

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

**910 SECOND APPEAL NO.527 OF 2015
WITH CA/12217/2015 IN SA/527/2015**

BIBHISHAN NARHARI JOGDAND AND OTHERS

VERSUS

DWARKABAI VITHOBA JOGDAND LRS SUMAN

...

Mr. S.R. Choukidar, Advocate for the appellants

Mr. N.S. Tekale, Advocate for the sole respondent

...

CORAM : SMT. VIBHA KANKANWADI,J.

DATE : 27th MARCH, 2019

PER COURT :

1 Present appeal has been filed by the original defendants challenging the Judgment and Decree passed in Regular Civil Appeal No.18/2014 (old R.C.A. No.17/2008) by Adhoc District Judge-1, Bhoom dated 13.02.2015, whereby their appeal came to be dismissed. In the said appeal, the present appellants had challenged the Judgment and Decree passed in Regular Civil Suit No.113/1996 by Civil Judge Junior Division, Bhoom dated 03.12.2007. The present original respondents had filed the said suit for partition and separate possession in respect of agricultural lands

bearing Gat No.291 admeasuring 04 Hectare 10 Ares, Gat No.293 admeasuring 00 Hectare 98 Ares, House property bearing Grampanchayat No.2-25, 2-9 and 2-10 situated at village Jamb, Tq. Bhoom, Dist. Osmanabad. It was contended by the original plaintiff that the said suit properties are the ancestral properties of her husband and the defendants, who are the relatives of her husband. The defendants have contested the suit and denied that the suit properties are ancestral properties. Defendant No.1 had contended that those are the self acquired properties of himself. The learned Trial Court has decreed the suit and it was held that the original plaintiff has half share in the suit properties. As aforesaid, the said Judgment and Decree was challenged by the defendants in the said appeal and the said appeal has been dismissed.

2 Heard Mr. S.R. Choukidar, Advocate for the appellants and Mr. N.S. Tekale, Advocate for the respondent.

3 The learned Advocate appearing for the appellants has submitted that the substantial question of law involved in this case is, the non compliance of Order 41 Rule 31 of the Code of Civil Procedure by the First Appellate Court. Only one point was framed i.e. Whether the Judgment and Decree under appeal requires any change ? and the finding is given, in the

negative. He also pointed out para No.13 of the impugned Judgment, wherein the learned First Appellate Court simply stated that he has gone through the impugned Judgment, issues and findings and find that the learned Trial Court has properly considered the whole evidence. Except this, there is absolutely no reason assigned though from paragraph No.8 to 12 he has narrated the submissions made by both the parties. He, therefore, submitted that there was absolutely no application of mind by the learned First Appellate Court and therefore, Second Appeal deserves to be admitted. He also prayed that it should be remanded for fresh consideration on the point raised by the appellants in the appeal.

4 Per contra, the learned Advocate appearing for the respondent submitted that he cannot travel beyond the record. The only submission he intended to make was, that the original plaintiff sought partition of her share from the suit properties and the learned Trial Court had granted it, way back in the year 2007, but she was not able to enjoy the fruits of her decree. It appears that during the pendency of the appeal she expired and her legal representative has been brought on record and therefore, he prayed for direction to expedite the matter. The learned Advocate appearing for the appellants has relied on the decision by this Court in Subabai Shivram Patil since deceased through L.R. and others vs. Dharamsing Julalsing Patil

since deceased through L.Rs. and others in Second Appeal No.282 of 2015 decided on 09.01.2019, wherein similar circumstances, when there was no compliance in Order 41 Rule 31 of CPC, this Court has remanded the matter.

5 Perusal of the impugned Judgment by the First Appellate Court, was given clear picture, that there is absolutely no application of mind by the learned First Appellate Court. Though the arguments, those were submitted on behalf of both the parties have been noted, the learned First Appellate Court failed to discuss those points of submission on the basis of evidence adduced, so also any independent assessment of the evidence (documentary as well as oral). It is not the job of the First Appellate Court, only to certify any cryptic words, that whatever decision has been given or whatever evidence has been adduced by the parties has been properly appreciated by the Trial Court. It can be seen that the First Appellate Court has not framed the points for determination as required under Order 41 Rule 31 of CPC and the only point quoted earlier cannot be said to be in compliance with the requirements of law. The First Appellate Court has not considered the ratio laid down in **Khatunbi and others vs. Aminabai, 2006(6) Mh.L.J., 759**, wherein it has been observed :

“5 Order 41, Rule 31 of the Code of Civil Procedure clearly provides that the judgment of the appellate Court shall be in writing and shall state the points for determination, the decision thereon, the reasons for the decision, and where the decree appealed from is reversed or varied, the relief to which the appellant is entitled, and shall at the time that it is pronounced be signed and dated by the Judge or by the Judges concurring therein.

6 Plain reading of the said provision would disclose that the appellate Court before proceeding to deliver the judgment on merits of the case has to formulate the points for determination and with reference to such points for determination, analyse the materials on record and thereupon arrive at the conclusion to be delivered as its decision. Obviously the decision should disclose the reasons for the decision. However, the reasons for decision by themselves cannot constitute the points for determination. The points for determination have to be formulated in order to enable the Court to identify the exact points in controversy in the matter and with reference to those points, the Court has to appreciate the evidence led by the parties. In fact, the law on this aspect has been well settled by the decision of the learned Single Judge of this Court in **Vishwas Balu v. Ghasiram Ramratan Jajum** MANU/MH/0168/1975 : AIR 1975 Bom. 278 wherein it has been held that the compliance of Order 41, Rule 31 is mandatory and the expression used therein “shall state” clearly discloses that the failure to comply with the said provision of law would not be a mere irregularity. Indeed, the phraseology used in Rule 31 apparently discloses that compliance of the said provision is not a mere formality and therefore failure thereof cannot be said to be a mere irregularity. This is also clear from Rule 30 of Order 41 and in particular Sub-rule

(2) thereof. Rule 30(2) of Order 41 provides that “where a written judgment is to be pronounced, it shall be sufficient if the points for determination, the decision thereon and the final order passed in the appeal are read out and it shall not be necessary for the Court to read out the whole judgment, but a copy of the whole judgment shall be made available for the perusal of the parties or their pleaders immediately after the judgment is pronounced.” Obviously, in cases where on conclusion of the arguments in appeal, the judgment is reserved to be delivered and thereafter it is sought to be pronounced, it is not sufficient merely to declare as to whether the appeal is allowed or not, but ultimate decision has to be made known to the parties along with the points for determination which have been considered in the appeal. This provision of law clearly discloses the necessity for formulation of the point for determination before the appellate Court proceeds to deliver the judgment in the appeal.

7 The learned Single Judge of this Court in **Smt. Anita M. Barretto v. Abdul Wahid Sanaullah** MANU/MH/0711/1984 : 1984 **Mh.L.J. 931 : AIR 1985 Bom.98**, while dealing with the necessity of compliance of provisions of Order 41, Rule 31, held that 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 such 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. Further, while referring to the earlier decision in **Mhasu v. Davalat (1905) 7 Bom.L.R. 174**, it was also reminded that there was similar provision in the earlier Civil Procedure Code and it was pointed out that the object of the Legislature in making it incumbent on an appellate Court to raise

points for determination is to clear up the pleadings and focus the attention of the Court and of the parties on the specific and rival contentions in the matter. It was further held that 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 was further held that it is a matter of almost textbook knowledge that the exact questions which arise in the appeal for determination must be stated in the judgment.

8 It is thus clear that right from the beginning of 20th century consistent view taken by this Court is that the provision regarding the requirement of formulation of points for determination by the appellate Court while proceeding to deliver the judgment in appeal has been held to be mandatory in nature and not a mere irregularity.”

6 Further, reliance can be placed on the decision in **Abdul Kadar s/o Mohammad Ibrahim, Second Appeal No.68 of 1991**, decided by this Court on 14.10.2008. In this case also, reliance was placed on the above said decision of **Khatunbi & others vs. Aminabai** and further reliance was placed on **Smt. Anita M. Barretto vs. Abdul Wahid Sanaullah (AIR 1985 Bom. 98)**. In both these above said cases, it was, therefore, held that when there is no proper framing of points in compliance of Order XLI Rule 31 of the Code of Civil Procedure, 1908, the matter deserves to be remanded.

7 In the present case, one of the parties was contending that the
suit properties were the ancestral properties, whereas another party was
contending that it is the self acquired property of defendant No.1. Under
such circumstance, when the decision by the Trial Court was challenged in
the appeal, there ought to have been specific points regarding the nature of
the property and then whether plaintiff had any share in the same. When
such exercise has not been done, which is basically contemplated under
Order 41 Rule 31 of CPC, the matter deserves remand to the First Appellate
Court with direction. Hence, following order.

ORDER

1 The Second Appeal is partly allowed.

2 The Judgment and Decree passed by learned Adhoc District
Judge-1, Bhoom in Regular Civil Appeal No.18/2014 (old R.C.A.
No.17/2008) dated 13.02.2015 is hereby set aside. The said appeal is
restored to the File of learned District Judge-1, Bhoom.

3 Since the appeal was pending since 2008, directions are issued
to learned District Judge-1, Bhoom to expedite the hearing of the appeal.

4 Both the parties should co-operate in early disposal of the
appeal, preferably by not taking adjournments.

5 Learned District Judge-1, Bhoom to complete the hearing and
decide the matter as expeditiously as possible and preferably within six
months from the receipt of writ together with Record and Proceedings.

6 Record and Proceedings be remitted to the First Appellate Court,
immediately.

7 No order as to costs.

8 Needless to observe, that the learned First Appellate Court to
decide the matter as per the provisions of law.

9 Both parties are directed to remain present before the First
Appellate Court on 15.04.2019 and in that event, issuance of notice after
remand, is dispensed with.

10 Interim order in respect of stay to the execution of the Decree
passed by the learned Trial Court to continue till the final hearing and
disposal of the First Appeal.

11 Civil Application also stands disposed of.

(Smt. Vibha Kankanwadi, J.)