

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

910 SECOND APPEAL NO.439 OF 2016

- 1) Mrs. Kusumbai w/o Ashok Pande,
Age 56 years, Occupation Agriculture,
- 2) Smt. Vimal Rama Nhavi,
Age 56 years, occupation Agriculture,
Both R/o. Wakadi Tq. Jamner
Dist. Jalgaon.
- 3) Mrs. Mangalabai Yashwant Nhavi,
Age 56 years, occupation Agriculture,
R/o Loni Tq. Jamner Dist. Jalgaon.

...Appellants.
(Ori.Plaintiffs)

VERSUS

- 1) Satyawan Sukdeo Nhavi,
Age 63 years, occupation Agriculture,
- 2) Eknath Sukdeo Nhavi,
Age 66 years, Occupation Agriculture,
Since Deceased Through Legal Heirs.

Both R/o Wakadi Tq. Jamner
Dist.Jalgaon.
- 2A) Smt. Kesharbai Eknath Nhavi,
Age 55 years, Occupation Household,
- 2B) Ramdhan Eknath Nhavi (Bhidke),
Age 33 years, occupation Agriculture,

Both R/o Wakadi Tq. Jamner Dist.Jalgaon.
- 2C) Sindhubai Prakash Gaikwad,
Age 39 years, Occupation Household,
R/o Dharangaon Tq. Dharangaon
Dist. Jalgaon.
- 3) Ramdas Sukdeo Nhavi,

Since Deceased Through Legal Heirs.

- 3a) Tapabai Ramdas Nhavi,
Age 67 years, Occupation Agriculture,
- 3b) Nandkishor Ramdas Nhavi,
Age 38 years, Occupation Agriculture,
- 3c) Vinod Ramdas Nhavi,
Age 33 years, Occupation Agriculture,

All R/o Wakadi Tq. Jamner Dist.Jalgaon.
- 3d) Kokilabai Baliram Mahale,
Age 36 years, Occupation Household,
R/o Udana, Kailash Nagar,
Surat.
- 3e) Shobhabai Subhash Kshirsagar,
Age 34 years, Occupation Household,
R/o Soygaon Tq. Soygaon
Dist. Aurangabad.
- 3f) Lilabai Rajendra Shelke,
Age 32 years, Occupation Household,
R/o Jamathi Tq. Bodwad Dist.Jalgaon.
- 4) Indubai Devidas Jadhav,
Age 61 years, Occupation Agriculture,
R/o Devalgaon Tq. Jamner
Dist. Jalgaon.
- 5) Kamalbai Pralhad Shinde,
Age 64 years, Occupation Agriculture,
R/o Palaskhede Bk. Tq. Jamner
Dist. Jalgaon.

...Respondents
(Ori.Defendants)

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Advocate for Appellants : Mr. B. R. Warma.
Advocate for Respondents No.1, 3a to 3f, 4 and 5 : Mr. G.
V. Wani holding for Mr. A. V. Rakh.

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CORAM : SMT.VIBHA KANKANWADI, J.
DATE : 10-10-2019.

ORAL JUDGMENT :

1. Present appeal has been filed by the original plaintiffs challenging the concurrent Judgment and decree passed in Regular Civil Suit (RCS) No.237 of 2001 by Civil Judge, Junior Division, Jamner Dist. Jalgaon, dated 01-07-2008, thereby rejecting the partial claim in the suit which has been then confirmed by the learned Principal District Judge, Jalgaon in Regular Civil Appeal (RCA) No.176 of 2008 on 10-04-2015.

2. Common Judgment was passed in RCS No.222 of 2000 and RCS No.237 of 2001 by learned Civil Judge, Junior Division, Jamner on 01-07-2008. Present appellants were the plaintiffs in said RCS No.237 of 2001 which was filed for declaration, injunction and mandatory injunction; whereas the cross suit was filed by present respondents for declaration and possession. The admitted facts were that, plaintiff Eknath and defendants No.2 to 6 in RCS No.222 of 2000, were children of one Sukdeo Sakharam Nhavi. The plaintiffs in the said suit as well as defendant No.6 in that suit, were the children of Sukdeo from his first wife Rambhabai. Rambhabai expired on 31-03-

1956. Thereafter, Sukdeo performed marriage with one Sonabai who had a daughter but she expired in her childhood itself. Sukdeo expired on 30-12-1993. The genealogy has been given by the learned Trial Court in its judgment. Sukdeo has left agricultural land as well as the house property.

3. According to the present respondents, there was no partition in respect of joint family properties by metes and bounds. They contend that, Sukdeo had illicit relation with defendant No.1 Sakhrabai. Plaintiffs in RCS No.237 of 2001 are the children of Sukdeo from Sakhrabai. According to them, the children begotten from said lady are not legal heirs, and therefore, they filed suit for declaration and possession. The present appellants had filed suit contending that, Sukdeo and said defendant No.1 Sakharabai started residing together in one house since 1952-1953 as husband and wife. There was divorce between Sukdeo and Sonabai. Sukdeo and Sakharabai then performed register marriage on 23-05-1962. Present appellant No.2 was born on 01-06-1963. It is stated that, there was partition between Sukdeo and his brother Namdeo and then certain property came to the share of Sukdeo. Out of those properties, Survey No.400/1 and 401 lands and one house was given by Sukdeo to Satyawaan and Ramdas by giving an application to Talathi on 20-

06-1956. Plaintiff No.1 Eknath and defendant No.6 Ramdas had sold agricultural land Gut No.196 admeasuring 1 H 84 R to one Ishwarlal Jain. The present appellants had contended that, the respondents had no right, title or interest over Gut No.318, 43 and 428. As regards other properties also, they have given the account as to how they are only entitled to have those properties. In the nutshell, they have stated that, those properties which are the suit properties in their suit belong to them and since the present respondents were obstructing them, they had filed that suit.

4. Defendants in both the suits have filed respective written statements. They are the contents as against each others' plaint, hence they have not been reproduced again.

5. After the issues were framed, parties have led oral as well as documentary evidence. After considering the evidence on record, as aforesaid both the suits were tried together and decided together. RCS No.222 of 2000 was dismissed; whereas RCS No.237 of 2001 was partly allowed. It was declared that, Sakharabai is the legally wedded wife of Sukdeo. It was held that, only the present appellants No.2 and 3 are the legitimate children of Sakharabai and Sukdeo, and then declaration has been given in respect of certain other properties and the injunction has been granted in favour of the

present appellants in their suit RCS No.237 of 2001. However, what has been rejected or not granted is the status of plaintiffs No.1 and 2 in RCS No.237 of 2001. Hence, that fact was challenged by all those plaintiffs in that suit in RCA No.176 of 2008 before the learned Principal District Judge, Jalgaon. After hearing both the sides, the learned Principal District Judge has dismissed the appeal.

6. Present respondent No.1 was in fact the plaintiff No.1 in RCS No.237 of 2001. So also he had filed the said appeal but it appears that since he has not signed the appeal, the other three persons have preferred the second appeal.

7. As regards the scope of the second appeal is concerned, it was limited to the extent of the rejection of the prayer from RCS No.237 of 2000 and RCA No.176 of 2008, and therefore, to that limited extent, the second appeal is considered.

8. Heard learned advocate Mr. Warma for appellant and learned advocate Mr. Wani holding for Mr. Rakh for respondents No.1, 3a to 3f, 4 and 5.

9. In order to cut short it can be said that, both of them have made submissions in support of their respective contentions. The main point which has been harped by the learned advocate

appearing for the appellant is that, the learned First Appellate Court did not consider all the points which were canvassed by all the appellants because out of those appellants only two were held to be the legitimate children of Sukdeo, taking into consideration the fact that marriage between Sukdeo and Sakharabai was registered in the year 1962. The children born to them after 1962 have been considered as legitimate by the learned Trial Court, but what was not considered by the Trial Court was that, since 1952-1953 Sukdeo and Sakharabai were residing together as husband and wife, and therefore, their offspring were legitimate. Taking into consideration the legitimacy of the appellants before him, the learned First Appellate Court ought to have decreed the suit filed by those appellants in entirety. Though Satyawaan has been held to be the owner of land Survey No.185 and House No.249 situated at village Wakadi Tq. Jamner, yet there were other properties to the said suit filed by them, and because of the said finding, the status of plaintiffs No.1 and 2 in RCS No.237 of 2001 were jeopardize. If that finding would have been given, considering the legitimacy of them, then they were entitled to the reliefs claimed.

10. Per contra, the learned advocate appearing for the respondents especially for respondents No.3A to 3F, 4 and 5

submitted that, the reasons given by the learned Trial Court were correct. There was no proper evidence adduced to show that, Sukdeo was residing as husband with Sakharabai since 1952-1953. When their marriage was registered only on 23-05-1962, the children born thereafter only can be said to be legitimate children. The first wife of Sukdeo had expired in the year 1956. Therefore, unless it would have been shown that there was marriage between Sakharabai and Sukdeo prior to the coming into force of the Hindu Marriage Act, she could not have got any status of a legally wedded wife. However, when no such evidence has been led, the decree passed by the Trial Court was correct and it has been upheld by the learned First Appellate Court.

11. Before going into the points raised in detail, taking into consideration the submissions made as well as the perusal of both the impugned Judgments, following substantial questions of law can be said to be arising in this case ;

(1) Whether there is compliance of Order 41 Rule 31 of Code of Civil Procedure by the First Appellate Court ?

(2) Whether both the Courts below erred in holding that, children born prior to 23-05-1962 to Sukdeo and Sakharabai cannot be said to be legitimate ?

(3) Whether those so called illegitimate children are deprived of inherited property from Sukdeo ?

(4) Whether deceased Sukdeo had gifted Survey No.200 from village Wakadi Tq. Jamner to Sakharabai and then Sakharabai had no right to gift the said land to Satyawaan ?

(5) Whether interference is required ?

AS TO POINT NO. (1) :

12. Perusal of the Judgment passed by the learned First Appellate Court would show that, it is as much cryptic as it can be and since it was the appeal before the last fact finding Court, there is absolutely no proper compliance of Order 41 Rule 31 of Code of Civil Procedure. All the points which were raised and the facts as well as the evidence that has been led by the parties, are not reflected in the said Judgment. Though point No.1 in impugned judgment is in respect of declaration of legitimacy and the point No.2 is in respect of relief of other properties, yet there is absolutely no proper discussion in respect of the evidence that has been led. The perusal of the Judgment by the Trial Court it can be seen that all the evidence was considered but when it was challenged before the First Appellate Court, it was the duty of the First Appellate Court to consider the entire evidence, appreciate it and then come to a conclusion. Only

in one para that too which is in half page, the discussion has been made by the First Appellate Court which cannot be said to be a sufficient application of mind to the facts and the evidence that has been led before the Court. The points which were not considered while discussing point No.1 is that, as per the appellants, Sukdeo and Sakharabai were residing as husband and wife since 1952-1953. The learned First Appellate Court had started its discussion from the date of the registration of marriage between Sukdeo and Sakharabai but then there is absolutely no proper discussion in respect of the period prior to that date. What could have been the effect of the fact if proved that, they were staying as husband and wife, and then coming into force of the Hindu Marriage Act, ought to have been clearly discussed. Though the learned advocate appearing for the appellants has tried to raise the point regarding burden of proof, and presumption under Section 112 and 114 of the Indian Evidence Act, it can be said that, those sections would come into play only when evidence is led and the person who is disputing the legitimacy. In view of the fact that, there is absolutely no proper compliance of Order 41 Rule 31 of Code of Civil Procedure, instead of going into further discussion on the basis of available evidence adduced by the parties, though this Court has come to the conclusion that, substantial question of law has been framed, yet when the last fact

finding Court has not given its conclusive finding based on proper appreciation of evidence, it will not be appropriate for this Court to answer the substantial question of law.

13. Reliance can be placed on the decision in, *Barnes School and Another Versus Arzoo Allan Baker*, reported in [2012 (3) Mh.L.J. 310], and *Hazrat Ali Mohamad (D) through Lrs. Versus Prabhakar Dattaram Sirvoicar*, reported in 2015 (5) ALL.M.R. 730. In both these decisions by this Court at Principal Seat and at Panaji Bench respectively, it has been held that,

“It is mandatory for the First Appellate Court to set out the points for determination, the decision thereon and the reasons for the decision.”

Further in *Laliteshwar Prasad Singh and Others Versus S. P. Srivastava (dead) through L.Rs.*, reported in 2017 (4) Mh.L.J. 663, it has been held that,

“The Judgment of the First Appellate Court must reflect Court’s application of mind and record its findings supported by reasons.”

14. Further, in the case of *H. Siddiqui Versus A. Ramalingam*, reported in (2011) 4 Supreme Court Cases 240, it has been held that,

“The Order 41 Rule 31 of the Code of Civil procedure provide guidelines for the appellate court as to how the

court has to proceed and decide the case. The provisions should be read in such a way as to require that the various particulars mentioned therein should be taken into consideration. Thus, it must be evident from the judgment of the appellate court that the court has properly appreciated the facts/evidence, applied its mind and decided the case considering the material on record. It would amount to substantial compliance with the said provisions if the appellate court's judgment is based on the independent assessment of the relevant evidence on all important aspect of the matter and the findings of the appellate court are well founded and quite convincing. It is mandatory for the appellate court to independently assess the evidence of the parties and consider the relevant points which arise for adjudication and the bearing of the evidence on those points. Being the final court of fact, the first appellate court must not record mere general expression of concurrence with the trial court judgment rather it must give reasons for its decision on each point independently to that of the trial court. Thus, the entire evidence must be considered and discussed in detail. Such exercise should be done after formulating the points for consideration in terms of the said provisions and the court must proceed in adherence to the requirements of the said statutory provisions. (Vide: Sukhpal Singh v. Kalyan Singh , AIR 1963 SC 146; Girijanandini Devi v. Bijendra Narain Choudhary, AIR 1967 SC 1124; G. Amalorpavam v. R.C. Diocese of Madurai, (2006) 3 SCC 224; Shiv Kumar Sharma v.

Santosh Kumari, (2007) 8 SCC 600; and Gannmani Anasuya v. Parvatini Amarendra Chowdhary , AIR 2007 SC 2380)."

15. In view of the guidelines/ observations referred above, this is a fit case where the matter deserves remand to the First Appellate court for reappraisal of the evidence and accordingly the matter is now remanded. As aforesaid there is no necessity to answer the other substantial questions of law in view of the fact that matter deserves remand and only the first substantial question of law has been answered in the negative. For the discussion above said, following order is passed ;

ORDER

- 1) The second appeal is hereby partly allowed.
- 2) The Judgment and decree passed in Regular Civil Appeal No.176 of 2008, by learned Principal District Judge, Jalgaon dated 10-04-2015, is hereby set aside.
- 3) The said appeal is remanded for decision as per law to the concerned Court.
- 4) Parties to appear before the concerned Court on 11-11-2019.
- 5) It is clarified that, if any party remains absent then the presence of such party be secured by the learned

Court and then the matter be proceeded.

6) Further needless to say that, there should be a proper compliance under Order 41 Rule 31 of the Code of Civil Procedure.

7) Since the matter of 2008 has been remanded, the concerned Court to give preference and decide appeal as early as possible and before 31-03-2020.

(SMT. VIBHA KANKANWADI)
JUDGE

vjg/-.