

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

**SECOND APPEAL NO. 377 OF 2019
WITH
CA/7565/2019
IN
SA/377/2019**

Umashankar s/o Prabhakarappa Tamshette
Age : 32 Yrs., Occ. Agriculture,
R/o : Charthana, Tq. : Jintur,
Dist. Parbhani.

**.... APPELLANT/
[ORI. PLAINTIFF]**

V E R S U S

1. Prabhuappa s/o Mohanappa Tamshette
Age : 56 Yrs., Occ. Agriculture,
R/o : Charthana, Tq. : Jintur,
Dist. Parbhani.

2. Vimalbai w/o Kailasappa Tamshette
Age : 46 Yrs., Occ. H.H. & Agri.,
R/o : Charthana, Tq. : Jintur,
Dist. Parbhani.

3. Komal d/o Kailasappa Tamshette
Age : 24 Yrs., Occ. Nil.,
R/o : Charthana, Tq. : Jintur, **RESPONDENTS/
Dist. Parbhani. [ORI. DEFENDANTS]**

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Mr. M.P.Kale, Advocate for Appellant.
Mr. R.J.Nirmal, Advocates for R – 1.
Mr. D.V.Katneshwarkar, Advocate for R- 2 & 3.

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CORAM : V.L.ACHLIYA, J.

DATE OF JUDGMENT : 21/11/2019

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JUDGMENT :

1. Being aggrieved and dis-satisfied by the Judgment and decree dated 18/12/2018 passed by learned District Judge-3, Parbhani in R.C.A. No.

131/2014 thereby allowed the appeal and set aside the Judgment and decree dated 22/08/2014 passed by learned Civil Judge [J.D.], Jintur, District Parbhani in R.C.S. No. 7/2013, the appellant/original plaintiff has preferred this Second Appeal u/s 100 of Code of Civil Procedure.

2. By order dated 18/11/2019 the appeal has been admitted on satisfaction that the appeal raises following substantial questions of law.

" [i] Whether the impugned Judgment and decree passed by the first appellate Court to reverse the judgment of the trial Court is sustainable in law ?

[ii] Whether the first appellate Court exceeded its jurisdiction in setting aside the Judgment and decree passed by the trial Court ?"

3. Heard learned Advocates representing appellant and respondents. Perused the record and proceedings.

4. Before adverting to deal with the submissions advanced, it is useful to refer few facts leading to filing of appeal. For the sake of convenience the

parties are referred as they are referred and described in the Judgment of trial Court. The appellant/original plaintiff had filed civil Suit bearing R.C.S.No. 7/2013 seeking declaration of ownership of land bearing G.No. 662 admeasuring 55 R. situated at Charthana, Taluka Jintur, District Parbhani [hereinafter referred to as suit property] and further claimed decree of possession of said suit property. Defendant Nos. 1 to 3 though served, failed to appear and file Written Statement. Hence, Suit proceeded ex-parte against defendants. In support of case, the plaintiff has examined himself and further examined four witnesses. The defendants failed to appear and cross examine the plaintiff as well as witnesses examined by plaintiffs. The trial Court has decreed the Suit. Being aggrieved the appellants/original defendant Nos. 2 and 3 preferred appeal before the District Court, Parbhani. They have challenged the Judgment and decree with contention that proper opportunity of hearing was not given to them and urged to remand the case to trial Court for fresh decision. The lower appellate Court set aside the

Judgment and decree passed by trial Court and further dismissed the Suit. Being aggrieved the appellant/original plaintiff has preferred this Appeal.

5. By referring the over all facts of the case, the learned counsel for appellant submits that the respondents/defendants have preferred appeal with contention that the trial Court has decreed the suit without proper opportunity of hearing to them. They have urged for remand of case so as to decide the same afresh. However, lower appellate Court has exceeded its jurisdiction. So also lower appellate Court failed to follow the procedure prescribed under Order XLI Rule 31 of Code of Civil Procedure in deciding the appeal. The points for determination formulated by lower appellate Court to base its Judgment are not in consonance with challenge raised in appeal. The lower appellate Court exceeded its jurisdiction in reversing the findings on facts recorded by lower appellate Court in absence of any case made out to cause interference in exercise of appellate jurisdiction.

6. On the other hand learned counsel for respondent Nos. 2 and 3 supported the Judgment and decree passed by lower appellate Court. It is contended that the reasons and findings recorded by lower appellate Court are based upon due appreciation of pleadings and evidence adduced by plaintiff. It is contended that appeal raises no substantial question of law. The lower appellate Court acted well within exercise of its appellate jurisdiction.

7. I have carefully examined the reasons and findings recorded by lower appellate Court. In my view, the reasons and findings recorded by lower appellate Court are not sustainable in law. It is a classic case of non application of mind on the part of lower appellate Court. Learned Judge has not taken pains even to read the plaint and oral and documentary evidence adduced in the case before reversing the findings on facts recorded by trial Court.

8. If we consider the challenge raised in appeal,

then the Judgment and decree passed by trial Court has been challenged on the ground that proper opportunity of hearing was not given to appellants-defendants and prayed for remand of case to trial Court so as to enable them to file Written Statement. In the memo of appeal, the appellants have raised the grounds as under.

" 3. That findings on point no. 1 is challenged. It is submitted that no doubt the defendant nos. 2 and 3 fails to file written statement, the record discloses that after submitting the amendment, no opportunity was given to file written statement nor the notices were issued to defendant nos. 2 and 3 in pursuance of amended plaint and Court on the basis of earlier 'No W.S.' order had proceeded further, this aspect goes to show a patent illegality on the part of trial Court. Besides this, once the suit is for declaration of ownership with recovery possession in that contingency, irrespective of the fact that the written statement was not submitted but it is for the plaintiff to establish the title over the suit property. It is submitted that plaint contentions disclosed that there appears the partition in between sons and Mohanappa and in partition disputed property was allotted to the heir of Kailasappa who was husband of defendant no. 2 and father of defendant No. 3. The plaint contention also reflects that the father of plaintiff who is defendant no. 1 and late Kailasappa after compromise in presence of respective

parties had executed the sale deed of disputed property in the name of plaintiff. It was also contended by the plaintiff that he had given the property, his maternal uncle had again given disputed property on batai to the defendant nos. 1 to 3 in the year 2009. It was further contended that there was further mutation in the name of defendant nos. 2 and 3 by which the name of plaintiff was deleted from the revenue record. If all these facts as if taken into consideration, it was the bounden duty of the plaintiff to establish earlier partition so as to show that this property in the partition was allotted to the share of Kailasappa as well as Prabhuappa. The plaintiff also required to establish the settlement as contended by way of evidence. Further the sale deed in the hand of the plaintiff was also required to be proved either by examining the attesting witnesses or scribe or vendor, but none of the evidence was produced on record by the plaintiff. The Court below only on the contention raised by the plaintiff, and as there appears no written statement on behalf of defendant nos. 2 and 3 relied the revenue entries and on the basis of 7/12 extract and revenue entries the Court had established the title of the plaintiff. It is submitted that so far as revenue entries are concerned, those are not document of title and this settled principle was also not considered by the trial Court and, therefore, while deciding the point no. 1 the Court below had made observations contrary to law and therefore the finding on point no. 1 needs to be set aside.

5. That the finding on point no. 4 is

challenged. It is submitted that so far as point of written statement is concerned, the defendants who are appellant, they were ready to prepare the written statement but no instructions have been given irrespective of the fact that they appeared through Advocate. The matter is pertaining to immovable property, the appellants are ready to file written statement even before this Hon'ble Court or as directed by this Court to the trial Court within the time stipulated by law so that the matter should be decided on merit and adjudicate finally and effectively. Therefore, the appellants request this Court to remand the matter by giving opportunity to the appellants to file written statement. "

9. Thus, the above quoted grounds raised in appeal neither discussed or decided by lower appellate Court.

10. The lower appellate Court has observed in the Judgment that the trial Court has relied the sale deed, though the contents of sale deed were not proved. Plaintiff has not examined the executent, scribe or attesting witness to prove its contents. Thus, the observations and findings recorded by lower appellate Court are per-se contrary to record and proceeding. The record and proceedings reflects that the plaintiff has examined himself as P.W. 1 and further examined

Dattarao Limbaji Gore [P.W.5], the attesting witness to sale deed and duly proved the contents of sale deed [Exh.38], though suit proceeded ex-parte. Thus, it reflect total non application of mind and mis-reading of important evidence on the part of lower appellate Court.

11. Although the defendants have not filed Written Statement nor adduced any evidence, still the lower appellate Court has observed in its Judgment that in an appeal filed by appellants-defendants the revenue authorities had cancelled those revenue entries. Neither such evidence produced by defendants before the trial Court nor any permission sought to adduce such evidence at the appellate stage. In absence of such evidence brought on record by the defendants reflects the total non application of mind on the part of lower appellate Court. It establishes the Judgment and decree passed by lower appellate Court is totally perverse and not sustainable in law.

12. Perusal of record and proceedings of trial Court

spell out that the plaintiff had filed Suit seeking declaration and possession in respect of suit land. In spite of service of summons, the respondents/defendants failed to appear and file Written Statement. The case proceeded 'without Written Statement' against defendants. On 08/10/2013 the plaintiff has filed affidavit by way of Examination-in-Chief. On 19/11/2014 the plaintiff appeared before learned Judge of trial Court and deposed on oath that the facts stated in his affidavit are true and correct. The note to that effect taken by learned Judge and the affidavit by way of Examination-in-Chief of plaintiff become evidence. It become part of the proceeding. In the affidavit filed, the plaintiff has categorically stated on oath about ownership as well as title to suit land. He has also stated about the act of dispossession committed on the part of defendants as well as creation of bogus partition deed by defendants as well as transfer of suit land in the name of defendant No. 3 by defendant No. 2. Thus, the facts deposed by plaintiff on oath remained unchallenged and uncontroverted. Plaintiff

has examined four witnesses namely Umashankar Prabhakarappa Tamshette [P.W.2], Suresh Malharrao Deshpande [P.W.3], Watchalabai Mohanappa Tamshette [P.W.4] and Dattarao Limbaji Gore [P.W.5]. The plaintiff has examined Dattarao Limbaji Gore as a attesting witness to sale deed executed between Kailasappa Mohanappa Tamshette and Prabhuappa Mohanappa, the original of which is produced at Exh. 37. Dattarao Limbaji Gore [P.W.5] has categorically stated that he has signed the sale deed as a attesting witness. Thus, the testimony of plaintiff and witnesses remain unchallenged.

13. On due consideration of unchallenged and uncontroverted pleadings and the testimony of plaintiff and his four witnesses, the trial Court has decreed the suit in favour of plaintiff. In para nos. 6 and 7, the trial Court has discussed the reasons to decree the suit which reads as under.

" 6. As mentioned earlier the oral evidence adduced by the plaintiff went unchallenged. His said oral evidence is having the support of documents such as 7/12 extract of the suit property [Exh.6],

the sale deed [Exh. 37] it becomes clear that defendant No. 1 has sold the suit property to plaintiff on 12/05/1991. At that time the plaintiff was minor and was under the guardianship of his mother Kamalbai. It is to be noted that the said transaction further converted into passing of mutation entry bearing No. 179 by which the name of plaintiff was entered as the owner of the suit property on the basis of sale deed [Exh. 37].

7. The mutation entry bearing No. 628 [Exh.8] is admittedly set aside by Deputy Collector, Sailu vide his order dated 25/06/2013. Thus, it is clear that the mutation entry on the basis of which the defendants are denying the title of plaintiff over the suit property, at present is not in existence. However, the facts on record clearly goes to show that the defendants by taking disadvantage of the said mutation entry are denying the title of plaintiff over the suit property. The said mutation entry was cloud on the title of plaintiff over the suit property. It is, therefore, necessary to grant relief of declaration of ownership in favour of plaintiff. Besides being a owner of the suit property, the plaintiff is entitled to enjoy its fruits by having its possession over it. Hence, he is also entitled for the relief of possession as prayed. "

14. Thus, the Judgment and decree passed by trial Court prima facie reveals that same was delivered after following the procedure prescribed under law. The decision in the case of ***Habib Patel Shami Patel Vs. Kanij Akhtar Altaf Khan reported in 2010 (3) BCJ***

530 have no bearing upon the facts of the case. There was absolutely no perversity in the Judgment and decree passed by trial Court to call for interference in exercise of appellate jurisdiction by lower appellate Court.

15. The provisions of Order XLI Rule 31 of Code of Civil Procedure provides the guidelines to decide appeal. The Judgment and decree to be passed by appellate Court must reflect that it has decided the issues raised in appeal after considering the material on record. It should not record mere general expression as to the concurrence or dis-agreement with the Judgment of trial Court. The first appellate Court require to formulate points for determination and then base its Judgment on those points. The first appellate Court not only required to formulate proper points for determination to base its decision but also record reasons to support such conclusion on independent assessment of evidence. However, the perusal of Judgment and decree passed by the lower appellate Court prima facie reflect that the lower

appellate Court has failed to follow the procedure prescribed under Order XLI Rule 31 of Code of Civil Procedure in deciding the appeal. As discussed, the appeal was filed with contention that the trial Court has proceeded ex-parte against the defendants and no opportunity of hearing was given to appellant. The appellants-defendants had urged for remand of the case. However, if we consider the Judgment and decree passed by lower appellate Court, then the lower appellate Court neither considered said grounds nor based its Judgment on such grounds raised in appeal.

16. The lower appellate Court has formulated following points for its consideration to deliver the Judgment.

- " 1. *Whether the trial Court rightly held that the plaintiff is owner of the suit property ?*
2. *Whether the trial Court correctly directed the defendants to hand over possession of the suit property to the plaintiff ?*
3. *Whether interference is needed in the trial Court's judgment ?*
4. *What Order ? "*

Thus, the points as quoted above framed to base the Judgment itself reflect that the lower appellate Court has failed to follow the procedure prescribed under Order XLI Rule 31 of Code of Civil Procedure in deciding the appeal. The points formulated itself reflect that the first appellate Court has completely lost its track in deciding appeal based upon challenge raised in appeal.

17. The scope of examination for the lower appellate Court was very limited and confine to test whether under the unchallenged, uncontroverted pleadings and evidence, the plaintiff was entitled for the decree to be passed in his favour. The lower appellate Court was expected to have examined the reasons and findings recorded by trial Court within the limited sphere to find out whether such decree could have been passed in favour of plaintiff under unchallenged and uncontroverted pleadings and evidence adduced in the case. Further the lower appellate Court required to examine whether there was any procedural flaw in passing the ex-parte decree against

the defendants. In stead of deciding the appeal on the grounds raised in appeal, the lower appellate Court mis-directed itself and decided the appeal as if the appellate Court was called upon to appreciate and re-appreciate the rival pleadings and evidence adduced by both sides. In that view, the Judgment and decree passed by lower appellate Court deserves to be set aside.

18. In the result, the appeal deserves to be allowed and the case needs to be remanded to lower appellate Court to decide the appeal afresh. Accordingly, the impugned Judgment and decree passed by lower appellate Court is set aside. The case is remanded back to the lower appellate Court to decide the appeal afresh after giving opportunity of hearing to both sides. The parties to bear their respective costs. Decree be drawn accordingly.

[V.L.ACHLIYA]
JUDGE

KNP.

