

**IN THE HIGH COURT OF MADHYA PRADESH  
AT JABALPUR**

**BEFORE  
HON'BLE SHRI JUSTICE DWARKA DHISH BANSAL**

**SECOND APPEAL No. 127 of 2001**

**Between:-**

- 1. SMT. HAZARA BI (DEAD)**
- 2. EJAAJ MOHAMMAD KHAN, AGED ABOUT 39 YEARS, R/O PANCHMADI, DISTRICT HOSHANGABAD, (M.P.)**
- 3. AYAZ MOHAMMAD KHAN, AGED ABOUT 35 YEARS, R/O PANCHMADI, DISTRICT HOSHANGABAD, (M.P.).**
- 4. NISAAR AHMED KHAN, AGED ABOUT 25 YEARS, R/O PANCHMADI, DISTRICT HOSHANGABAD, (M.P.),**
- 5. SMT. NAJMA BEGUM (DEAD) THROUGH LRs.:**
- 5A MR. NIZAM KHAN, S/O LATE MOHAMMAD SULEMAN, AGED ABOUT 34 YEARS, R/O SANJAY GANDHI NAGAR, MODIWADA CANTT, JABALPUR (M.P.)**
- 5B MISS NOORJAHAN, D/O LATE MOHAMMAD SULEMAN, AGED ABOUT 32 YEARS, R/O SANJAY GANDHI NAGAR, MODIWADA CANTT, JABALPUR (M.P.)**
- 5C SMT. SAHAJAHAN W/O MOHAMMAD SABIR KHAN, AGED ABOUT 30 YEARS, R/O. SUPATAL, MUJAWAR MOHALLA, GARHA, JABALPUR (M.P.)**

- 5D SMT. RUHEE KHAN, W/O MOHAMMAD NASIR KHAN, AGED ABOUT 27 YEARS, R/O. SUPATAL, MUJAWAR MOHALLA, GARHA, JABALPUR (M.P.)**
- 5E KU. RUKHSHAR, D/O MOHAMMAD SULEMAN, AGED ABOUT 20 YEARS, R/O SANJAY GANDHI NAGAR, MODIWADA, CANTT. JABALPUR (M.P.)**
- 6. SHAHNAAZ BEGUM W/O MOHD. ZUBIR KHAN, R/O PIPARIYA, DISTRICT HOSHANGABAD, (M.P.)**
- 7. SAYRA BANO, AGED ABOUT 22 YEARS, W/O SHAKEEL KHAN, R/O PIPARIYA, DISTRICT HOSHANGABAD, (M.P.)**

**.....APPELLANTS**

***(BY SHRI R.S. TIWARI-SENIOR ADVOCATE ASSISTED BY SHRI ABHIJIT BHOWMIK-ADVOCATE)***

**AND**

**ABDUL KARIM S/O ABDUL GAFFAR KHAN, AGED ABOUT 35 YEARS, PENSIONER, R/O DAFAI MOHALLA, PANCHMADI, DISTRICT HOSHANGABAD (M.P.)**

**.....RESPONDENT**

***(BY SHRI ASHISH SHROTI-ADVOCATE)***

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**Reserved on : 23.11.2022**

**Pronounced on : 28.11.2022**

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*This second appeal has been heard and reserved for judgment, coming on for pronouncement this day, the court passed the following:*

## JUDGMENT

This second appeal has been preferred by the appellants/plaintiffs challenging the judgment and decree dated 02.11.2000 passed by Additional District Judge, Sohagpur to the court of District Judge, Hoshangabad in Civil Appeal No.3-A/1999 whereby reversing the findings on issue no.1,2,4&6 recorded in judgment and decree dated 23.12.1998 passed by Civil Judge Class-I, Pipariya, Camp Pachmadhi in Civil Suit No.3-A/97.

2. In short the facts are that the original plaintiff-Noor Mohd. (whose descendants are the appellants) instituted a suit for eviction and recovery of arrears of rent on the grounds available under Section 12(1)(a)(e)&(g) of the M.P. Accommodation Control Act, 1961 (in short 'the Act') on the allegations that the original owner of the suit property was Abdul Aziz who in the year 1947 gifted the suit property orally to the plaintiff-Noor Mohammad. On the basis of oral gift, the plaintiff instituted Civil Suit which vide judgment and decree dated 25.09.1982 (Ex.D/2) was dismissed holding the gift to be not proved, which attained finality due to dismissal of plaintiff's appeal vide judgment and decree dated 21.02.1984 (Ex.D/3). It is alleged that thereafter Abdul Aziz executed registered Gift deed in favour of the plaintiff Noor Mohd. on 22.02.1986 (Ex.P/2). Hence on the basis of regd. gift deed second suit for eviction on same set of facts, was filed.

3. The defendant/respondent appeared and filed written statement denying the plaint allegations as well as title of the plaintiff over the suit house, however, the defendant had admitted to have taken the house on rent from Abdul Aziz. Denying the oral gift made in the year 1947, so also the subsequent registered gift deed dtd. 22.02.1986, it is contended that Abdul Aziz had no right to execute the regd. gift deed, which is illegal and does not confer any

right to the plaintiff(s). Denying the availability of grounds of eviction taken by the plaintiffs, the suit was prayed to be dismissed with exemplary cost.

4. On the basis of pleadings of the parties, learned trial court framed as many as 12 issues and recorded evidence of the parties and vide its judgment and decree dated 23.12.1998 held that the suit is not barred by *res-judicata* and holding the regd. gift deed (Ex.P/2) to be a valid document, held that the plaintiffs/appellants are owner of the house, but dismissed the suit for eviction in its entirety.

5. The judgment and decree of the trial court was challenged by plaintiffs/appellants and defendant/respondent both by filing separate two appeals. Civil Appeal no.3-A/1999 was filed by defendant-Abdul Karim challenging the findings recorded by learned trial court on issue no.1,2,4,6&11. Civil Appeal no.2-A/1999 was filed by plaintiffs challenging refusal of decree of eviction by learned trial Court. Both the Civil Appeals were decided by the same presiding officer but by writing separate two judgements. Learned first appellate court dismissed the Civil Appeal no.2-A/1999 filed by the plaintiffs but allowed the Civil Appeal No.3-A/1999 filed by the defendant and reversed the findings on issue no.1,2,4 and 6 recorded by learned trial court. The present second appeal has been filed by plaintiffs/appellants challenging the judgment and decree passed by first appellate court in Civil Appeal No.3-A/99. Although, just after cause title of the memo of appeal, the challenge appears to have been made only about the judgment passed in Civil Appeal No.3-A/99, but in the memo of appeal the plaintiffs/appellants have taken all the relevant grounds seeking decree of eviction.

6. Resultantly, upon coming of second appeal in hearing on 08.11.2001, it was admitted by this court on the following substantial questions of law :-

“1. Is the gift deed dated 22.02.1986 by Abdul Aziz Khan in favour of Late Noor Mohd as it was executed to confirm the oral gift in 1947 which was not relied upon in the previous litigation between late Noor Mohd. and Abdul Kalim (respondent) or because Abdul Aziz had left India ?

2. Is the finding under Section 12(1)(a) of the M.P. Accommodation Control Act, 1961 manifestly wrong in law ?”

7. Learned counsel for the appellants/plaintiffs submits that learned first appellate court has erred in reversing the judgment and findings of learned trial court recorded on the issue no.1,2,4 and 6 by holding the present suit to be barred by *resjudicata* and that the registered gift deed dated 22.02.1986 (Ex.P/2) is not a valid document. He submits that the Civil Appeal no.3-A/1999, filed only against the findings, was not maintainable and in any case, the learned first appellate court ought to have decided both the Civil Appeal No. 3-A/99 and 2-A/99 together by passing common judgment and decree, which arose out of single judgment passed in single/one suit. Learned counsel for the appellants further submits that the defendant being tenant of Abdul Aziz had no right to challenge the registered gift deed and as the defendant has not paid any rent, therefore, he is liable to be evicted and the suit for eviction filed by the plaintiffs, on the basis of gift deed, ought to have been decreed.

8. Learned counsel for the respondent submits that the plaintiffs/appellants have not filed second appeal against the judgment and decree passed in Civil Appeal no.2-A/99, therefore, the substantial question of law No.2 framed by this court does not arise in the present second appeal. He further submits that because the previous dismissal of suit was based on the oral gift deed and by the registered gift deed dated 22.02.1986 (Annexure P/2), only the previous oral

gift has been acknowledged, therefore, in fact the gift is the same, which was subject matter of previous Civil Suit decided vide judgement and decree dtd. 25.9.1982 (Ex.D/2) and accordingly the learned first appellate court has not committed any error in holding the present suit to be barred by *res-judicata*. He further submits that because there was no valid acceptance of the gift as required under section 122 of the Transfer of Property Act as well as under Section 149 of the Mohammedan Law, the gift deed cannot be said to be a valid document. With these submissions, he prays for dismissal of the second appeal.

9. Heard learned counsel for the parties and perused the record.

10. Since there is dispute about validity of the regd. gift deed in question executed by a Mohammedan, therefore, section 122 of the Transfer of Property Act and section 149 of the Mohammedan Law are relevant to quote, as under :-

**Section 122 of Transfer of Property Act :**

“122. “Gift” defined.—“Gift” is the transfer of certain existing moveable or immoveable property made voluntarily and without consideration, by one person, called the donor, to another, called the donee, and accepted by or on behalf of the donee. Acceptance when to be made.—Such acceptance must be made during the lifetime of the donor and while he is still capable of giving. If the donee dies before acceptance, the gift is void.”

**Section 149 of the Mohammedan Law :**

“149. THREE ESSENTIALS OF A GIFT: It is essential to the validity of a gift that there should be (1) a declaration of gift by the donor; (2) an acceptance of the gift, express or implied, by or on behalf of the

donee; and (3) delivery of possession of the subject of the gift by the donor to the donee as mentioned in Sec. 150.

If these conditions are satisfied, the gift is complete.”

**11.** Upon perusal of record, it is an admitted fact that Abdul Aziz was owner of the suit property and he inducted the defendant as tenant in the suit property and admittedly there was relationship of landlord and tenant between the defendant-Abdul Karim and Abdul Aziz. Previous suit filed by the plaintiff was based on oral gift and the present Civil Suit has been filed on the basis of registered gift deed dated 22.02.1986 (Ex.P/2) executed by Abdul Aziz in favour of Noor Mohd. Since the basis of present suit for eviction, is the registered gift deed and in the previous Civil Suit there was oral gift, therefore, validity of regd. gift deed (Ex.P/2) although acknowledging previous oral gift, was required to be decided in the light of aforesaid two provisions, which is lacking in the impugned judgement and decree.

**12.** By way of filing application (IA No.11222/2022) under Order 41 Rule 2 r/w Order 41 Rule 33 and Section 100(5) and Section 151 CPC, the appellants/plaintiffs have tried to say that mistakenly the challenge could not be made in the instant second appeal to the judgement and decree passed in Civil Appeal no.2-A/1999 and he submits that in the existing facts and circumstances of the case, non mentioning of the Civil Appeal no.2-A/99 in the memo of second appeal, makes no difference and this court can pass the appropriate order in the interest of justice.

**13.** Undisputedly one and single Civil Suit no. 3-A/97 was instituted by the plaintiff-Noor Mohd. against Abdul Karim which was decided and decreed by learned trial Court by passing judgement and decree dtd. 23.12.1998. Against dismissal of suit for eviction, the plaintiffs/appellants preferred Civil Appeal



no. 2-A/99 and against the adverse findings recorded in the judgement, the defendant-Abdul Karim preferred Civil Appeal no. 3-A/99. It appears that learned first appellate Court has firstly decided the Civil Appeal no. 3-A/1999 and reversed the findings on issue no.1,2,4 and 6, thereafter, relying upon such findings learned first appellate Court has dismissed the Civil Appeal no.2-A/1999 filed by the plaintiffs/appellants.

**14.** In the case of *Banarsi and others Vs. Ramphal* (2003) 9 SCC 606 the Supreme Court has clearly held that first appeal or second appeal lies only against a decree and is not maintainable merely against the finding and held as under :-

“8. Sections 96 and 100 of the 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 another v. Gopal Lal*, 1967 (3) SCR 153; *Smt. Jatan Kanwar Golcha v. M/s. Golcha Properties (P.) Ltd.*, 1970 (3) SCC 573; *Smt. Ganga Bai v. Vijay Kumar and others*, (1974) 2 SCC 393. ***No appeal lies against a mere finding.*** It is significant to note that both Sections 96 and 100 of the CPC ***provide for an appeal against decree and not against judgment.***

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 pursuance 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 another*, (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-objections ***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 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.

**15.** Apparently, ignoring the provisions contained in section 96, Order 41 Rule 22 and 33 CPC, learned first appellate Court has on the basis of decision of co-ordinate bench of this Court in the case of ***Hiralal Vs. Omprakash* 1981 MPLJ SN-52** held the defendant's Civil Appeal No.3-A/99 to be maintainable, which was filed merely against the findings, whereas entire decree was in favour of the respondent/defendant, whereby suit for eviction filed by the plaintiff-Noor Mohd. was dismissed in its entirety on all the grounds. As such the decision in the case of **Hiralal**

(supra) is not applicable at all to the proposition that the appeal is not maintainable merely against finding(s).

**16.** So far as the question/objection of maintainability of present second appeal raised by the respondent/defendant is concerned, the Kerala High Court has, in the case of *P.N. Kesavan and another v. Lekshmy Amma Madhavi Amma & others* AIR 1968 Kerala 154, followed the decision of Supreme Court in the case of *Sheodan Singh v. Daryao Kunwar* AIR 1966 SC 1332 and held as under :-

“3. Another argument is also advanced by the counsel of the contesting respondents on the preliminary objection. Before the lower appellate court there were two appeals, one by the fourth defendant and the other by the second defendant; and there were also two decrees, though the litigation started in one suit. The Official Receiver has filed only one second appeal against the decision in the appeal by the second defendant. The objection is that the Official Receiver cannot impugn both the decrees in one second appeal. In this contention also the counsel is not on firm ground, because the law is that if two appeals have been filed by two parties in a litigation arising out of one suit, one second appeal alone need be filed against both the decisions. We shall remain content by citing the latest decision of the Supreme Court on the question; vide *Sheodan Singh v. Daryao Kunwar*, AIR 1966 SC 1332.

4. The preliminary objection raised by the counsel of the contesting respondents is overruled.”

**17.** As such in my considered opinion the present second appeal is maintainable, which has been filed against the judgement and decree passed in Civil Appeal no.3-A/99. Copy of judgement & decree passed in Civil Appeal no.2-A/99 (filed along with IA no.11222/22) shows that learned first appellate has not decided anything in the Civil Appeal no.2-A/99 but has dismissed it, as a consequence of decision given in the Civil Appeal no.3-A/99, which is impugned herein.

**18.** Due to impractical procedure followed by the first appellate Court, the aforesaid complications have arisen, therefore, I am of the considered opinion that whenever two or more appeals (against judgement and decree passed in one and single Civil Suit), are filed by different sets of plaintiffs or defendants, the

appellate Court, with a view to avoid unnecessary and unwanted complications, must/is bound to decide both/all the Civil Appeals together by a common judgement and decree.

**19.** Since, I have already held that the Civil Appeal no.3-A/1999 filed by the defendant-Abdul Karim was not maintainable merely against the findings, therefore, impugned judgement and decree dtd. 2.11.2000 passed in Civil Appeal no.3-A/1999 is not sustainable, which had decided the issue of res-judicata without taking into consideration the provisions of section 122 of the Transfer of Property Act as well as section 149 of the Mohammedan Law. Further, in absence of challenge to the judgement & decree passed in Civil Appeal no.2-A/1999 in the Second Appeal and there being no independent findings in the judgement deciding the Civil Appeal no.2-A/1999, I deem it fit to remand the case to first appellate Court to re-decide both the Civil Appeal no.3-A/1999 and 2-A/1999 afresh in accordance with the law, certainly without being influenced by any of the findings or observations made by this Court by way of the judgement passed today. Parties are directed to appear before the first appellate Court on **23.01.2023**.

**20.** Resultantly, this second appeal succeeds and is **allowed** to the extent indicated above. However, no order as to costs.

**21.** Pending application(s) if any, shall stand disposed off.

**(DWARKA DHISH BANSAL)**  
**JUDGE**

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