

Balkrishna Chatrabhuj Thacker and ors. Vs. Devabai and ors.

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SooperKanoon Citation : sooperkanoon.com/737294

Court : Gujarat

Decided On : Nov-09-1984

Reported in : AIR1985Guj133; (1985)1GLR321

Judge : J.P. Desai, J.

Acts : [Code of Civil Procedure \(CPC\), 1908](#) - Sections 107 - Order 20, Rules 4 and 5 - Order 41, Rules 23 and 33

Appeal No. : Second Appeal No. 74 of 1978

Appellant : Balkrishna Chatrabhuj Thacker and ors.

Respondent : Devabai and ors.

Advocate for Def. : Y.S. Mankad, Adv.

Advocate for Pet/Ap. : K.J. Vaidya, Adv.

Judgement :

1. This Second Appeal is filed by the original Plaintiffs (original mortgagors) against the judgment and decree of the learned District Judge, Kutch at Bhuj in Regular Civil Appeal No. 91 of 1974 whereby he dismissed. The appeal of the original mortgagee but did not grant the relief of actual possession of the suit premises which were in possession of the tenant.

2. The facts leading to the filing of this Second Appeal may be briefly stated as follows: -

One Jethalal Valji mortgaged with possession the suit property with one Hansraj Devkaran for 15000 Kories under the mortgage-deed of Maha Vad Amas 1995 corresponding to 19th Feb. 1939. The heirs of the said Jethalal filed a suit for redemption of the suit property from mortgage against the heirs of the original mortgagee as also persons in possession of the suit premises who were tenants inducted by the original mortgagee. The said suit being Regular Civil Suit No. 34 of 1971 was heard by the teamed Joint Civil Judge, Junior Division at Bhuj. The learned trial Judge, after taking into consideration the various contentions raised by the heirs of the original mortgagee, came to the conclusion that the plaintiffs were entitled to redeem the suit property from mortgage. The plaintiffs prayed for actual possession of the suit premises, but as the premises did in possession of, the mortgagee, though, of course, induct the tenants,, the trial Court granted a decree only for symbolic possession. The heirs of the original mortgagee filed Regular Civil Appeal No. 91 of 1974 in ' the District Court at Kutch at Bhuj challenging the preliminary decree for redemption passed by the learned trial Judge. The learned District Judge, after hearing the learned advocates for the parties, came to the conclusion that the learned trial Judge had not committed any error in passing preliminary decree for redemption in favour of the plaintiffs. The learned District Judge accordingly dismissed the appeal with costs. The heirs of the original mortgagor who were the plaintiffs in the trial Court have filed this Second Appeal raising a contention that in view of a Full Bench decision of this Court reported in Lalji Purshottam v. Madhavji Meghaji : AIR1976 Guj161 , the tenants inducted by the mortgagee were not entitled to protection from being evicted and, therefore, the plaintiffs were entitled to actual physical possession and not only symbolic possession even from the tenants Inducted by the mortgagee. The appellants have taken a contention in their Memo of appeal that when the appeal came up for final hearing before the District Court, the teamed advocate who appeared for the original plaintiffs before the District Court drew the attention of the learned District Judge to this Full Bench judgment of this Court which came to be delivered during the pendency of the appeal and urged that the District Court may exercise the powers under O. 4 1, R. 33, C.P. C. and may pass

a decree for actual possession even though the heirs of the original mortgagor i.e. the original plaintiffs, have not filed any appeal or cross-objection in the district Court.

3. When this Second Appeal came up for admission before this Court, the following substantial question of law was formulated: -

'Whether it was patently illegal, erroneous and unjust approach of the lower Appellate Court not to accept, rely, and apply a binding Full Bench judgment reported in : AIR1976 Guj161 to the facts and circumstances of this case before it particularly more so when the same was cited at the bar and relied upon in support at the time of hearing.'

4. Now, when this appeal came up for final hearing before me, on going through the judgment of the learned District Judge, I found that there was no reference to either the contention of the learned advocate for the appellants as regards exercising powers under O. 41, R. 33 C.P.C. or with regard to the decision of the Full Bench. In view of this, it prima facie appeared that the learned advocate who appeared for the original plaintiffs in the District Court might have missed to request the District Court to exercise the powers under O. 41, R. 33, C.P.C. Ordinarily,. it might have been very difficult to accept the contention raised in the memo of appeal that the attention of the learned District Judge was drawn to the Full Bench decision of this Court and he was requested to exercise the powers under O. 41, R. 33, C.P. C. when the judgment of the District Court is completely silent on this point. No affidavit of the learned advocate who appeared on behalf of the original plaintiff in the District Court is also filed along with the memo of Appeal in this appeal. In view of this, I was not inclined to entertain this contention raised in this memo of Appeal. But fortunately for the appellants of this appeal, there are on record at page 73 after -Ex. 35 in the record of the District Court notes of arguments written in pencil. In the said notes of argument, reference has been made to O. 41, R. 33, C.P.C. while noting the arguments of the learned advocate Mr. M. J. Thackker who appeared on behalf of the original plaintiffs in the District Court. It also appears from the said notes of arguments that, Mr. Thackker advanced an argument that the tenant was not entitled to protection. There is, of

course, no reference to the Full Bench decision of this Court in the said notes of arguments, but the said notes of arguments do support the contention of the appellants that their advocate who appeared in the District Court did raise a contention that the powers under O. 41, R. 33, C.P.C. may be exercised in this case because the tenant was not entitled to protection. Even though there is no reference to the Full Bench decision of this Court in the notes of arguments, it is not improbable that the Full Bench decision, which was rendered by this Court on 24-6-1976 and which was reported in : AIR1976 Guj161 might have been cited before the learned District Judge because but for this decision of this Court there was no occasion to request the District Court to pass a decree for actual possession when there were earlier decisions of this Court that a tenant inducted by a mortgagee was entitled to protection under the Rent Act, which judgments were overruled only by this Full Bench decision. But apart from this, the fact remains that at the time of arguments the learned advocate for the original plaintiffs who appeared in the District Court made a request that powers under O. 41, R. 53, C.P.C. may be exercised by the District Court and a decree for actual possession may be granted. In view of this, the question that arises for consideration in this appeal before me is whether the District Court committed an error in not even considering the contention raised by the learned advocate for the original plaintiffs that powers under O. 41, R. 33, C.P.C. may be exercised and decree for actual possession may be passed. It is obvious that even if the learned District Judge was not inclined to grant any relief to the original plaintiffs under O. 41, R. 53, C.P.C. for whatever reasons, he committed a grave error in not even referring to that contention in his judgment. If he was not inclined to grant that request, he should have considered the contention raised on behalf of the original plaintiffs and then made his observations as to why he was not inclined to exercise the powers under O. 41, R. 33, C.P.C. The learned District Judge, having not considered ' this aspect at all, though raised before him, this court is required to consider whether the District Court in the present case could have exercised the powers under O. 41, R. 33, C.P.C. when the District Court was dismissing the appeal of the original mortgagee and whether this is a fit case in which the powers under O. 41, R. 33, C.P.C. should have been exercised.

O. 41, R. 33, C. P. C. is in these terms: --

'The appellate Court shall have power to pass any decree and 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, and this power may be exercised by the Court notwithstanding that the appeal is as to part only of the decree and may be exercised in favour of all or any of the respondents or parties, although such respondents or parties may not have filed any appeal or objection.'

Illustration to this rule is as under :-

A claims a sum of money as due to him from X or Y, and in a suit against both obtains a decree against X. X appeals and A and Y are respondents. The appellate Court decides in favour of X. It has power to pass a decree against Y.'

5. The wordings of the above Rule show that it is undoubtedly expressed in terms, which are wide. Illustration to the above Rule shows that powers under O. 41, R. 53, C.P.C. can be exercised when the Appellate Court makes some change in the decree passed by the trial Court. The question whether the illustration is exhaustive or not will be discussed a little later. In the case of *Rameshwar Prasad v. Shambehari Lal* : [1964]3SCR549 Reghubar Dayal J. delivering the judgment of the Supreme Court, observed (para 17)'Rule 33 really provides as to what the appellate Court can find the appellant entitled to. It empowers the appellate Court to pass any decree and make any order, which ought to have been passed or made in the proceedings before it, and thus could have reference only to the nature of the decree or order in so far as it affects the rights of the appellant. It further empowers the Appellate Court to pass or make such further or- other decree or order as the case may require. The Court is thus given wide discretion to pass such decrees and orders as the interest of justice demand. Such a power is to be exercised in exceptional cases when its non-exercise will lead to difficulties in the adjustment of rights of the various parties.'

6. In *Panna Lal v. State of Bombay* : [1964]1SCR980 , Das Gupta J. delivering the judgment of the Supreme Court observed as follows (Para 12)'Even a bare reading of O. 41, R.33 is sufficient to convince any one that the wide wording was intended to empower the appellate Court to make whatever order it thinks fit, not only as between the appellant and the respondent but also as between a

respondent and a respondent. It empowers the appellate Court not only to give or refuse relief to the appellant by allowing or dismissing the appeal but also to give such other relief to any of the respondents as 'the case may require. While the very words of the section make the position abundantly clear the illustration puts the position beyond argument,

7. In the case of *Nirmala Bala v. Balai Chand* : [1965]3SCR550 , Shah J. who delivered the judgment of the Supreme Court observed at para. 22 at page 1884 as follows: -

'The rule is undoubtedly expressed in terms which are wide, but it' has to be applied with discretion and to cases where interference in favour of the appellant necessitates interference also with a decree which has by acceptance or acquiescence become final so as to enable the Court to adjust the rights of the parties. Where in an appeal the court reaches a conclusion which is inconsistent with the opinion of the Court appealed from and in adjusting the right claimed by the appellant it is necessary to grant relief to a person who has not appealed, the power conferred by O. 41, R. 33 may properly be invoked. The rule however does not confer an unrestricted right to reopen decrees which have become final merely because the appellate Court does not agree with the opinion of the Court appealed from.' The observations of the Supreme Court in the case of *Nirmala Bala v. Balai Chand* : [1965]3SCR550 (supra) go to show that even though the rule is expressed in terms which are wide it has to be applied with discretion and to cases where interference in favour of the appellant necessitates interference also with a decree which has by, acceptance or acquiescence become final so as to enable the Court to adjust the rights of the parties. These observations go to show that ordinarily the provisions of this Rule can be invoked only when the appellate Court interferes with the decree passed by the trial Court. The Supreme Court has observed in this case that the rule does not confer an unrestricted right to reopen decrees which have become final merely because the appellate Court does not agree with the opinion of the Court appealed from.

8. Relying upon the ratio of the above decision of the Supreme Court, a teamed single Judge of this Court in *Rajmal Shamji Bhansali v. Patel Manrupji Ranchhodji*,

(1972) 13 Guj LR 737 reached the same conclusion. It appears that in that case the plaintiff filed a suit for recovering Rs. 830/- from the defendants and the teamed trial Judge passed a decree only for Rs. 112/- in favour of the plaintiff. The plaintiff filed an appeal before the District Court in respect of the amount, which was not allowed by the trial Court. The teamed District Judge came to the conclusion that the entire version given by the plaintiff was false and that the trial Court was in error even in passing a decree for Rs. 112/- and accordingly not only dismissed the appeal of the plaintiff but dismissed the whole suit of the plaintiff even though the defendants had not filed any appeal or cross-objections. A revision application was filed before this Court and the learned single Judge of this court who heard that revision application, after referring to the above decision of the Supreme Court and relying upon the observations of the Supreme Court in *Nirmala Bala* case : [1965]3SCR550 (supra) reached the conclusion that the District Judge was not justified in dismissing the suit of the plaintiff in toto when there was no appeal or cross-objections filed by the original defendants simply because the learned District Judge was not inclined to agree with the conclusion reached by the trial Court. This decision, on the face of it, would appear to lay down that it is only when the appellate Court interferes with the decree of the trial Court that the question of exercising powers under O. 41, R. 33, C.Y.C. may arise. This decision of a learned single Judge of this Court is binding upon me. But it is pertinent to note that it is not laid down in this judgment of this Court that the powers under O. 41, R. 33, C.P.C. can never be exercised by the appellate Court if the appellate Court does not interfere with the decree passed by the trial Court. Even the Supreme Court has observed that the rule is expressed in terms, which are very wide. The Supreme Court has, of course, observed that it has to be applied with discretion and ordinarily the question would arise when the appellate Court interferes with the decree of the trial Court. If a party does not file appeal or cross-objections against a decree which is passed against it, then no grievance can be made by that party with regard to that part of the decree and obviously if the appeal filed by the other side is being dismissed by the appellate Court, the question of making any adjustment of the right of the parties will naturally not arise and, therefore, the question of exercising the powers under O. 41, R. 33, C. P.C. also will not arise, now, the illustration, which is given to O. 41, R. 33 C.P.C. and

which is reproduced by me above shows that a suit was filed by the plaintiff claiming a sum of money due to him from X or 'Y' and W claimed a decree against or 'Y' in the same suit. A decree was passed against X only and the suit was dismissed as against 'Y'. Only X appealed impleading 'A' And 'Y' as respondents. The appellate Court, if it came to decide in favour of X has naturally to allow the appeal and dismiss the suit as against 'X'. In such a situation, no question of adjusting the rights between the parties would arise because if 'X' did not appeal against the decree of dismissal of his suit as against 'Y', then he has to thank himself. It can be said that he should have filed an appeal or cross-objection with regard to dismissal, of his suit against 'Y' if he wanted a decree against 'Y' in case. The appellate Court decides in favour of 'X'. The illustration, however, shows that while allowing the appeal of X a decree can be passed against 'Y' in exercise of the power-, under O. 41, R. 33, C.P.'C. Even though no appeal or cross objections have been filed by 'X' as against 'Y'. It cannot be said that by allowing the appeal of X and dismissing the suit against X the appellate Court would be passing any inconsistent- decrees. Hence this illustration does not show that powers under O. 41 R. 33, C. P.C. have to be exercised only when there is possibility of inconsistent decrees or inconsistent opinions of the Court in the same matter. Ordinarily, it is true that the occasion to exercise the powers under O. 41, R. 33 would arise when the appellate Court interferes with the decree of the trial Court and it becomes necessary to exercise the powers for adjustment of the rights of the parties and to see that there is no inconsistency between the conclusion of the trial Court and the District Court on account of interference with the decree passed by the trial Court. But one thing is certain that it is nowhere laid down that in no case powers under O. 41, the appellate Court while dismissing the appeal can exercise R. 33. I may mention here even at the cost of repetition that as observed by the Supreme Court in the case of *Nirmala Bala* : [1965]3SCR550 (supra), the appellate Court cannot exercise the powers under O. 41, R. 33 simply because it does not agree with the opinion of the Court appealed from. But even then it does not mean that in no circumstances the powers can be exercised while dismissing the appeal.

9. There are two decisions of this Court wherein it appears that the powers under O. 41, this Court while dismissing the appeal even though the party in whose

favour the powers were exercised had not riled any appeal or cross-objections exercised R. 33.

10. In the case of Bharatbhai Kasturchand Shah v. Mafatbhai Bababhai Makwana, (1979) 20 Guj 1LR 517, a learned single Judge of this Court exercised these-powers. Under O. 41, R. 33, C.P.C. It was an appeal arising from a decision of the Motor Accident Claims Tribunal whereby the Tribunal had passed an award against the driver and the employer only, while the claim was dismissed as against the Insurance Company and respondent No. 4 the owner of the vehicle, opponent 2 having purchased the vehicle from opponent 4. An appeal was filed by-the original opponents 1 and 2 in the High Court. While hearing that appeal the learned single Judge of this Court reached the conclusion that the Tribunal had not committed any error in awarding compensation against opponents 1 and 2 and hence the appeal was required to be dismissed, It was contended before the learned single Judge of this Court that the Tribunal had erred in not passing an award against the original owner and the Insurance Company. It was contended on behalf of original opponents 3 and 4 that no appeal or cross objections were filed against them and, therefore, the High Court cannot interfere and pass an award against them. This contention was negatived by this Court and the award was directed to be modified by making original opponents 3 and 4 also liable for the claim, while dismissing the appeal. This prima facie shows that even while dismissing an-appeal the appellate Court can exercise powers under O. 41, R. 33, 1 may observe however here that I have gone through the original record of this appeal and it appears that even though the original claimants did not file any appeal or cross-objections as regards the dismissal of their claim against opponents 3 and 4, original opponents 1 and 2 who had filed the appeal against the award passed against them had raised a contention in their Memo of Appeal that the Tribunal had committed an error in not passing an award against opponents 3 and 4. When such a contention was raised by the original opponents 1 and 2 in the Memo of Appeal, it can be said that the Court, though technically was dismissing the appeal, was partly allowing the appeal by making the original opponents 3 and 4 also liable for the claim. It cannot be disputed that original opponents 1 and 2 were entitled to contend that even if the award passed against them was maintained, opponents 3 and 4 should also be made liable for the claim.

That way, it can be said that there was an appeal even as regards dismissal of the claim against opponents 3 and 4, though the appeal was not by the original claimants but by the original opponents 1 and 2. That way, this case can be distinguished on its own facts. I may, however, add here that the learned single Judge of this Court did not take the view that because there was an appeal by opponents 1 and 2 who had raised a contention about the liability of opponents 3 and 4, he was party allowing the appeal. Such a contention also does not appear to have been advanced before him. It, on the contrary, clearly appears that the learned single Judge exercised the powers under O. 41, R. 33 bearing in mind that there was no appeal or cross-objections filed by the original claimants as regards dismissal of the claim as against opponents 3 and 4. In fact, the learned Judge has referred to and relied upon the decision of the Supreme Court in the case of *Parma Lal v. State of Bombay* : [1964]1SCR980 (supra).

11. In *Gujarat State Road Transport Corporation v. Malubai Menand*, (1980) 21 Guj LIZ 400, it appears that there was a collision between a truck and a bus of the Gujarat State Road Transport Corporation and the claimants had filed claim petitions impleading the drivers of both the vehicles as also owners of both the vehicles as well as Insurance Company as opponents in the claim petitions. It appears that the petition was dismissed as against the Insurance Company. No appeal or cross-objections were filed by any one as regards the dismissal of the claim against the Insurance Company. The appeals filed by the Gujarat State Road Transport Corporation came up for hearing before a Division Bench of this Court. The Division Bench agreed with the conclusions reached by the Motor Accident Claims Tribunal that drivers of both the vehicles were negligent as a result of which this incident took place and that the drivers of both the vehicles and owners of both the vehicles were liable for the claim of the petitioners. The High Court, of course, came to the conclusion that the amount awarded by the Tribunal was required to be enhanced and accordingly enhanced the amount of compensation. It was contended before the Division Bench that even though there was no appeal or cross-objections with regard to dismissal of the claim petitions as against the Insurance Company, an award might be passed against the Insurance Company also in exercise of the powers under O. 41, R. 33 because the Insurance Company was liable. It appears that the deceased persons were traveling as paid

passengers in the truck, which was involved in this incident, and hence the Tribunal disallowed their claim. There were appeals of 1974 and hence it is clear that the Tribunal decided the claim petitions sometime in the year 1973 or 1974. A Full Bench of this Court decided First Appeal No. 403 of 1975 on 4th May 1978 and that case is reported in *Ambaben v. Usmanbhai Amiramiya Sheikh* : AIR1979 Guj9 . The aforesaid decision of the Full Bench clearly laid down that if passengers are carried gratuitously in a goods vehicle, the Insurance Company would not be liable to answer the claim of compensation. But if, on the other hand, passengers are carried for hire or reward in the goods truck, the Insurance Company will be answerable for the claim arising out of the injuries caused to such passengers as a result of the accident. This decision was thus rendered after the Tribunal rendered the decision but before the First Appeals were decided by this Court in April 1979. This Full Bench decision of this Court was cited before the Division Bench of this Court which decided these First Appeals. It was contended before the Division Bench that there was neither any appeal nor cross-objections by the claimants raising a contention that the Insurance Company was liable and, therefore, the question of passing any award against the Insurance Company did not arise. This contention was negated by the Division Bench observing that there was a twofold answer to the said submission. It appears that the claimants in that matter had filed cross-objections challenging that part of the award which was against them in both the appeals. I have looked into the original cross-objections and it appears that the cross objections were only with regard to the quantum and not with regard to the liability of the Insurance Company. In view of this, it can be said that though there were cross-objections filed by the original claimants, they were only with regard to the quantum and not with regard to the liability of the Insurance Company. There were thus no cross-objections with regard to the liability of the Insurance Company. The Division Bench of this Court observed that it was true that the claimants had not taken specific contentions regarding the liability of the Insurance Company in their cross-objections but it would be an additional ground which can certainly be permitted as a pure question of law as emerging from the aforesaid Full Bench decision. The Division Bench also observed that the second answer to the contention of the learned Counsel for the Insurance Company was that the appellate Court can certainly go into the question

about the liability of the Insurance Company to pay compensation in exercise of the powers under O. 41, R. 33, C.P.C. It is thus clear that even though no appeal or cross-objections were filed by anyone raising a contention that the Insurance Company was liable, this contention was allowed to be raised by the Division Bench even while dismissing the appeals filed by the Gujarat State Road Transport Corporation very probably because of the, Full Bench decision which was rendered pending hearing of the two appeals.

12. Now, in the present case, there were decisions of this Court prior to the decision of the Full Bench of this Court rendered on 24-6-1976 that a tenant inducted by a mortgagee was entitled to protection of the Rent Act. In view of this, the original plaintiffs will naturally be satisfied with the decree of symbolic possession passed by the trial Court and they would naturally not think of filing any appeal or cross-objections. The decision of the Full Bench was rendered on 24-6-1976. That was after the decision of the trial Court which was rendered in the year 1974 and pending the appeal before the District Court, which was filed on 17-6-1974 and decided on 25-4-1977. There was thus change in law as laid down by this Court with regard to the rights of a tenant inducted by a mortgagee in possession. The question is whether in spite of this change in declaration of law in this regard by this Court, it can be urged while dismissing the appeal of the mortgagee that powers under O. 41, R. 33 cannot be exercised and should not be exercised simply because the original plaintiffs had not filed any appeal or cross-objections with regard to the dismissal of their claim for actual physical possession. In my opinion, in such a situation, powers under O. 41, R. 33, C.P.C. can always be exercised even while dismissing the appeal. It is settled law that an appellate Court can take into account and is bound to take into account change in circumstances or change in law pending the appeal. In the case *Giani Ram v. Ramji Lal* : [1969]3SCR944, it has been held that the expression 'which ought to have been passed used in O. 41, R. 33 C.P.C.' means 'which ought in law to have been passed'. It is laid down therein that if the appellate Court is of the view that any decree which ought in law to have been passed, but was in fact not passed by the subordinate court, it may pass or make such further or other decree or order as the justice of the case may require.

13. 'In the case of P. Venkateswarlu v. Motor& General Traders : [1975]3SCR958 , the Supreme Court has observed that for making the right or remedy claimed by the party just and meaningful as also legally and factually in accord with the current realities, the court can, and in many cases, must, take cautious cognisance of events and developments subsequent to the institution of the proceeding provided the rules of fairness, to both sides are scrupulously obeyed& It has further observed therein that where, during the pendency of a proceeding under Rent Control legislation by the landlord for permission to evict the tenants, a subsequent event in the facts of the case takes place which has a material bearing on the landlord's right to evict, the approach of the High Court in revision, in taking' cognizance of the new development cannot be said to be wrong or illegal. The Supreme Court has observed in that case at para 4 as follows: -

'We feel the submissions are devoid of substance. First about the jurisdiction and propriety vis--vis circumstances which come into being subsequent to the commencement of the proceedings. It is basic to our processual jurisprudence that the right to relief must be judged to exist as on the date a suitor institutes the legal proceeding. Equally clear is the principle that procedure is the handmaid and not the mistress of the judicial process. If a fact, arising after the suit has come to court and has a fundamental impact on the right to relief or the manner of moulding it, is brought diligently to the notice of the tribunal, it cannot blink at it or be blind to events which stultify or render inept the decretal remedy. Equity justifies bending the rules of procedure, where no specific provision or fair play is violated, with a view to promote substantial justice subject, of course, to the absence of other disentitling factors or just circumstances. Nor can we contemplate any limitation on this power to take note of updated facts to confine it to the trial Court. If the litigation pends, the power exists, absent other special circumstances repelling resort to that course in law or justice. Rulings on this point are legion, even as situations for applications of this equitable rule are myriad. We affirm the proposition that for making the right or remedy claimed by the party just and meaningful as also legally and factually in accord with the current realities, the court can, and in many cases must take cautious cognisance of events and developments subsequent to the institution of the proceeding provided the rules of fairness to both sides are scrupulously obeyed.'

The Supreme Court has then referred to a judgment of the Federal Court reported in *Lachmeshwar Prasad Shukul v. Keshwar Lal Chaudhuri* on this point. The Federal Court has observed in that case that the hearing of an appeal under the procedural law of India is in the nature of re-hearing and therefore in moulding the relief to be granted in a case on appeal, the appellate -Court is entitled to take into account even facts and events which have come into existence after the decree appealed against. Consequently, the appellate Court, is competent to take into account legislative changes since the decision in appeal was given and its powers are not confined only to see whether the lower Courts decision was correct according to the law as it stood at the time. when its decision was given.

14. Applying the test laid down in the above case decided by the Supreme Court as also in the case decided by the Federal Court which is referred to by the Supreme Court, it ' can be said that the appellate Court may make such order as the Judge of the first instance 1could have made if the case had been heard by him at the 'date on which the appeal was heard. If the trial Court were to decide the matter at the date on' which the appeal was heard, the trial Court would certainly have passed a decree for physical possession in view of the decision of the Full Bench of this Court that a tenant inducted by a mortgagee is not entitled to protection under the Rent Act on redemption of the property from mortgage. In other words, it can be said that the trial Court, ought in law to have passed a decree for actual possession looking to the Full Bench decision The trial Court had decided the suit after the decision of the Full Bench and that way, it can be said that the appellate Court can pass a decree for actual possession taking note of the Full Bench decision rendered pending the appeal.

15. Now, in some of the cases cited before me., powers under O. 41, R.33, C.P.C. were exercised by the appellate Court even while dismissing the appeal, but in none of those cases specific contention was raised that such powers can never be exercised while dismissing the appeal. I may mention here that neither the decision of the Supreme Court in the case of *Nirmala Bala* : [1965]3SCR550 (supra) nor the decision of this Court in the case of *Rajmal Shamji Bhansali* (1972-13 Guj LR 737) (supra) was cited before the learned single Judge who decided the case of *.Bharatbhai Kasturchand Shah* (1979-20 Guj LR 5 17) (supra) nor before

the Division Bench which decided the case of Gujarat State Road Transport Corporation v. Malubai (1980-21 Guj LR 400) (supra). I may also mention here once again that even in the case of Rajmal Shamji Bhansali (1972-13 Guj LR 737) (supra), it is not laid down that in no case and under no circumstances the powers under O. 41, R. 33 can be exercised while dismissing the appeal. But while searching for some decision directly on this point, I came across a Full Bench decision of the Madras High Court reported in S. M. S. Subramanian Chettiar v. Sinnammal, AIR 1930 Mad 80 1, wherein such a question came up for consideration. It appears that in execution of a money decree obtained by the plaintiff against one Subbiah Pillai, the plaintiff attached the suit properties in October 1913. Subsequently the plaintiff himself purchased the property 'in Court auction on 9th March 1914 and the sale was confirmed on 9th April 1914 and the plaintiff got delivery of property in enforcement of the sale certificate on 2nd December 1914. One Peria Revutha Goundar filed a suit on 19th Nov 1913 to recover money due on his hypothecation bond, making Subbiah Pillai party defendant. The plaintiff who had obtained money decree against Subbiah Pillai and who had attached and purchased the property at Court auction was not made a party to that suit. The defendant of the suit filed by Peria Revutha Goundar, after obtaining the preliminary and final decree himself purchased the property in Court auction on 27th March 1916. On the allegation that the defendant had got into the possession of the property by trespass in May 1916, the plaintiff -of the original Suit No. 650 of 1910 against Subbiah Pillai filed a suit against Peria Revutha Goundar, the plaintiff of original Suit No. 597 of 1913 for redemption of the defendant's mortgage. The defendant pleaded that he was the owner of the property and that the plaintiff was not entitled to redeem. The Court of the first instance decreed redemption by the plaintiff on payment of Rs, 830-8-5 to the defendant. the plaintiff preferred an appeal to the lower Court on the ground that the amount that he was directed to pay for redemption was. too large and that he was entitled to redeem on payment of a smaller amount. At the hearing of the appeal, the learned Subordinate Judge came to the conclusion that the plaintiff was not entitled to any right of redemption at all, and consequently not only dismissed the plaintiff's appeal, but reversed the decree of the first Court in plaintiff's favour and dismissed the suit in toto. A second appeal was filed before

the High Court. It appears that the learned single Judge dismissed that Second Appeal, That judgment of the learned single Judge who dismissed the appeal is reported in S. M. & Subramanian Chettiar v. Sinnammal : AIR1925 Mad266 . It appears from the report of the said case that till the Madras High Court took the contrary view in the case of Chamiyappa Tharagan v. Rama Ayyar, AIR 1921 Mad,10, it was the consist S*tent view of the High Court as reported in Venkata Sitharamayya v. Venkataramayya, (1914) ILR 37 Mad 418 : (AIR 1914 Mad 439), that an attaching decree holder has trot only a right to redeem a mortgage on the attached property, but is also a necessary party to a mortgage suit. As stated in the judgment of the learned single Judge who decided the Second Appeal, the decision in the case of Chamiyappa Tharagan v. Rama Ayyar, AIR 1921 Mad,30 in which a contrary view was taken came to be delivered only shortly before the appeal came to be heard by the learned subordinate Judge, Taking this aspect into consideration, the earned single Judge of the Madras High Court observed that the defendant in that case had not filed any appeal or cross-objections merely because there was about the time, when it was open to him to have filed such an appeal or Memorandum of Objections, a decision of the said High Court' in which it was definitely held by two learned Judges of that High Court that an attaching decree-holder had riot only a right to redeem a mortgage on the attached property, but was also a necessary party to a mortgage-suit and that there was sufficient excuse, or justification in the circumstances, for the defendant-respondent, not having preferred an appeal or Memorandum of Objections, The learned single Judge observed that if such excuse or justification should exist, there is no reason whatever, why an Appellate Court should not exercise its discretion and give legal and logical effect to its finding on a particular question, raised before it and that is what the lower Appellate Court had done in that case. It appears that a Letters Patent Appeal was filed against the decision of the learned single Judge and the Division Bench hearing, the Letters Patent Appeal referred the matter to the Full Bench which decision of the Full Bench is reported in S. M. S. Subramanian v. Sinnammal, AIR 1930 Mad 801 (supra). The discussion made therein also shows that the Full Bench was inclined to take the view that since a decision of the Madras High Court came to be delivered shortly' before the appeal came to be heard by the first Appellate Court, taking a view contrary. to the view which

prevailed till then, there was sufficient excuse and justification on the part of the ' defendant in not filing an appeal or cross-objections and, therefore even while dismissing the appeal of the plaintiff, the first Appellate Court rightly exercised the powers under O. 41, R. 33, C.P.C. even while dismissing the appeal of the plaintiff. While speaking on behalf of the Full Bench. Madhavan Nair, J. reproduced O. 41, R. 33, C.P.C. and illustration to the same and then observed that the object of the rule was clearly to enable the Court to do complete justice between the parties, His Lordship further observed that by the very terms of t4c order, involving as it does an exercise of judicial discretion, the question whether the appellate Court should exercise the powers conferred by them in a particular case would no doubt depend upon the special facts and circumstances of that case, and that the illustration to the rule is a type of one class of cases, which calls for the exercise of the powers conferred by R. 33; but it does not by any means exhaust the class of cases in which the powers of the appellate Court under this rule may be invoked. His Lordship further observed that having regard to the wide language of the rule it is inexpedient to lay down any hard and fast rule regarding the true scope of this provision and that in a proper case the Courts should not hesitate to use the powers conferred upon it by this rule. His Lordship then observed that the basis for the rule may be found in O. 58, R. 4 of the Rules of the Supreme Court in England. His Lordship then observed that in none of the cases brought to their notice has it been laid down that in an appeal preferred by the plaintiff against a portion of the decree the appellate Court has no jurisdiction, in the absence of a cross-appeal or cross-objection, to dismiss the whole suit and that the utmost that the appellate Court is competent to do is to dismiss the appeal. His Lordship has then observed that no doubt, it was remarked by the learned Judges in several decisions that the provision embodied in this rule should be used with care and caution, but that does not mean that the appellate Court has no jurisdiction under it to dismiss the plaintiff's suit in toto. The Court is not bound to interfere in every case in which it has the power to do so and it is in this connection that the question of judicial discretion comes in. There may, no doubt. be cases where no excuse or justification could be found for a party not having preferred an appeal or a memorandum of objections, in which cases justice may not require the exercise of powers under O. 41, R. 33, and the appellate Court will be well advised in not

exercising such powers.

16. It would thus appear from the above discussion that in the present case also the law as laid down by this Court when the trial Court decided the suit was that a tenant inducted by a mortgagee was entitled to protection under the Rent: Act even on redemption of the property from mortgage and that a contrary view was taken by the Full Bench only after the decision of the trial Court was rendered and before the appeal came up for final hearing before the District Court. In a similar situation the Madras High Court took the view that taking into consideration the later pronouncement of the High Court taking a view contrary to the earlier view which prevailed till the trial Court decided the matter, the appellate Court was entitled to exercise the powers under O. 41, R. 33, C.P.C. I see no reason why, applying the ratio laid down in the decision of the Full Bench of the Madras High Court, there should be any impediment in the District Court exercising the powers under O. 41, R. 33, C. P.C. in the present case. I am, therefore, inclined to take the view that even while dismissing the appeal of the original mortgagee, the District Court, in the present case, could have exercised the powers under O. 41, R. 33, C.P.C., even though neither any appeal nor any cross-objections were filed by the original plaintiffs. I may mention here that even though the original plaintiffs could have filed an appeal, so far as their claim for physical possession was rejected by the trial Court, they could not have filed any cross-objection. In an appeal filed by the original mortgagee. They could have filed cross-objections only if an appeal was filed by the tenant challenging the decree even for symbolic possession. But any way, it can be said that the original plaintiffs could have filed an appeal challenging that part of the decree by which physical possession was not decreed in their favour. But, -as stated earlier, there was sufficient excuse for the original plaintiffs in not filing any appeal because they could not have envisaged that a decision will be rendered by this Court pending the hearing of the appeal, which would favour their contention that they were entitled to actual possession.

17. The learned advocate Mr. Y. S. Mankad appearing for the respondents contended that the powers under O. 41, R. 33, C.P.C. were to be exercised subject to the provisions of other statutes. He urged that the decree of the trial Court, so far as it refused to grant actual possession, had become final and any appeal

against that decision would be barred by limitation when the powers under O. 41, R. 33 were to be exercised and, therefore, the powers could not be exercised. Now, if such a view is taken, then in no case powers under O. 41, R. 33 can be exercised because ordinarily when an appeal comes up for final hearing, the period of limitation for filing an appeal or cross-objections would naturally have expired. Power under O. 41, R. 33 have thus to be exercised ordinarily at a stage when the party in whose favour the powers are to be exercised could not file an appeal or cross-objections on account of the provision of the Limitation Act. There is, therefore, no substance in this contention of Mr. Mankad.

18. Such a contention was raised before the Madras High Court in the case of S. M. S. Subramanian Chettiar v. Sinnammal : AIR1925 Mad266 (supra) based on a decision of the Allahabad High Court reported in Rangam Lal v. Jhandu, (1912) ILR 34 All 32. The learned single Judge who decided the Second Appeal referred to that decision of the Allahabad High Court and observed that no doubt, the learned Judges in that case, state that in the exercise of the powers conferred by O. 41, R. 33 Courts should not lose sight of the other provisions of the Civil P.C. itself, nor the Court fees Act, nor of the law of limitation. The learned single Judge has observed that he cannot agree that that case should be read, as though the learned Judges lay down that the provisions of O. 41, R. 33, Civil P.C., were controlled by such provisions as R. 22 of the same order. The learned single Judge of the Madras High Court regarded the case of Rangam Lal v. Jhandu as only an authority for the position that, in the circumstances of the case before the Court, there having been no excuse or justification for the defendant not having filed any cross-objection or appeal, against a portion of the decree to which he had submitted, the lower Appellate Court erred in exercising the discretion in his favour. His Lordship further observed that the said decision is, at any rate, clear authority for the position that, in any case, in which there are grounds justifying a party in not filing an appeal or Memorandum of Objections, judicial discretion may properly be exercised in his favour. I am in respectful agreement with the view taken by the learned single Judge of the Madras High Court in the above case, which view has been upheld by a Full Bench of the same High Court. The Full Bench, speaking through Madhavan Nair, J. also referred to the decision in Rangam Lal v. Jhandu (supra) and then observed that the true purport of that

decision is explained in *Jawahar Bano v. Shujaat Husain Beg*, AIR 1921 All 367 in these words : - 'The Full Bench in that case held that, although the words of O. 41, R. 33 were very wide, And the Judge, strictly speaking, had jurisdiction to pass the decree which he had made (the italics are ours), still there was not a proper exercise of jurisdiction by him in that case. It was pointed out that in a case where there is no sufficient reason for a respondent neglecting either to appeal or to file objections the Court will hesitate before allowing him to object at the hearing of the appeal.'

19. If it is held, as contended by Mr. Mankad, that the provisions of O. 41, R. 33 are controlled by other provisions of the said Code or- the provisions of the Limitation Act or those of the Court-fees Act, then it will not be possible to exercise the powers under O. 41, R. 33 in any case, because apart from any other questions, the question of limitation, as stated by me a little earlier, is bound to arise in every case. If the powers under O. 41, R. 33 were to be controlled by the provisions of the Limitation Act or the provisions of any, other statutes, then the powers conferred by O. 41, R' 33 will be rendered nugatory as they could not be exercised in any case.

20. The discussion made above will go to show that the learned District Judge who heard the appeal was competent to exercise the powers under O. 41, R. 33, C.P.C. in view of the Full Bench decision of this Court, even though he was inclined to dismiss the appeal of the original mortgagee and even though the original plaintiffs had not filed any appeal or cross-objections.

21. The next question is whether this is a fit case in which these powers should have been exercised. The learned advocate Mr. Mankad urged that in case I was inclined to take the view the powers can' be exercised even while dismissing the appeal, then the matter may be remanded to the District Court for considering whether this is a fit case in which the powers should be exercised. He urged that such a course should be adopted so that the tenant may not lose a right of one more appeal to this Court if the decision of the District Court is against him. Now, the question, which arises in the present case, is purely a question of law. The position of law is very clear, as laid down by the Full Bench that a tenant who is

inducted by a mortgagee is not' entitled to protection under the Rent Act after the property is redeemed from mortgage. In the present case, there is no dispute that the mortgagee inducted the tenant. In view of this, I fail to understand as to what purpose would be served by remanding the matter to the District Court for deciding this question. I do not think that the matter should be remanded to the District Court when this Court can decide this question, which is a pure question of law. The ratio of the decision of the Supreme Court in the case of *P. Venkateswarlu v. Motor & General Traders* : [1975]3SCR958 (supra) read with the ratio of the decision of the Federal Court in the case of *Lachmeshwar Prasad v. Keshwar* 1 -1 (supra) clearly shows that the appellate Court should consider as to what view the trial Court would have taken if the trial Court was deciding the matter as on the date on which the appeal was heard. The answer to this question is obvious because if the trial court was deciding the suit on the date on which the first appeal was heard by the District Court, then the trial Court being bound by Full Bench decision of this Court would certainly be bound to pass a decree for actual possession as the tenant, as per the Full Bench decision, was not entitled to any protection.. In view of this, I am inclined to take the view that the District Court ought to have passed a decree for actual possession in favour of the original plaintiffs in the light of the Full Bench decision of this Court, even though the original plaintiffs had not filed any appeal or cross-objections as regards the dismissal of their claim for actual possession.

22. The result of the aforesaid, discussion is that the Second Appeal filed by the original plaintiffs deserves to be allowed and decree for actual possession is required to be passed in favour of the original plaintiffs as against the tenants who were impleaded as defendants in the trial Court.

23. Hence the Second Appeal is allowed, the decree of the trial Court, so far as it ' relates to delivery of symbolic possession only, is hereby modified and it is hereby directed that the original plaintiffs shall be entitled to actual possession of the suit property from all the defendants. Looking to the facts and circumstances of the case, I think it just and proper to leave the parties to bear their own costs of this Second Appeal.

24. Before parting with this case, I am constrained to observe here that the learned District Judge who heard this appeal committed a grave error in not even referring in his judgment to the contention advanced by the learned advocate for the original plaintiffs before him that powers under O. 41, R. 33, C.P.C. may be exercised in the present case. The learned District Judge ought to have referred to this contention and discussed the same and expressed his opinion on this question one way or the other. It was highly improper on his part to have altogether ignored this important submission made before him by the learned advocate for the original plaintiffs. I fail to understand why the learned District Judge in his judgment has not even referred to such an important contention raised by the learned advocate for the original plaintiffs. Whatever submissions are made before the Court have to be referred to in the judgment and have to be dealt with. Even if the Court is inclined to take the view that there is no substance in a particular submission or submissions, then the Court may just refer to the same and say that there is no substance, if it is so obvious. In the present case, the contention based on O. 41, R. 33, which was again supported by a Full Bench decision of this Court, cannot be said to be one which deserved no consideration by the learned District Judge. The learned District Judge ought to have dealt with this submission and discussed the same and expressed his opinion on that question so that this Court would have been in a position to know the views of the learned District Judge on this vital and important aspect of the matter.

25. The learned advocate Mr. Y. S. Mankad who appears for Thacker Hariram Motiram, original defendant 3, at his stage requests that in view of the fact that the decree for actual possession is being passed in this Second Appeal, the tenant Hariram may be given some reasonable time for handing over vacant possession of the suit premises to the original plaintiffs. He submits that a period of about three years may be granted for this purpose. The learned advocate Mr. K. J. Vaidya for the original plaintiffs vehemently opposes this request made by Mr. Mankad and submits that no time should be granted as prayed for. He submits that in any case, not more than about six months' time may be granted. Looking to the facts and circumstances of the case, I am inclined to grant one year's time to the defendant Hariram Motiram to hand over vacant and peaceful possession to the original plaintiffs. He should hand over possession by the end of December

1985. This time is granted subject to his giving an undertaking before this Court within three weeks to the effect that he will not allow any one else to occupy these premises nor will he transfer his rights in the suit premises to anyone nor possession to any one during this period of one year and will hand over peaceful and vacant possession of the suit premises to the original plaintiffs by the time stated above. The undertaking should be given within a period of three weeks. If such undertaking is not given, then the original plaintiffs will be entitled to execute the decree for possession at once.

26. Order accordingly.

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