

Shailaja

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 1918 OF 1997

Smt. Kamal Nagnath Katkar & Ors.	]	Petitioners
Vs.		
Ramesh Ganesh Page & Anr.	]	Respondents

.....
Mr. N. J. Patil, for the petitioners.

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CORAM : R.G. KETKAR, J.

DATE : 22nd MAY, 2017.

P.C.

Heard Mr. N.J. Patil, learned Counsel for the petitioners
at length.

2. At the outset, Mr. Patil has fairly stated that he has received letter dated 18th May, 2017 addressed by Mr. Sudhakar Thorat, Advocate appearing for the first respondent. The same is taken on record and marked as 'X' for identification. Mr. Patil submitted that because of the difficulties expressed by Mr. Thorat in the letter, he is unable to attend the proceedings.

3. By this petition under Article 227 of the Constitution of India, the petitioners have challenged the judgment and decree dated 22nd November, 1996 passed by the learned Second Additional District Judge Solapur in Civil Appeal No. 58 of 1991. By that order, the learned District Judge allowed the appeal preferred by the respondents, hereinafter referred to as 'plaintiffs' and set aside the judgment and decree dated 19th November, 1990 passed by the learned Joint Civil Judge Senior Division, Solapur in Regular Civil Suit No. 376 of 1984. Learned District Judge remitted the matter to the trial Court for fresh hearing after giving reasonable opportunity to both the sides and dispose of the suit expeditiously, in any case, within six months from the receipt of the record.

4. The relevant and material facts giving rise to filing of the present petition, briefly stated, are as under:

The plaintiffs have instituted a suit for recovery of possession of one Room admeasuring 15'x10' situate in City Survey No. 8501/2/9 bearing House No. 114/9 situate at Morarji Peth Solapur [for short 'suit premises'] against the defendants, inter alia, contending that husband of defendant No.1 and father of

defendants No. 2 and 3, Nagnath Katkar was monthly tenant of the suit premises. Defendant No.4 was not residing with Nagnath. Defendants No.1 to 3 are heirs of Nagnath. There was open space close to the constructed room. Plaintiff No.1 had leased out it to defendant No.2 where he constructed 4 rooms and garage. Till his death, Nagnath was using it as Dhobighat. After his death, defendant No.4 unauthorizedly and without the express consent of the plaintiffs started using the same. Plaintiffs alleged that defendant No.4 made unauthorized construction of shed without their consent.

5. Plaintiffs further contended that they require the suit property for their own use and occupation. They have submitted plans of the proposed construction to the Corporation and had obtained necessary building permission for construction. Plaintiffs further alleged that defendants No.1 to 3 had not paid rent from 1st January, 1993 to 31st May, 1993. The plaintiffs issued notice terminating their tenancy by the end of 31st May, 1993. In short, plaintiffs have instituted suit for eviction under Sections 12, 13 (1) (b), 13 (1) (i) and 13 (1) (g) of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 [for short 'Act'].

6. Defendants No.1 to 4 resisted the suit by filing written statement at Exhibit 17. They denied all the material allegations of the plaintiffs. Defendant No.4 contended that he is the tenant in the suit property since 1952. He has constructed the shed. Defendant No.4 is independent tenant and his tenancy commences from the first day and ends on the last day of every month. Defendant No.4 is using it as Dhobighat since 1957. Nagnath never enjoyed the same independently since then.

7. On the basis of the pleadings of the parties, learned trial Judge framed necessary issues at Exhibit 18. Learned trial Judge also framed additional issue namely whether defendant No.4/applicant in Misc. Application No. 143 of 1983 proves his tenancy in respect of open space and answered that issue in the affirmative. Parties led evidence. After considering the material on record, by order dated 19th November, 1990, the learned trial Judge dismissed the suit. Learned trial Judge held that plaintiffs failed to prove that defendants No. 1 to 3 are the tenants of the suit premises; plaintiffs failed to prove that defendants are defaulters. Defendants proved that they are ready and willing to pay the rent. Learned trial Judge further held that plaintiffs failed to prove that

defendants erected permanent construction of shop without their consent. Learned trial Judge negated the ground of reasonable and bona fide requirement for the purpose of erecting new building set up by the plaintiffs, as also, the ground that the plaintiffs reasonably and bona fide require the suit premises for personal use and occupation. The learned Judge also answered issue of comparative hardship in favour of defendants.

8. Aggrieved by that decision, plaintiffs preferred appeal. By the impugned order, as indicated earlier, learned District Judge allowed the appeal and set aside trial Court's order. Learned District Judge remitted the matter to the trial Court for fresh hearing. It is against this order, defendants have instituted the present petition.

9. In support of this petition, Mr. Patil has taken me through the trial Court's judgment. He submitted that on the basis of the pleadings of the parties, learned trial Judge framed as many as 10 issues at Exhibit 18. On the basis of the application filed by defendant No.4, he framed additional issue as to whether defendant No.4 proves his tenancy in respect of open space. As

against this, learned District Judge framed only one point viz: whether remand of the suit has become essential. He submitted that having regard to the provisions of Order- XLI, Rule-31 of the Code of Civil Procedure, 1908 [for short 'C.P.C'], learned District Judge should have framed points for determination. The points must cover all important questions involved in the case and points of general and vague nature should not be framed. Failure to frame points as required by Order- XLI, rule-31 resulted in miscarriage of justice by the first Appellate Court. In support of that submission, he relied upon the judgment of this Court in case of Anita Vs. Abdul, 1984 Mh. L. J 931 and in particular paragraph 16 and 17 thereof.

10. With the assistance of Mr. Patil, I have perused the material on record. As noted earlier, learned trial Judge has dismissed the suit. Learned trial Judge held that plaintiffs failed to establish grounds under Sections 12, 13 (1) (b), 13 (1) (i) and 13 (1) (g) of the Act. Learned trial Judge further held that greater hardship will be caused to the defendants in the event of passing of eviction decree. As against this, a perusal of the impugned order shows that in paragraph 14, learned District Judge observed that

plaintiffs came with a specific case that the suit premises were let out to Nagnath Katkar, husband of defendant No.1 and father of defendants No. 2 and 3 and defendant No.4 had no concern of whatsoever nature with the tenancy. As against this, defendant No.4 in the written statement contended that it was not independent tenancy of Nagnath and being real brothers and members of joint family they were in joint possession of the suit premises. On death of Nagnath, defendant No.4 continued to occupy the suit premises as tenant. In that context, learned District Judge observed that it was necessary for the trial Court to find out whether there were two tenancies and that they were distinct or it was a case of single tenancy of joint family consisting of Nagnath and defendant No.4. Learned District Judge referred to money order coupons produced by the plaintiffs at Exhibit 57, as also rent receipts and observed that contents of money order coupons at Exhibit 57 are relevant. Learned trial Judge, however, did not refer to the said documents. Learned trial Judge also ignored rent receipts produced by the plaintiffs on the ground that they were not signed by Nagnath. Learned District Judge observed that rent receipts were from the year 1957 when there was no dispute between the parties. Rent receipts record that rent was paid

towards open site. Though Nagnath is younger brother of defendant No.4, rent receipts were issued in the name of Nagnath. Learned District Judge also observed that the learned trial Judge also did not refer to the contents of money order coupons at Exhibit 58.

11. In paragraph 15, learned District Judge noted that evidence on record show that shed is built in bricks having walls. Reference was also made to the report Exhibit 41 submitted by Inspector to the Corporation which shows that the shed was constructed in bricks having two doors. Learned District Judge, therefore, observed that inquiry should have been made to find out whether it is permanent or temporary construction, more so when defendant No.4 admitted that he did not obtain written permission from the landlord as required by Section 13 (1) (b) of the Act. Learned District Judge also referred to the application filed by the plaintiffs after closure of evidence for appointment of Commissioner for bringing on record condition of the shed as well as its dimensions. Learned trial Judge rejected that application. Learned District Judge thereafter commented upon the finding recorded by the learned trial Judge on point No.4 that the shed of

iron sheet cannot be said to be a permanent construction because it can be removed easily and observed that findings of the trial Court are based upon surmises. The learned trial Judge did not discuss oral as well as documentary evidence for the purpose of finding out whether it is a case of permanent or temporary construction.

12. In paragraph 16, learned District Judge considered the fact that defendants No.1 to 3, wife and sons of Nagnath have not paid rent to the plaintiffs/landlords. If defendant No.4 is held to be not tenant of the suit premises and if it is held that it was Nagnath, who was tenant then the entire complexion of the matter changes.

13. In paragraph 17, the learned District Judge also referred to evidence of the plaintiff where he deposed that he had raised sum of Rs. 63,000/-. Learned District Judge observed that evidence was not properly appreciated in the context of ground under Section 13 (i) of the Act.

14. In para 18, learned District Judge categorically recorded a finding that as the learned trial Judge has recorded

finding ignoring oral as well as documentary evidence, it has become necessary to obtain finding on all the material issues and remand of the suit has become essential. In paragraph 19, the learned District Judge also clarified that learned trial Judge shall decide suit afresh without being impressed by any of the observations made in the judgment as regards merits of the matter.

15. Mr. Patil relied upon the decision of this Court in the case of Anita [supra] and in particular paragraphs 16 and 17 to contend that failure to frame points as required under Order- XLI, rule-31 has resulted into miscarriage of justice at the hands of the First Appellate Court. He submitted that the First Appellate Court being last fact finding Court ought to have complied with the requirements of Order XLI, rule 31 of the C.P.C. In paragraph 16 and 17, this Court observed 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 other 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 section 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 section 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 if 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 has passed the impugned order. At this stage, I am constrained to invite the attention of the courts below to the provisions of Order 41, rule 31 of the Code of Civil Procedure. 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 as 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.

17. This manner ignores that Order 41 rule 31 (a) requires the appellate Court to state in its judgment the points that arise for determination after the arguments are advanced. Asking such vague questions as mentioned above will not lead to the pronouncement of a well considered and reasoned judgment. Imagine a court of first appeal being confronted with the judgment where an issue is framed as to whether the suit of the plaintiff should be decreed. All concerned will be at sea if a suit is decided on similar provision in the earlier Civil Procedure Code, it has been pointed out that the object of the Legislature in making it incumbent on an appellate Court to raise points for determination was to clear up the pleadings and focus the attention of the Court and of the parties on the specific and rival contentions of the latter. The points which must arise for determination by a Court of first appeal must cover all important questions involved in the case and they should not be general and vague. It is a matter of almost textbook knowledge that the exact questions which arise in the appeal and require determination must be stated in the judgment. "It is not sufficient to state the point to be determined in appeal whether or not the decision is consistent with the merits of the case". The point so stated is hardly a point for determination as contemplated in Order 41 rule 31 of the Code. The learned Judges of the Courts of first appeal should not approach the appeals merely from

the point of speedily disposing of the same. The appeals must be also intelligently disposed of after taking note of the arguments advanced, the points arising from the arguments and other material and then deciding those points regularly. A failure to understand the object of the provision such as Order 41 rule 31 (a) of the Code has demonstrably resulted in the instant case in the failure of justice at the hands of the lower appellate Court”.

16. Provisions of Order- XLI, rule-31 were considered by the Apex Court in the case of **Parimal Vs. Veena @ Bharti (2011)**

3 SCC. In paragraphs 21 and 22, it was observed that:

“21.Order XLI, Rule 31 CPC provides for a procedure for deciding the appeal. The law requires substantial compliance of the said provisions. The first appellate Court being the final court of facts has to formulate the points for its consideration and independently weigh the evidence on the issues which arise for adjudication and record reasons for its decision on the said points. The first appeal is a valuable rights and the parties have a right to be heard both on question of law and on facts. (vide: Moran Mar Basselios Catholicos & anr. v. Most Rev. Mar Poullose Athanasius & Ors., AIR 1954 SC 526; Thakur Sukhpal Singh v. Thakur Kalyan Singh & Anr., AIR 1963 SC 146; Santosh Hazari v. Purshottam Tiwari, AIR 2001 SC 965; Madhukar v. Sangram, AIR 2001 SC 2171; G. Amalorpavam & Ors. v. R.C. Diocese of Madurai & Ors., (2006) 3 SCC 224; Shiv Kumar Sharma v. Santosh Kumari, (2007) 8 SCC 600; and Gannamani Anasuya & Ors., v. Parvatini Amarendra Chowdhary & Ors., AIR 2007 SC 2380.

22. The first appellate Court should not disturb and interfere with the valuable rights of the parties which stood crystallised by the trial Court's judgment without

opening the whole case for re-hearing both on question of facts and law. More so, the appellate Court should not modify the decree of the trial Court by a cryptic order without taking note of all relevant aspects, otherwise the order of the appellate Court would fall short of considerations expected from the first appellate Court in view of the provisions of Order XLI, Rule 31 CPC and such judgment and order would be liable to be set aside (Vide B.V. Nagesh & Anr. v. H.V. Sreenivassa Murthy, JT (2010) 10 SC 551)".

17. A perusal of the above extracted paragraphs shows that law requires substantial compliance of Order- XLI, rule-31. The First Appellate Court being the final Court of facts has to independently weigh the evidence on the issues which arise for adjudication and record reasons for its decision on the said points. After perusing the trial Court's judgment, I do not find that the learned District Judge committed any error in remanding the case to the trial Court. The learned trial Judge recorded findings ignoring oral and documentary evidence. Mr. Patil was not in a position to successfully attack the findings recorded by the learned District Judge. In view thereof, reliance placed by Mr. Patil on the decision of Anita [supra] does not advance the case of the defendants. Applying tests laid down in Parimal's case to the facts of the present case, I do not find that learned District Judge has committed any error.

18. I have already extensively dealt with findings recorded by the learned District Judge from paragraphs 14 onwards. At the cost of repetition, it must be said that the learned District Judge held that the learned trial Judge did not satisfactorily decide the case. The learned trial Judge ignored oral as well as documentary evidence on record. It, therefore, became essential to remand the matter to the trial Court for deciding all the issues. For the reasons recorded in paragraphs 14 to 18, I do not find that the learned District Judge committed any error in passing the impugned order. In view of the Apex Court decision extracted hereinabove, I do not find any merit in the submission of Mr. Patil that failure to frame points under Order- XLI, rule-31 has resulted into miscarriage of justice. Hence, no case is made out for invocation of powers under Article 227 of the Constitution of India. Petition fails and the same is dismissed. Rule is discharged. In the circumstances of the case, there shall be no order as to costs. Office shall transmit the R & P to the trial Court forthwith. Order accordingly.

[R.G. KETKAR, J.]