

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

**SECOND APPEAL NO.730/2014**

Shri Antu Lakhu Suryavanshi  
Since deceased through L.Rs.

- 1(i) Smt. Rakhmabai Anant Suryavanshi,  
Age 75 years, Occ : Household,
- 1(ii) Shri Mohan Anant Suryavanshi,  
Age 54 years, Occ : Agriculture,
- 1(iii) Shri Bhaskar Anant Suryavanshi,  
Age 51 years, Occ : Agriculture,
- 1(iv) Shri Sanjay Anant Suryavanshi,  
Age 48 years, Occ : Agriculture,
- 1(v) Sau. Shanta Shamrao More,  
Age 70 years, Occ : Household,  
R/o. Narsingpur, Tal : Walwa,  
District Sangli.
- 1(vi) Sau. Sushila Balasaheb Patil,  
Age 65 years, Occ : Household,  
R/o. A/p. Varunji, Tal : Karad,  
District Satara.
- 1(vii) Smt. Indubai Antu Jadhav,  
Age 61 years, Occ : Household,
- 1(viii) Nanda Baburao Mohite,  
Age 59 years, Occ : Household,  
R/o. Bazaar Belawade,  
Taluka Karad, Dist. Satara.

1(ix) Sau. Sunita Gajanan Desai,  
Age 57 years, Occ : Household,

1(x) Sau. Shobha Bapurao Patil,  
Age 45 years, Occ : Household,

Nos. 1(i) to 1(iv) and 1(vii),  
1(ix), 1(x) R/o. 141 Shaniwar Peth,  
Suryavanshi Wada, Karad,  
Taluka Karad, Dist. Satara. ....Appellants/Org. Defendants.

Versus

1. Shri Ramkrishna Yashwant Suryavanshi,  
Age 52 years, Occ : Agriculture,
2. Shri Shankar Eknath Suryavanshi,  
Age 49 years, Occ : Agriculture,
3. Ratnabai Eknath Suryavanshi,  
Age 70 years, Occ : Agriculture/Housewife,

All R/o. Goleshwar, Taluka Karad,  
District Satara.

4. Shri Hanmanta Lakhu Suryavanshi,  
Since deceased through L.Rs.

4(A) Shri Murlidhar Hanmant Suryavanshi,  
Age 47, Occ : Agriculture,

4(B) Shri Dilip Hanmant Suryavanshi,  
Age 42, Occ : Agriculture,

4(C) Shri Sudhir Hanmant Suryavanshi,  
Age 42, Occ : Agriculture,

Nos. 4(A) and 4(C) R/o.  
Shaniwar Peth, Karad, Taluka  
Karad, District Satara.

4(D) Smt. Suman Bhagwan Patil,  
Age 55 years, Occ : Housewife,  
R/o. Varunji, Taluka Karad,  
District Satara.

4(E) Sau. Sushila Pandurang Patil,  
Age 53 years, Occ : Housewife,

4(Ee) Sau. Alka Manohar Karade,  
Age 50 years, Occ : Housewife,

5. Sau. Subhadra Sambhaji Pawar,  
Age 45 years, Occ : Housewife,  
R/o. Shaniwar Peth, Karad,  
Taluka Karad, District Satara.

....Respondents

----

Shri Uday Warunjikar, Advocate for the appellants.

Shri Avinash B. Patil, Advocate for respondent Nos.1 to 3.

Shri Pravartak Pathak a/w Shri Omkar A. Keni, Advocate for respondent  
No.4.

----

**CORAM: NITIN W. SAMBRE, J.**

**Order reserved on : 23<sup>rd</sup> January, 2020.**

**Order pronounced on : 30<sup>th</sup> June, 2020.**

**P.C.**

1] This appeal is by the legal heirs of original defendant No.1.

2] The respondent Nos.1 to 3 are the original plaintiffs. Based

on Exh.50, a mortgage by conditional sale dated 12<sup>th</sup> July, 1948, suit for redemption, possession and *mesne* profits came to be initiated in the Court of Civil Judge, Junior Division Karad. This suit came to be partly decreed vide judgment and decree dated 13<sup>th</sup> November, 2001 wherein the original defendant Nos.1 to 3 were directed to execute the re-conveyance in favour of the plaintiffs by accepting the amount of mortgage money, which was deposited by the plaintiffs in the Court. A further order of enquiry of *mesne* profits was also made.

3]           The defendant No.4 died during the pendency of the suit and as such, the defendant Nos.1 to 3 chose to prefer a Regular Civil Appeal Being 19/2002 on the file of Additional District Judge, Karad which came to be dismissed, however, a modification of the decree was ordered in favour of the plaintiffs and the suit was directed to be decreed in toto i.e. including possession.

4]           The suit property consists of land to the extent of 1 acre out of 2 Acres 13 Gunthas out of Survey No.223/3 at village Goleshwar, Dist. Satara.

5]           Mr.     Warunjikar,     learned     Advocate     for     the

appellants - original defendant Nos.1 to 3 while questioning the judgment and decree passed by the trial Court and the appellate Court would urge that both the Courts below have lost sight of the provisions of Bombay Tenancy and Agricultural Lands (Vidarbha Region) Act. He would draw support from the provisions of Section 25A of the Bombay Tenancy and Agricultural Lands Act (herein after shall be referred to as Bombay Act for sake of brevity) so as to claim that the appellants since were in settled possession on 12<sup>th</sup> July, 1948, the Civil Court has exceeded its jurisdiction by causing interference. Next submission of Mr. Warunjikar is that the Court must look into the provisions of Order 41 Rule 33 of the Code of Civil Procedure as the appeal preferred by the appellants came to be dismissed, however, in absence of any cross-objection from the respondents - plaintiffs, the decree came to be modified, which is contrary to the provisions of Order 41 Rule 33. According to him, the appellants were never put to notice on the said issue and that being so, the judgment impugned is liable to be quashed and set aside.

6]           The learned Advocate for the respondents Shri Avinash Patil and Shri Pathak would urge that, claim that the provisions of the

Bombay Act are applicable are held against the appellants. According to them, a specific finding is recorded by the appellate Court that the appellants have failed to prove their tenancy over the land in question. Apart from above, they have invited attention of this Court to the judgments and decree in R.C.S. Nos.46/1947 and 83/1956 which are against the interest of the appellants. A further contention is that the provisions of Order 41 Rule 33 are enabling provisions. If the appellate Court intended to exercise the said powers, there is no necessity to have a cross-objection under Order 41 Rule 22 of the C.P.C. as is aptly clear from the language of the said provisions. As such, a prayer for dismissal of the appeal is made.

7]            Considered the rival submissions.

8]            The questions of law which, in my opinion, are sought to be agitated are:

*(1)            Whether both the Courts below have committed an error in recording negative finding on the rights of the respondents - plaintiffs particularly when the land is governed by the provisions of the Bombay Act ?  
And*

*(2)            Whether the Court below was justified in invoking the provisions of Order 41 Rule 33 of the Code of*

*Civil Procedure in modifying the decree in absence of a cross-objection?*

9] As far as R.C.S. No.46/1947 is concerned, certified copy of the same is produced at Exh.57. The suit was initiated by adoptive mother of plaintiff No.1 against the predecessor-in-title of defendant Nos.1 to 3 for perpetual injunction and the said suit was compromised wherein the appellants - defendants have agreed not to obstruct the plaintiffs in their peaceful possession.

10] Regular Civil Suit No.83/1956 was initiated by the respondent Nos.2 and 3 against defendant No.4 - Eknath for partition and separate possession. The decree passed for partition in the said suit is under execution.

11] In the aforesaid background, if we appreciate the claim of the appellants that the suit claim ought not to have been entertained in view of the provisions of Section 25A of the Bombay Act, in my opinion, there is hardly any material to infer that the land in question is governed by the said provisions. But for raising pleading in support thereof, may be at appellate stage, there is hardly any *iota* of evidence

to establish that the land in question was governed by the provisions of the said Act. If the appellants claim that the provisions of the Bombay Tenancy and Agricultural Lands Act governs the dispute between the parties, it was expected of them to approach the appropriate Authority under the provisions of the said Act. As such, the said contention will be hardly of any assistance to the appellants.

12] This takes me to the next submission of the learned Advocate for the appellants as regards the applicability of provisions of Order 41 Rule 33 of the Code of Civil Procedure in absence of any cross-objection on the part of the respondents - plaintiffs. The learned Advocate for the appellants has invited my attention to the various judgments of the Apex Court particularly in the matter of *Pralhad and others V/s. State of Maharashtra and another* reported in (2010) 10 SCC 458.

13] Paragraph Nos.18 and 20 of the said judgment are worth referring, which read thus:

*“18. The provision of Order 41, Rule 33 of CPC is clearly an enabling provision, whereby the Appellate Court is empowered to pass any decree or make any order which*



ought to have been passed or made, and to pass or make such further or other decree or order as the case may require. Therefore, the power is very wide and in this enabling provision, the crucial words are that the Appellate Court is empowered to pass any Order which ought to have been made as the case may require. The expression "Order ought to have been made" would obviously mean an Order which justice of the case requires to be made. This is made clear from the expression used in the said Rule by saying "the court may pass such further or other Order as the case may require". This expression "case" would mean the justice of the case. Of course, this power cannot be exercised ignoring a legal interdict or a prohibition clamped by law.

20. In *Banarsi vs. Ram Phal*, AIR 2003 SC 1989, this Court construing the provisions of Order 41 Rule 33 of CPC held that this provision confers powers of the widest amplitude on the appellate court so as to do complete justice between the parties. This Court further held that such power is unfettered by considerations as to what is the subject-matter of appeal or who has filed the appeal or whether the appeal is being dismissed, allowed or disposed of while modifying the judgments appealed against. The learned Judges held that one of the objects in conferring such power is to avoid inconsistency, inequity and inequality in granting reliefs and the overriding consideration is achieving the ends of justice. The learned Judges also held that the power can be exercised subject to three limitations: firstly, this power cannot be exercised to the prejudice of a person who is not a party before the Court; secondly, this power cannot be exercised in favour of a claim which has been given up or lost; and thirdly, the power cannot be exercised when such part of the decree which has been permitted to become final by a party is reversed to the advantage of that party."

Code of Civil Procedure were within the knowledge of the respondents as the present appellants preferred an appeal before the first appellate Court. Being party to the appeal, the finding recorded by the trial Court of refusing to grant decree for possession was never questioned by the respondents in a separate appeal or by preferring cross-objection.

15] As such, the finding recorded by the trial Court refusing to grant the possession in favour of respondent Nos.1 to 3 was never questioned by them before the first appellate Court in the form of cross-objection or otherwise. It was expected of the respondent Nos.1 to 3 to prefer an appeal or cross-objection questioning the judgment of trial Court in refusing to grant a decree of possession of one acre of land, which till date they have not done.

16] From the judgment of the trial Court it has been noticed that the prayer of the plaintiffs for grant of possession was rejected. In such a situation, it can be noticed that part of decree is in favour of plaintiffs and part in favour of defendants. As such, once the decree for possession was refused in favour of the respondents - plaintiffs,

nothing prevented respondents - plaintiffs from filing a cross-objection or an appeal questioning the part of decree wherein they are aggrieved i.e. refusing the decree for possession. As a consequences of not questioning the said decree of refusal of grant of possession, the same has attained finality against the respondents - plaintiffs.

17] As such, the first appellate Court has committed an error of law in granting decree for possession in exercise of powers under Order 41 Rule 33 particularly when the respondents - plaintiffs are not aggrieved by such finding of refusal of decree for possession recorded by the trial Court as they have not questioned the same in an appeal under Section 96 of the Code of Civil Procedure or under Order 41 Rule 22 by way of cross-objection.

18] An appropriate support also can be drawn from the judgment of the Apex Court in the matter of *Banarsi and others V/s. Ram Phal* reported in **(2003) 9 SCC 606** particularly paragraph Nos.8, 10, 11 and 13, which read as under:-

*“8. Sections 96 and 100 CPC make provision for an appeal being preferred from every original decree or from every decree passed in appeal respectively; none of the*

*provisions enumerates the person who can file an appeal. However, it is settled by a long catena of decisions that to be entitled to file an appeal the person must be one aggrieved by the decree. Unless a person is prejudicially or adversely affected by the decree he is not entitled to file an appeal. (See [Phoolchand and Anr. v. Gopal Lal, Jatan Kumar Golcha v. Golcha Properties \(P\) Ltd.](#) and [Ganga Bai v. Vijay Kumar.](#)) No appeal lies against a mere finding. It is significant to note that both Sections 96 and 100 CPC provide for an appeal against decree and not against judgment.*

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 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 a 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.

13. We are, therefore, of the opinion that in the absence of cross appeal preferred or cross objection taken by the plaintiff-respondent the first appellate court did not have jurisdiction to modify the decree in the manner in which it has done. Within the scope of appeals preferred by the appellants the first appellate court could have either allowed the appeals and dismissed the suit filed by the respondent in its entirety or could have deleted the latter part of the decree

*which granted the decree for specific performance conditional upon failure of the defendant to deposit the money in terms of the decree or could have maintained the decree as it was passed by dismissing the appeals. What the first appellate court has done is not only to set aside the decree to the extent to which it was in favour of the appellants but also granted an absolute and out-and-out decree for specific performance of agreement to sell which is to the prejudice of the appellants and to the advantage of the respondent who has neither filed an appeal nor taken any cross objection.”*

19] In that view of the matter, the decree of the appellate Court to the extent of modifying the decree of trial Court ordering the possession to be handed over to the plaintiffs cannot be sustained. As such, the appeal needs to be partly allowed. The judgment and decree passed by the appellate Court on 31<sup>st</sup> July, 2013 in Regular Civil Appeal No.19/2002 is modified. Though the appeal of the appellants was dismissed, the observations made in paragraph No.1(d) “*the defendant Nos.1 to 3 shall hand over vacant possession of the suit property in favour of the plaintiffs*” is hereby set aside and rest of the observations are maintained.

( NITIN W. SAMBRE, J. )