

A GANPATI MADHAV SAWANT (D) BY LRS.

v.

DATTUR MADHAV SAWANT
(Civil Appeal No. 583 of 2008)

JANUARY 22, 2008

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[DR. ARIJIT PASAYAT AND P. SATHASIVAM, JJ.]

Code of Civil Procedure, 1908 – s. 100 and O. XX r. 12 – Second appeal – Dismissal of – On the ground that no question of law involved – However, at the time of issuance of notice, the question regarding requirement of enquiry under O. XX r. 12 before grant of mesne profit was pointed out – On appeal, held: In the circumstances of the case, matter remitted to High Court.

D High Court dismissed, second appeal holding that no question of law was involved. However, while issuing notice in the appeal, it had noticed that grant of mesne profit without any enquiry in terms of O. XX r. 12 CPC was not permissible. Hence the present appeal.

E Partly allowing the appeal and remitting the matter to High Court, the Court

F HELD: The High Court while deciding the second appeal, failed to notice that while issuing notice it was categorically noted that the plaintiff had not prayed for an inquiry relating to mesne profit in terms of Order XX Rule 12 CPC and in the absence of any specific prayer for any inquiry into that aspect, the same could not have been granted. Though at the time of issuance of notice, the High Court had noted that this substantial question of law did arise for consideration, while deciding the second appeal, this aspect was lost sight of. In the circumstances, it would be appropriate to remit the matter to the High Court to consider that aspect. [Paras 7 and 8] [1086-A, B, C]

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Mohammad Amin and Ors. v. Vakil Ahmed and Ors. AIR A
1952 SC 358 – referred to.

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 583
of 2008.

From the final Judgment and Order dated 6.5.2004 of the B
High Court of Bombay, Bench at Aurangabad in Second Appeal
No. 485 of 2001.

C.G. Solshe and Vinesh C. Solshe for the Appellants.

The Judgment of the Court was delivered by C

Dr. **ARIJIT PASAYAT**, J. 1. Leave granted.

2. Challenge in this appeal is to the order passed by a
learned Single Judge of the Bombay High Court Aurangabad
Bench, dismissing the appeal filed by the appellant under D
Section 100 of the Code of Civil Procedure, 1908 (in short the
'CPC'). The appellants, heirs of the original Defendant Nos. 1
to 3 questioned correctness of the decree and judgment passed
by learned Additional District Judge, Osamabad in Regular Civil
Appeal No. 89 of 1999 confirming the decree in Regular Civil E
Suit No. 62 of 1981 passed by the Civil Judge, Jr. Division,
Kallam. The High Court dismissed the Second Appeal holding
that there was no question of law involved and therefore, the
Second appeal was without merit.

3. Learned counsel for the appellant submitted that while F
issuing notice in the Second appeal, the High Court categorically
observed as follows:

"The next ground argued by the learned counsel for the
appellant is that the plaintiff did not pray for an inquiry with G
the mesne profit to be held under Order XX Rule 12 in the
plaint and in the absence of specific prayer for an inquiry
into the mesne profits the same should not have been
granted by the courts below. The said directions is
contained in clause IV in the operative part of the judgment
and decree of the trial court. The learned counsel for the H

A appellant has placed reliance of the judgment of the Apex Court reported in AIR 1952 Supreme Court 358 Mohammad Amin and Others v. Vakil Ahmed and Others and to precise para 20 thereof. In this view of the matter issue notice before admission returnable in six weeks touching only clause IV of the operative part of the order B passed by the trial court directing the inquiry in regard to mesne profits under Order XX Rule 12. The respondents be intimated that the appeal will be finally heard and decided at admission stage."

C 4. It was, therefore, pointed out that the grant of mesne profit without any enquiry in terms of Order XX Rule 12 CPC was not permissible.

5. There is no appearance on behalf of respondent.

D 6. In *Mohammad Amin and Ors. v. Vakil Ahmed and Ors.* [AIR 1952 SC 358] it was, inter-alia, observed as follows.

E "It was however pointed out by Shri S.P. Sinha that the High Court erred in awarding to the plaintiffs mesne profits even though there was no demand for the same in the plaint. The learned Solicitor General appearing for the plaintiffs conceded that there was no demand for mesne profits as such but urged that the claim for mesne profits would be included within the expression "awarding possession and occupation of the property aforesaid together with all the rights appertaining thereto." We are F afraid that the claim for mesne profits cannot be included within this expression and the High Court was in error in awarding to the plaintiffs mesne profits though they had not been claimed in the plaint. The provision in regard to G the mesne profits will therefore have to be deleted from the decree. We dismiss the appeal of defendants 1 to 5 and affirm the decree passed by the High Court in favour of the plaintiffs, deleting therefrom the provision in regard to mesne profits. The plaintiffs will of course be entitled to H their costs throughout from defendants 1 to 5."

7. The High Court while deciding the Second Appeal, failed to notice that while issuing notice it was categorically noted that the plaintiff had not prayed for an inquiry relating to mesne profit in terms of Order XX Rule 12 CPC and in the absence of any specific prayer for any inquiry into that aspect, the same could not have been granted.

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8. As rightly contended by learned counsel for the appellants that though at the time of issuance of notice the High Court had noted that this substantial question of law did arise for consideration, while deciding the second appeal, this aspect was lost sight of. In the circumstances it would be appropriate to remit the matter to the High Court to consider that aspect.

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9. The appeal is allowed to the aforesaid extent with no order as to costs.

K.K.T.

Appeal partly allowed.

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