

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

928 SECOND APPEAL NO.240 OF 2018

1. Asaram s/o Deorao Sakalkar,
Since died, through his L.Rs.
- 1A. Smt. Sushilabai w/o Asaram Sakalkar,
Age 65 years, Occupation Household
and Agriculture, R/o Saygaon Tq.
Badnapur Dist. Jalna.
- 1B. Bhagwan s/o Asaram Sakalkar,
Age 39 years, Occupation Agriculture,
R/o Saygaon Tq. Badnapur,
Dist. Jalna.
- 1C. Sau. Shobha w/o Diliprao Harne,
Age 42 years, Occupation Household,
R/o Gajanan Nagar, Ward No.17,
Chikhali Tq. Chikhali Dist.Buldhana.
- 1D. Vishnu s/o Asaram Sakalkar,
Age 41 years, occupation Service,
R/o Saygaon Tq. Badnapur
Dist. Jalna.

...Appellants.

VERSUS

Jayshree w/o Vishnu Sakalkar,
i.e. now Jayshree d/o Suresh Harer,
Age 34 years, occupation Household,
R/o Pachod Tq. Paithan Dist.
Aurangabad.

...Respondents.

...
Advocate for Appellants : Mr. Patil Milind M. (Beedkar)
Advocate for Respondent : Mr. Chandrakant V. Thombre
...

CORAM : SMT.VIBHA KANKANWADI, J.

DATE : 11-04-2019.

ORAL JUDGMENT :

1. Present appeal has been filed by original plaintiffs who had filed Special Civil Suit No.91 of 2008 before Joint Civil Judge, Senior Division, Jalna for cancellation of sale deed and perpetual injunction.

2. What is not in dispute is that, plaintiff No.2 got married to defendant. Plaintiff No.1 is the father of plaintiff No.2 and father-in-law of defendant. Plaintiff No.1 was the owner of agricultural land Gut No.94 admeasuring 1 H 54 R situated at Mauje Saigaon Tq. Badnapur Dist. Jalna. Plaintiff No.2 is serving in Indian Army and used to reside at the place of his posting. Further it is not in dispute that, in the year 2005 the defendant had lodged report against the plaintiffs contending that, they have committed offence punishable under Section 498 A, 323, 504 read with 34 of the Indian Penal Code. After a full fledged trial, the plaintiffs have been acquitted. Further it is not in dispute that, a document of sale deed came to be executed by plaintiffs No.1 and 2 in favour of defendant on 18-08-2008 in respect of land Gut No.94.

3. With these background the plaintiffs had come with a case that, defendant started picking up quarrels with plaintiff No.2 and his relatives and then she used to go to her parental house. After the acquittal of the plaintiffs from the criminal trial, father of the defendant insisted plaintiff No.1 to transfer the suit land in favour of defendant so that he would send her back for cohabitation. Accordingly the father of the defendant had gave threat to the plaintiffs. The plaintiffs further contended that, on 18-08-2008 defendant with her father and other persons from village Pachod had come to the house of plaintiffs in vehicle, they had beaten the plaintiffs and other persons in their house. They had broken the door of house of the plaintiffs, snatched amount of Rs.20000/- from a trunk and took both the plaintiffs forcibly in the vehicle to Badnapur at Sub-Registrar's Office. It is stated that, by giving threats and putting their life in fear, the sale deed has been got executed in respect of land Gut No.94. It is also stated that thereafter plaintiff No.1 had lodged report about the incident. Further his wife had also filed another report with the police station regarding the incident that had taken place at the house. It is stated that, the defendant is trying to dispossess plaintiffs from the suit land. In fact the sale deed in question is not binding on them

and deserves to be cancelled, and therefore, they filed the suit for cancellation of the sale deed as well as permanent injunction.

4. The defendant appeared in the matter, filed written statement. She denied that, any such incident as narrated in the plaint had taken place on 18-08-2008. She has denied that, any criminal force was used as against plaintiffs. She has stated that, at the time of sale deed she was residing with the plaintiffs but due to the dispute she had gone to her parental house. Though the plaintiffs have been acquitted from the complaint under Section 498 A of Indian Penal Code, she had decided to prefer an appeal. The plaintiffs were indebted because of the said prosecution and therefore they had decided to sell the suit land for repayment of those debts. Plaintiffs therefore, requested the father of the defendant to purchase the suit land with the condition not to prefer any appeal and then they could maintain the defendant properly. The said request was accepted by her father and got the sale deed in the name of defendant. It is stated that, since then she is in possession of the suit land as owner and cultivating it. She contends that, the said sale deed is legal and valid, and binding on the plaintiffs. She also contends that, immediately on the next date i.e. on 19-08-2008 the plaintiffs had

beaten her and therefore she had lodged report with police on 28th of August 2008.

5. Taking into consideration these rival contentions, issues came to be framed. Parties have led oral as well as documentary evidence. Taking into consideration the evidence on record, the learned trial Court decreed the suit. It was declared that, the sale deed dated 18-08-2008 is not binding on the plaintiffs and it has been ordered to be cancelled. Consequential relief of permanent injunction has been granted against defendant.

6. Original defendant approached District Court, Jalna by filing Regular Civil Appeal No.159 of 2012. The said appeal has been heard by learned Adhoc District Judge -1, Jalna and after hearing both the sides, the appeal has been allowed. The Judgment and decree passed by the learned trial Court has been set aside by passing the Judgment and decree on 01-02-2018. Now the original plaintiffs are before this Court in this second appeal.

7. Heard learned advocate for Appellants Mr. Patil Milind M. (Beedkar) and learned advocate for Respondent Mr. Chandrakant V. Thombre. Both have argued in support of their contentions.

8. The learned advocate for the appellant submitted that, the first appellate Court has not framed proper points for determination, and therefore, there is absolutely no compliance of Order XLI Rule 31 and Section 96 of Code of Civil Procedure. Only one point has been framed as to whether there is necessity to interfere with the Judgment passed in the original suit. This cannot be said to be the compliance under Order XLI Rule 31 of Code of Civil Procedure. He further submitted that, even the evidence that was adduced by the plaintiffs has not been properly considered by the first appellate Court, when in fact it was considered properly by the trial Court. It appears that, the learned first appellate Court went under wrong assumption and relied on the first information report and has drawn the inference that words without consideration and forcible execution of sale deed are missing in the FIR. The plaintiffs were not denying a fact that, a document was executed on 18-08-2008, however they had come with a specific case that, it was got executed by coercion by taking both the plaintiffs before the Sub-Registrar forcibly, and therefore, when there is no proper appreciation of evidence by the first appellate Court, and there is apparent perversity, definitely the second appeal deserves

admission. In fact the learned advocate for the appellant has made submission that, when in fact there is no proper compliance of Order XLI Rule 31 of Code of Civil Procedure by first Appellate Court, the matter deserves remand.

9. Per contra, the learned advocate appearing for the respondent vehemently submitted that, in fact the learned trial Court had erred in not considering the evidence properly, and therefore, the first appellate Court has properly interfered with the Judgment and decree passed by the trial Court. Though the points have not been taken out yet there is discussion in respect of the evidence that has been led before the trial Court, and therefore, the appellants herein cannot take a technical plea, matter does not deserve remand. Learned Learned advocate for the respondent has relied on the reasons given by the learned first appellate Court to support his submissions.

10. At the outset it requires a consideration that, whether the matter deserves remand and if the answer to that question is in the affirmative, it is not necessary to discuss the other point i.e. whether any substantial question of law has been made out in respect of the appreciation of evidence or other law points involved. Definitely as

regards non-compliance of order XLI Rule 31 of Code of Civil Procedure is concerned, it is also a substantial question of law but it deserves an immediate action if it requires remand.

11. Taking into consideration the narration of the pleadings of both the parties, it can be seen that the trial Court had framed as much as six issues and they have been answered. Therefore, while dealing with an appeal under Section 96 of Code of Civil Procedure, the first appellate Court should have considered the mandatory provision under Order XLI Rule 31 of Code of Civil Procedure. The learned advocate appearing for the appellants has relied on the decision in, *Khatunbi wd/o Mohammad Sayeed and others Versus Aminabai w/o Mohammad Sabir*, reported in 2006 (6) Mh.L.J. 759. wherein it has been observed that,

“The judgment ultimately decides about the rights of the parties and the issue sought to be raised by the adversaries in the litigation. In order to make it known to the litigating parties that the Judge delivering the judgment after considering the rival contentions, the materials placed on record and on application of mind to the same, has decided the matter, the judgment should apparently disclose the points which are considered by the Judge as relevant for considering while dealing with

the matter. This can be revealed from the judgment only when the points for determination are properly formulated by the Court before delivering its decision on the rival contentions of the parties. Being so, it cannot be said to be a mere formality in the course of delivering the judgment upon the adjudication of the rights of the parties in the matter. It is rather a very important stage in the delivery of the judgment by the Court. Being so, it is to be construed as a mandatory requirement to be complied with by the Appellate Court while delivering the judgment. Bare perusal of the impugned judgment discloses that the Single Judge, merely because nobody had appeared on behalf of the respondent in the said appeal, proceeded to dispose of the appeal without complying with the provisions of Order 41, Rule 31. Bare reading of the judgment nowhere discloses that the Single Judge having considered the necessity of formulating the questions which are required to be dealt with in the appeal. It is pertinent to note that when the Appellate Court has reversed the judgment of the trial Court, in such circumstances, it was absolutely necessary for the first Appellate Court to consider what were the points involved in the matter and accordingly formulate the points for determination and then deal with those points with regard to the materials on record. Failure on the part of the Single Judge in this regard clearly warrants setting aside of the judgment and remanding

the matter to the first Appellate Court to consider the appeal afresh in accordance with the provisions of law.”

In this case, the Division Bench of this Court has relied on the decision in, *Santosh Hazari Versus Purushottam Tiwari deceased by L.Rs.*, reported in 2001 (2) Mh.L.J. 786, wherein the scope of powers of appellate Court under Section 96 of Code of Civil Procedure were elaborated. It was observed that,

“The task of an appellate Court affirming the findings of the trial Court is an easier one and the appellate Court agreeing with the view of the trial Court need not restate the effects of the evidence or reiterate the reasons given by the trial Court, expression of general agreement with reasons given by the Court, decision of which is under appeal, would ordinarily suffice, struck a note of caution that “expression of general agreement with the findings recorded in the judgment under appeal should not be a device or camouflage adopted by the appellate Court for shirking the duty cast on it. While writing a judgment of reversal the appellate Court must remain conscious of two principles. The findings of fact based on conflicting evidence arrived at by the trial Court must weigh with the appellate Court, more so when the findings are based on oral evidence recorded by the same presiding Judge who authors the judgment. This certainly does

not mean that when an appeal lies on facts, the appellate Court is not competent to reverse a finding of fact arrived at by the trial Judge. As a matter of law, if the appraisal of the evidence by the trial Court suffers from a material irregularity or is based on inadmissible evidence or on conjectures and surmises, the appellate Court is entitled to interfere with the findings of fact. While reversing a finding of fact the appellate Court must come into close quarters with the reasoning assigned by the trial Court and then assign its own reasons for arriving at a different finding. This would satisfy the Court hearing a further appeal that the first appellate Court had discharged the duty expected of it."

12. It is to be noted that, the learned first appellate Court himself has not framed points for determination. Where in fact Rule 31 of Order XLI specifically states that, the Judgment of the appellate Court shall be in writing and shall state the points for determination. That means it is not expected from the first appellate Court that, it should pick up the issue that has been framed by the trial Court and then give answer to that issue. In the present case, the first appellate Court was aware about the seven issues those were framed by the trial Court and then went on to pick up each issue which was framed by the trial Court for discussion. Such exercise is

not contemplated under Order XLI Rule 31. What is expected is that the first appellate Court should apply its own mind and frame those points for determination which are arising out for determination. While framing those points the first appellate Court is required to consider the pleadings of the parties as well as the evidence to some extent. Therefore, in this case though there is some discussion in respect of evidence by the first appellate Court, it was on the basis of or in relation to the issues those were framed by the trial Court. That cannot be taken as a compliance of mandatory provision of law comprised under Order XLI Rule 31 of Code of Civil Procedure, and therefore, definitely the matter deserves remand for proper determination of points by the first appellate Court and findings or decision to be given on those points.

13. When the matter deserves remand, this Court is restraining itself from making any comment on the merits of the case. Further taking into consideration the fact that the suit was of 2008, and the appeal which was filed in 2012 deserves remand. The only direction that can be given is to expedite the matter. Hence, with these observations following order is passed.

ORDER

- 1) The second appeal is partly allowed.
- 2) The Judgment and decree passed by learned Adhoc District Judge -1, Jalna in Regular Civil Appeal No.159 of 2012 dated 01-02-2018, is hereby set aside.
- 3) The said appeal is restored on the file of learned Principal District Judge, Jalna.
- 4) The learned Principal District Judge, Jalna is directed to expedite the hearing of the appeal and decide it as per law, preferably within six (06) months from the date of receipt of writ.
- 5) Parties to bear their own costs.
- 6) Both the parties are directed to appear before the learned Principal District Judge, Jalna on 3rd June, 2019.
- 7) Record and proceedings be sent back immediately.
- 8) Both the parties are directed to co-operate learned Principal District Judge for expedite disposal of the matter.

(SMT. VIBHA KANKANWADI)
JUDGE

vjg/-.