

drp

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

SECOND APPEAL NO.383 OF 1990

Khaja Mohiuddin Sk. Azam
(Since deceased) Through L.Rs.

APPELLANTS

- 1-i) Khaja Imran s/o Khaja Mohiuddin
Age-32 years, Occ- Business
 - 1-ii) Khaja Salman s/o Khaja Mohiuddin
Age-30 years, Occ – Business
 - 1-iii) Mrs. Arjuman Ara d/o Khaja Mohiuddin,
Age-25 Years, Occ – Housewife
 - 1-iv) Khaja Farman s/o Khaja Mohiuddin
Age-22 years, Occ – Student
 - 1-v) Miss Oneaza Jamal d/o Khaja Mohiuddin,
Age-15 years, Occ – Student
- All R/o Ranmastapura,
House No. 4-10-67, Aurangabad

VERSUS

Waheeda Begum w/o Syed Abdul Latif Nehri
(Since deceased) through L.Rs.

RESPONDENTS

- 1-i) Fayyaz Nehri s/o Abdul Latif Nehri,
Age-50 years, Occ – Business,
R/o Takiya Shah Ali Nehri,
Ajabnagar, Aurangabad
- 1-ii) Azharuddin @ Azim Nehri s/o
Abdul Latif Nehri,
Age-45 years, Occ - Business
R/o Takila Shah Ali Nehri,
Ajabnagar, Aurangabad
- 1-iii) Allauddin Nehri s/o Abdul Latif Nehri
Age-40 years, Occ - Business

R/o Takila Shah Ali Nehri,
Ajabnagar, Aurangabad

1-iv) Ruquiya Nehri w/o Azhan Abedi d/o
Abdul Latif nehri,
Age-36 years, Occ - Household
R/o Takila Shah Ali Nehri,
Ajabnagar, Aurangabad

1-v) Baby d/o Abdul Latif Nehri,
Age-33 years, Occ - Household
R/o Takila Shah Ali Nehri,
Ajabnagar, Aurangabad

.....
Mr. K. G. Khader, Advocate for the appellants
Mr. A. D. Kasliwal, Advocate for respondents
.....

[CORAM : N. W. SAMBRE, J.]

DATE : 15th JANUARY, 2015

ORAL JUDGMENT :

1. Heard respective parties.
2. The appellant – original plaintiff based his suit for perpetual injunction on sale deed dated 30th March, 1986 executed by Smt. Abbasibegam Syed Imamuddin Nehri. Suit property consists of plot bearing CTS No. 14271 admeasuring 78 square meters. Appellant – plaintiff claimed in the suit a decree for perpetual injunction restraining the defendant, her family members and agents from interfering with possession over the suit property, situated at Takiya Shah Ali Nehri, Ajab Nagar,

Aurangabad.

3. The suit was contested by the sole defendant, by filing written statement at Exhibit-12, thereby denying the sale deed and alleged that the plaintiff-appellant has got his name entered into city survey record with collusion of city survey authorities, in relation to which proceedings before the appellate forum were pending. It is further claimed by the defendant that the plaintiff was not in possession of the suit house.

4. Learned trial court, having regard to the pleadings, issues framed and the evidence brought on record, decreed the suit and ordered that the defendant, her relatives agents and servants are restrained from interfering in possession of the plaintiff over the suit property. Said decree came to be passed on 30th June, 1987, by 7th Joint Civil Judge, Junior Division, Aurangabad, against which the respondent – defendant preferred Regular Civil Appeal No.213 of 1987.

5. Third Additional District Judge, Aurangabad, vide his judgment and order dated 30th August, 1990, has allowed the appeal and dismissed the suit by setting aside the judgment and order dated 30th June, 1987, passed in Regular Civil Suit No. 361 of 1986. As such, the present second appeal.

6. Mr. Khader, learned counsel for the appellant, submits that amongst other, least that was expected of the lower appellate court was to give reference to the provisions of Order XLI, Rule 31 of the Civil Procedure Code while deciding the appeal. He urged that under the above referred provision of Civil Procedure Code, it was incumbent on the part of learned lower appellate court to frame points for determination and to offer opportunity thereof to the respective parties. He has invited my attention to the point for consideration framed by the learned lower appellate court, which reads thus -

"Whether the impugned order of the learned Trial Judge dated 30th June, 1987 in Regular Civil Suit No. 361 of 1986 requires any interference."

7. He submits that the Bombay High Court has time and again deprecated such approach of first appellate court and has sought to rely upon judgment in the matter of **"Smt. Anita M. Harretto V. Abdul Wahid Sanaullah"** reported in **AIR 1985 Bombay 98**. He further urged that once there is sale deed executed in favour of present appellant, suit for simplicitor injunction is very much tenable, as the appellant need not to ask for declaration to that effect. In addition to above, he submits

that the defendant has given certain admissions in the evidence, which should have been read to the detriment of the defendant, however, the lower appellate court has failed to take the same into account, in view of the fact that the plaintiff is required to establish his case independently.

8. Mr. Kalsilwal, learned counsel for the respondent-defendant, has urged that the the lower appellate court has rightly delivered the judgment. He submits that once there is denial of alleged sale deed, it was expected by the present appellant – plaintiff to amend the suit, in the light of provisions of section 34 of the Specific Relief Act. He further urged that the present appeal, as such is liable to be rejected.

9. Having regard to the rival contentions of the parties and having perused the provisions of Order XLI, Rule 31 of the Civil Procedure Code, it is noticed that the learned lower appellate court has misdirected itself while framing points for determination. Only one point, as referred to herein above, has been framed by the learned lower appellate court. In my opinion, said point for determination is not at all permissible in the light provisions of Order XLI, Rule 31 of the Civil Procedure Code. The least that was expected of the lower appellate court was to deal

with the judgment of the trial court independently and if the lower appellate court is of the different view, then to give finding on the points independently. Learned counsel for the appellant was right, in my opinion, in placing reliance on the judgment in the matter of "Smt. Anita V. Wahid" (Supra). Paragraph No. 16 of said judgment is worth referring, which reads thus -

16. In the present case, I have already stated above that the learned Judge when he passed the order on 29th August 1979 directing the tenant to deposit the rent did not either then or thereafter direct the tenant that if he failed to comply with the order which he had made, he would not be entitled to appear in and defend the suit. On the order hand, on a mere report received from the Nazir of the Court, the learned trial Judge straightway proceeded to pass an order striking off the defence of the petitioner. The order is thus patently erroneous and not warranted by the provisions of S. 11(4) of the Bombay Rent Act. As a result of this order, the petitioner was naturally precluded from approaching the learned Judge for asking for leave to defend which he could have done only if the order striking off the defence had been passed pursuant to a direction given under the second part of S. 11(4) of the Bombay Rent Act. The decree passed on such an erroneous exercise of the jurisdiction by the learned trial Judge was liable to be set aside by the learned appellate Judge who, however, approached the case from a totally wrong point of view. If the learned

Judge by framing the point for determination properly had asked himself the right question, namely, as to whether the trial Court was justified in striking off the defence of the petitioner, then I am sure he would have addressed himself to the proper interpretation of section 11(4) of the Bombay Rent Act. Then he would not have confirmed the decree for possession passed by the Court of first instance. Unfortunately the learned Assistant Judge framed the point for determination in such a vague and indeterminate manner that his attention was not brought to bear upon the relevant provision of law subject to which the Court of first instance had passed the impugned order. At this stage I am constrained to invite the attention of the courts below to the provisions of O. 41, R. 31 of the Civil P. C. This provision deals with the judgment of the Appeal Court and it says amongst other things that the judgment shall state the points for determination. When a requirement such as this is insisted upon by the procedural law of the land, one must try to understand the object and scope of this provision. Merely asking the question as to whether the judgment of the Court below is correct, legal or valid is hopelessly an inadequate method of meeting the requirement of this legal provision. I have with dismay noted several times in the judgments of the Appeal Courts below the points for determination being formulated in the following manner :

(1) Is the judgment of the Court below liable to be set aside?

(2) Is the decree of the Court below liable to be interfered with?

(3) Is the decree of the Court below valid?

(4) Is the decree of the Court below proper and legal?

These are some of the ways in which the Courts of first appeal have tended to formulate the points for determination.

10. As such, in my opinion, a case for remand is made out by the learned counsel for the appellant, as the learned lower appellate court has not considered the pleadings, issues and evidence, after framing independent points for its consideration and has proceeded contrary to the scheme of Order XLI, Rule 31 of the Civil Procedure Code.

11. So far as other issues, that is to say, the tenability of suit for simplicitor perpetual injunction and admissions given by the defendant in her cross examination are concerned, this Court is not inclined to go into said aspects, since the matter is being remanded to the lower appellate court for deciding the appeal afresh, in the light of provisions of Order XLI, Rule 31 of the Civil Procedure Code.

12. As such, present second appeal, in my opinion, is liable to

be allowed. Judgment dated 30th August, 1990 delivered in Regular Civil Appeal No. 213 of 1987 by Third Additional District Judge, Aurangabad is hereby set aside and the appeal is restored to the file of learned District Judge, Aurangabad with a direction to decide the same by himself or by assigning it to any other district judge. Having regard to the fact that the claim of the parties is pending since 1986, it will be appropriate to direct the learned lower appellate court to decide the issue involved in the present appeal as expeditiously as possible and in any case within a period of three months from today. Appeal stands allowed in above terms.

[N. W. SAMBRE, J.]