra Pradesh V. B. Ranga Reddy (D) By Lrs** (cited supra) has aptly dealt with this issue with following observations.

"18. This Court while considering the amendments made in the Code in the year 1976, held that even under the amended provisions of Order XLI Rule 22 of the Code, a party in whose favour the decree stands in its entirety is neither entitled nor obliged to prefer any cross objections. However, by an amendment in Order XLI Rule 22 of the Code, it is permissible to file cross objections against the finding. The respondent may defend himself without filing any cross objections to the extent to which decree is in his favour. The Court held as under:

"10. The 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 the 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-objections to a finding recorded against him either while answering an issue or while dealing with an issue. The advantage of preferring such cross-objection is spelt out by sub-rule 4."

9. A distinction is also drawn by Apex Court between the decree and a finding on an issue stating that,

"36. We find that the High Court has failed to draw the distinction between the decree and a finding on an

issue. It is the decree against which an appeal lies in terms of Section 96 of the Code. Decree in terms of Section 2(2) of the Code means formal expression of an adjudication conclusively determining the rights of the parties. The defendants-State could not file an appeal against a decree which was of a dismissal of a suit simpliciter. The findings on Issue No. 1 against the State could be challenged by way of cross-objections in terms of amended provisions of Order XLI Rule 22 of the Code but such filing of cross-objections is not necessary to dispute the findings recorded on Issue No. 1 as the defendants have a right to support the ultimate decree passed by the trial court of dismissal of suit on grounds other than which weighed with the learned trial court. Even in terms of Order XLI Rule 33 of the Code, the Appellate Court has the jurisdiction to pass any order which ought to have been passed or made in proceedings before it."

10. Reverting back to the facts of present case, here the Trial Court had dismissed the suit and the decree is in favour of the defendant. He could not have filed appeal or cross objection to challenge the decree. He also does not intend to challenge any finding recorded by trial Court to get decree reversed. In view of above provision it is open for defendant to take exception to the finding recorded against him by Trial Court even without filing appeal or cross-objection. Learned First Appellate Court by declining to consider the said challenge to the finding adverse to the defendant/respondent, has committed serious error of law in appreciating provision of Order XLI Rule 22 CPC. The said view of appellant Court is contrary to law laid down by Apex Court above. The impugned judgment of First Appellate Court suffers from error of law and

hence the substantial question framed above deserves to be answered in affirmative.

11. As a result of above discussion impugned judgment dated 21/01/2023 passed in RCA No. 56/2013 by U+0020 District Judge -2, Majalgaon, Dist. Beed cannot sustain and hence set aside. The appeal is remitted back to the First Appellate Court for its decision afresh in accordance with law.

12. Parties to appear before the First Appellate Court on 10th April, 2023. The First Appellate Court shall not issue any fresh notices to the parties for appearance.

(R. M. JOSHI, J.)

ssp