

Court No. - 19

Case :- SECOND APPEAL No. - 218 of 2015

Appellant :- Mohd.Nafees And Ors.

Respondent :- Waseem And Ors.

Counsel for Appellant :- Mohd.Aslam Khan

Counsel for Respondent :- Rama Pati Shukla,Ahsan Malik,Mamta Chaudhary,Prabhat Kumar Upadhyay

Hon'ble Jaspreet Singh,J.

1. Heard Shri M.A. Khan, learned Senior Counsel along with Shri Mohd. Aslam Khan, learned counsel for the appellants and Shri R.P. Shukla, learned counsel for the respondents.

2. The instant second appeal has been filed by the defendants against the judgement and decree passed by the lower appellate court dated 01.10.2015, whereby the defendants' appeal under Section 96 CPC bearing No.73 of 2013 has been dismissed and the judgement and decree passed by the trial court in R.S. No.289 of 2011 dated 18.09.2013 has been affirmed.

3. This appeal was instituted in the year 2015, but came to be admitted by this Court on 09.08.2017 on the substantial questions of law as framed at serial No.A, B, C, D, E & H in the memo of second appeal, which read as under:-

"A. Whether the lower appellate court was justified in law in dismissing the appeal even without making compliance of the provisions of Order 41 Rule 31 CPC?

B. Whether then non compliance of the mandatory provisions of Order 41 Rule CPC shall vitiate the judgement and make it wholly void?

C. Whether it was the duty of the court of first appeal to record its finding only after dealing with all issues of law as well as of fact and with the evidence oral as well as documentary led by the parties and must give reason in support of its finding and failure to do so vitiates judgement passed?

D. Whether Mohd. Saleem alias Putti left behind not only his sons and daughters respondents Nos.1 to 3 but also Mohd. Usman and Smt. Bibi his father and mother who are also an heir under the Muslim Law, the learned court below were justified in law in decreeing the suit ignoring the fact that the suit was bad for non joinder of necessary parties?

E. Whether the Regular Suit No.1136 of 2011 filed by the respondents for cancellation of the will in the court of Civil Judge Junior Division South Court 24, Sultanpur having got dismissed as withdrawn the subsequent suit i.e. Regular Suit No.289 of 2011 filed by the respondents for declaration that the will is void, was maintainable and the learned court below were justified in law in decreeing the suit?

H. Whether Smt. Chunni alias Asma Bano respondent No.4 who had already been divorced, the learned court below were justified in law in holding that she is the wife as her name was recorded in electoral roll of 2000 and 2006 in declaring the will to be void, executed by Mohd. Saleem alias Putti in favour of his real brother and nephew."

4. Briefly, the facts giving rise to the instant appeal are being noticed hereinafter, first. The plaintiffs have filed a suit seeking cancellation of a Will said to be executed by Saleem @ Putti, who expired on 24.07.2011 on account of a terminal disease. The contention was that he was not mentally sound and physically disabled on account of disease. The plaintiffs had taken him to Rajiv Gandhi Cancer & Research Institute in Delhi, where he was under treatment. It is only after the death of Shri Putti, the plaintiffs went to get the names mutated, it revealed that the defendants on the basis of an alleged Will said to have been executed by Putti was claiming right and title over the property in question. It was further pleaded that apart from the fact that the Will was bad as the testator was both physically and mentally unwell. However, it was also bad since a Mohammedan testator could not execute the Will of his entire property.

5. The defendants contested the suit and stated that the mental condition of the testator was absolutely fine, though he was under treatment for a terminal disease but that itself cannot cause a cloud over the Will executed by Shri Putti. It is further urged that even otherwise the Will was valid for the reasons that it included certain agricultural properties owned by the testator and in the context with the bhumidhari land, the personal law is not applicable and it is governed by the special act that is U.P. Z.A. & L.R. Act, 1950, where there is no embargo for a Mohammedan to execute a Will.

6. On the basis of the pleadings, the trial court had framed 8 issues. However, the important issued upon which the suit was contested was (i) whether the Will executed by Shri Putti was liable to be declared void and cancelled in the light of the averments made in the plaint; (ii) whether the suit was time barred; (iii) whether the suit was maintainable and (iv) whether the suit was barred by Section 34 and 41 of the Specific Relief Act, 1963.

7. The parties led their respective evidence and the trial court by means of its judgement and decree dated 18.09.2013 decreed the suit and declared the Will dated 21.06.2011 as void.

8. The defendants being aggrieved against the judgement and decree dated 18.09.2013, preferred a regular civil appeal bearing No.73 of 2013, which came to be heard by the ADJ,

Court No.3, Sultanpur, who also dismissed the appeal by means of the judgement and decree dated 01.10.2015. It is in the aforesaid backdrop that the defendants have approached this Court in the instant second appeal.

9. From the perusal of the substantial questions of law as noticed herein-above, it would be found that primarily the substantial questions of law, which are six in number, out of which three have been framed relating to the compliance of the Order 41 Rule 31 CPC, whereas the remaining three are in respect of the merits of the controversy. This Court finds that it would first be proper to consider the three substantial questions of law, which arise for the compliance of Order 41 Rule 31 CPC and in case if the Court does not find favour with it, only then the three substantial questions of law on merit shall be considered. This course has adopted for the reasons that in case if the compliance of Order 41 Rule 31 of CPC is not made, then the matter would have to be remitted to the lower appellate court for decision afresh and in such cases if three questions of law on merit are answered by the Court then the exercise before the lower appellate court would be futile and it would unnecessarily impact the hearing of the appeal on merits.

10. It is in the aforesaid backdrop that the Court notices the some decisions of the Apex Court in this regard, namely, **Santosh Hazari v. Purushottam Tiwari, (2001) 3 SCC 179 and Sudarsan Puhan Vs. Jayanta Mohanti and others 2018 (10) SCC 552.**

11. In **Santosh Hazari** (supra), the Apex Court has held as under:-

"The question whether in a particular case there has been a substantial compliance with the provisions of Order 41 Rule 31 CPC has to be determined on the nature of the judgment delivered in each case. Non-compliance with the provisions may not vitiate the judgment and make it wholly void, and may be ignored if there has been substantial compliance with it and the second appellate Court is in a position to ascertain the findings of the lower appellate Court. It is no doubt desirable that the appellate court should comply with all the requirements of Order 41 Rule 31 CPC. But if it is possible to make out from the judgment that there is substantial compliance with the said requirements and that justice has not thereby suffered, that would be sufficient. Where the appellate court has considered the entire evidence on record and discussed the same in detail, come to any conclusion and its findings are supported by reasons even though the point has not been framed by the appellate Court there is substantial compliance with the provisions of Order 41 Rule 31 CPC and the judgment is not in any manner vitiated by the absence of a point of determination. Where there is an honest endeavour on the part of the lower appellate court to consider the controversy between the parties and there is proper appraisal of the respective cases and weighing and balancing of the evidence, facts and the other considerations appearing

on both sides is clearly manifest by the perusal of the judgment of the lower appellate court, it would be a valid judgment even though it does not contain the points for determination. The object of the Rule in making it incumbent upon the appellate court to frame points for determination and to cite reasons for the decision is to focus attention of the Court on the rival contentions which arise for determination and also to provide litigant parties opportunity in understanding the ground upon which the decision is founded with a view to enable them to know the basis of the decision and if so considered appropriate and so advised to avail the remedy of Second Appeal conferred by Section 100 CPC."

12. The Apex Court in **Sudarsan Puhan** (supra) held as under:-

"27. In **H.K.N. Swami v. Irshad Basith**, (2005) 10 SCC 243, this Court (at p. 244), this Court stated as under: (SCC page 244, para-3)

"3. The first appeal has to be decided on facts as well as on law. In the first appeal parties have the right to be heard both on questions of law as also on facts and the first appellate court is required to address itself to all issues and decide the case by giving reasons. Unfortunately, the High Court, in the present case has not recorded any finding either on facts or on law. Sitting as the first appellate court it was the duty of the High Court to deal with all the issues and the evidence led by the parties before recording the finding regarding title."

28. Again in **Jagannath v. Arulappa & Anr.**, (2005) 12 SCC 303, while considering the scope of Section 96 of the Code, this Court (at pp. 30304) observed as follows: (SCC para 2)

"2. A court of first appeal can reappreciate the entire evidence and come to a different conclusion....."

29. Again in **B.V Nagesh & Anr. vs. H.V. Sreenivasa Murthy**, (2010) 13 SCC 530, this Court taking note of all the earlier judgments of this court reiterated the aforementioned principle with these words:

"3. How the regular first appeal is to be disposed of by the appellate court/High Court has been considered by this Court in various decisions. Order 41 CPC deals with appeals from original decrees. Among the various rules, Rule 31 mandates that the judgment of the appellate court shall state:

(a) the points for determination;

(b) the decision thereon;

(c) the reasons for the decision; and

(d) where the decree appealed from is reversed or varied, the relief to which the appellant is entitled.

4. The appellate court has jurisdiction to reverse or affirm the findings of the trial court. The first appeal is a valuable right of the parties and unless restricted by law, the whole case is therein open for rehearing both on questions of fact and law. The judgment of the appellate court must, therefore, reflect its conscious application of mind and record findings

supported by reasons, on all the issues arising along with the contentions put forth, and pressed by the parties for decision of the appellate court. Sitting as a court of first appeal, it was the duty of the High Court to deal with all the issues and the evidence led by the parties before recording its findings.

The first appeal is a valuable right and the parties have a right to be heard both on questions of law and on facts and the judgment in the first appeal must address itself to all the issues of law and fact and decide it by giving reasons in support of the findings. (Vide Santosh Hazari v. Purushottam Tiwari, (2001) 3 SCC 179 at p. 188, para 15 and Madhukar v. Sangram, (2001) 4 SCC 756 at p. 758, para 5.) 5. In view of the above salutary principles, on going through the impugned judgment, we feel that the High Court has failed to discharge the obligation placed on it as a first appellate court.

In our view, the judgment under appeal is cryptic and none of the relevant aspects have even been noticed. The appeal has been decided in an unsatisfactory manner. Our careful perusal of the judgment in the regular first appeal shows that it falls short of considerations which are expected from the court of first appeal. Accordingly, without going into the merits of the claim of both parties, we set aside the impugned judgment and decree of the High Court and remand the regular first appeal to the High Court for its fresh disposal in accordance with law."

30. The aforementioned cases were relied upon by this Court while reiterating the same principle in State Bank of India & Anr. vs. Emmons 15 International Ltd. & Anr., (2011) 12 SCC 174 and Uttar Pradesh State Road Transport Corporation vs. Mamta & Ors. (2016) 4 SCC 172."

13. After having noticed the exposition of law as extracted from the two decisions of the Apex Court and if same is applied to the present case at hand, this Court finds that the judgement delivered by the lower appellate court dated 01.08.2015 clearly falls foul of the ratio as laid down by the Apex Court in the case of **Santosh Hazari** (supra) and **Sudarsan Puhani** (supra). Something, which strikes at the face of the judgement is that the lower appellate court while exercising powers under Section 96 of CPC exercises co-existence power with that of the trial court and all issues of fact and law are open before it. In the instant case, not only the lower appellate court has not framed any point for determination, but it has not even discussed the issue, which has been raised by the parties regarding the fact whether the Will executed by Putti was valid and it has been duly attested and executed. The trial court had given reasons. Even though, learned counsel for the appellants submits that the reasons were quite inadequate and they were bogus reasons for decreeing the suit. None of the aforesaid facts, arguments and evidences have been considered by the lower appellate court and in a cursory manner. It has referred to the judgement of the trial court and held that the lower appellate court concurs with the findings of the trial court.

14. Apparently, this is not a manner, in which a first appeal, which is a valuable right in the hands of the parties is to be considered and decided. It was incumbent upon the lower appellate court to have noticed the submission of learned counsel for the parties, frame the point for determination, which fell for consideration of the lower appellate court and thereafter ought to have referred to the facts and evidences, which was pointed out and in case if it concurred with the findings of trial court it should have been given his reasons and in case if it differed then it ought to have met with the reasons recorded by the trial court and they by given his reasons as to why it differed it then should record its own conclusion. Unfortunately, the same has not been done and, therefore, this Court at this stage, without entering into the substantial question of law, which has been framed on merit, is of the clear opinion that the judgement and decree dated 01.10.2015 passed by ADJ, Court No.3, Sultanpur cannot be sustained and is set aside on the aforesaid grounds only.

15. The matter shall stand remitted to the lower appellate court, where the parties shall appear on 11th December, 2023.

16. Lower appellate court upon receipt of the record and after the appearance of the parties on 11th December, 2023, shall afford reasonable opportunity of hearing to the parties concerned and decide the appeal afresh within a period of eight weeks thereafter.

17. The record of the court below be remitted forthwith.

18. With the aforesaid, the instant second appeal is **allowed** to the aforesaid extent. The judgment and decree passed by the lower appellate court dated 01.10.2015 passed in Civil Appeal No.73 of 2013 is set aside. In the facts and circumstances, there shall be no order as to costs.

Order Date :- 20.11.2023

Ashutosh Pandey