

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

**SECOND APPEAL NO.488 OF 2017
WITH
CIVIL APPLICATION NO.885 OF 2017
IN
SECOND APPEAL NO.488 OF 2017**

Yashwant Hari Parit (since deceased
through his legal heir)

1A) Balkrishna Yashwant Parit (since
deceased through his legal heir

1AB) Sandip Balkrishna Parit and

Ors.

...Appellants

Versus

Sau Sunita Ashok Bhandare and Ors.

...Respondents

.....

Mr. Machindra Deshmukh for the Appellants.

Mr. S.A. Pawar for the Respondent and for the Applicant in
CAS/888/2017.

CORAM : SMT. ANUJA PRABHUDESSAI, J.

DATED: 9th AUGUST, 2019.

ORAL JUDGMENT :-

This second appeal is admitted on the following substantial
questions of law:-

- (i) Whether Order 8 Rule 10 of CPC mandates the trial court to decree the suit for non-filing of written statement;
- (ii) Whether the judgment of the first appellate court is vitiated for reversing the findings of the trial court without assigning reasons;
- (iii) Whether the Appeal preferred by the Respondent No. 1/ plaintiff abated in its entirety for not bringing on record

the legal representatives of the original deceased Defendant nos. 4, 8 and 9, who died during the pendency of first Appeal.

2. The appeal is heard finally at the stage of admission with the consent of the learned counsel for the respective parties.

3. The Appellants herein have challenged the judgment and order dated 2/1/2009 whereby the learned District Judge-1, Sangli allowed the Regular Civil Appeal No.84 of 1999, set aside the judgment and decree dated 4/1/1999 passed by the learned C.J.J.D., Vita and thereby decreed the Regular Civil Suit No.208 of 1991 filed by the Respondent No.1-Sunita.

4. The dispute is in respect of the land bearing Gut Nos.403, 804, 399, 404 and 308 and house property bearing GP No.515 of village-Bhalwani. The said property is referred to as the suit property. The Respondent no. 1, the plaintiff in the suit, claimed that the suit property is an ancestral joint family property, originally owned by one Rau Salunkhe. Said Rau died leaving behind two sons i.e. Bapu and Bajrang Salunkhe (Respondent No.4). Respondent No.2 -Sakhu is the first wife of Bapu Salunkhe. It is averred that the respondent No.2 Sakhu, being unable to bear children, consented to the second

marriage of Bapu. Accordingly, Bapu entered into a second marriage with Respondent No.3-Suman while his first wife was alive. Respondent No.1 claims to be the daughter of Bapu and his second wife i.e Suman.

5. The Respondent no. 1 claims that after the death of Bapu, the name of the Respondent No.2 was recorded in the survey records as a joint family manager. Taking advantage of this entry, the Respondent No.2 sold the suit property under Gut Nos.403, 399 and 494 to Yashwant Parit (the predecessor of the Appellant No.1AB to 1AF). The Respondent no. 2 sold Gut No.804 to the Appellant No.2-Namdeo and the house property to Majid Hobale (the predecessor of the Appellant no. No.5A to 5 I). The Respondent No. 1 claims that she has half share in the suit property and that the sale deeds executed by the Respondent no. 2 are illegal, void and are not binding on her. Based on these pleadings the the Respondent No.1, filed a suit for declaration that the sale deeds executed by the Defendant no.1/Respondent No.2-Sakhu, in favour of Defendant No. 4 to 6 and 8 are not binding on her. She also sought partition and separate possession of her undivided share in the suit property.

6. The defendants did not file written statement and the suit proceeded ex-parte against all the defendants. The Trial Court after considering the evidence adduced by the Respondent No.1 dismissed the suit on the ground that the Respondent No.1 had failed to prove the factum of marriage between Bapu and Suman. The Trial Court also recorded a finding that in view of Section 16 of the Hindu Marriage Act, 1955, illegitimate children can claim share only in respect of property of their parents and not in the ancestral property. The Trial Court held that since the Respondent No.1-Plaintiff had claimed that the suit property was an ancestral joint property, she would not be entitled to any share in the said property, even if, it is presumed that she is the daughter of the deceased Bapu from his second wife-Suman.

7. The Respondent No.1 challenged the said judgment in Regular Civil Appeal No.84 of 1999. The records indicate that Yeshwant Parit, Majid Akbar Hobale and Bal Hamjekhan Momin, the original defendant no. 4, 8 and 9 died during the pendency of the appeal in the District Court. The factum of death of these parties was not reported in terms of Order XX rule 10-A CPC and consequently the legal representatives of these defendants were not brought on record.

Appeal before the District Court proceeded ex parte against all the original defendants including the deceased defendant nos. 4, 8 and 9. By the impugned judgment the first appellate court allowed the appeal, set aside the judgment of the trial court and thereby decreed the suit filed by the respondent no.1.

8. The first Appellate court observed that undisputedly the Respondent No.1 is the daughter of the deceased-Bapu from his second wife Suman. He died intestate without leaving any surviving male member. The first Appellate Court held that after the partition, the father of the plaintiff got half share in the suit property and as such, the suit property is a separate property of the father of the respondent No. 1. It is further held that though the Respondent No.2 is the wife of the deceased Bapu, she could not have sold the suit property detrimental to the right of the Respondent No.1-Plaintiff. The first Appellate Court has also observed that the Trial Court ought to have decreed the suit under Order VIII Rule 10 of the Civil Procedure Code.

9. The legal representatives of the original defendant no 4, 8 and 9 were not parties in the appeal before the District court. They along with defendants nos. 5, 6, and 7 filed this second appeal with

applications to bring them on record as the legal representatives of the said deceased defendants nos.4, 8 and 9. By order dated 20th October 2011 this court held that the applications to set aside abatement and to bring them on record as the legal representatives of the deceased defendants, who had died during the pendency of the first appeal, were not maintainable and allowed them to convert the applications into applications for leave to file appeal. Subsequently, by order dated 10th August, 2012 this court granted leave to the legal representatives of the deceased defendant nos 4, 8 and 9 to file appeal. Accordingly, the legal representatives of the original defendant no.4, the defendant nos. 5, 6, 7 and the legal representatives of the defendant no.8 have filed this second appeal.

10. Mr. Machhindra Deshmukh, the learned Counsel for the Appellants contends that the Court is not bound to decree the suit merely because the defendant fails to file the written statement traversing the facts as set out in the plaint. The power of the court to proceed under order VIII rule 10 CPC being discretionary, it is the matter of courts discretion to require the facts to be proved. The Appellate Court was therefore not justified in holding that the suit ought to have been decreed under Order VIII rule 10 CPC.

11. It may be mentioned that order VIII rule 10 CPC deals with the procedure to be followed when the defendant fails to present the written statement within the time fixed by the court. In exercise of the powers under this provision, the Court can either pronounce a judgment against him or make such order in relation to the suit as it thinks fit. In ***Shantilal Gulabchand Mutha vs. Tata Engineering and locomotive (2013) 4 SCC 396*** the Apex Court whilst considering the scope and ambit of Rule 10 of Order VIII of CPC has observed thus:-

"5. This Court in Balraj Taneja & Anr. V. Sunil Madan and Anr., AIR 1999 SC 3381 dealt with the issue and held that even in such fact- situation, the court should not act blindly on the averments made in the plaint merely because the written statement has not been filed by the defendant traversing the facts set out by the plaintiff therein. Where a written statement has not been filed by the defendant, the court should be little cautious in proceeding under Order VIII, Rule 10, CPC. Before passing the judgment against the defendant it must ensure that even if the facts set out in the plaint are treated to have been admitted, a judgment could possibly be passed in favour of the plaintiff without requiring him to prove any fact mentioned in the plaint. It is a matter of Court's satisfaction and, therefore, only on being satisfied that there is no fact which need be proved on account of deemed admission, the court can conveniently pass a judgment against the defendant who failed to file the written statement. However, if the plaint itself indicates that there are disputed questions of fact involved in the case regarding which two different versions are set out in the plaint itself, it would not be safe for the Court to pass a judgment without requiring the plaintiff to prove the

facts so as to settle the factual controversy. The power of the court to proceed under Order VIII, Rule 10 CPC is discretionary.

6. *The court further held that judgment as defined in Section 2(9) CPC means the statement given by the Judge of the grounds for a decree or order. Therefore, the judgment should be self- contained document from which it should appear as to what were the facts of the case and what was the controversy which was tried to be settled by the court and in what manner. The process of reasoning by which the court came to the ultimate conclusion and decreed the suit should be reflected clearly in the judgment*

7. *The court further held as under: (Balraj Taneja case):-*

45“Whether it is a case which is contested by the defendants by filing a written statement, or a case which proceeds ex parte and is ultimately decided as an ex parte case, or is a case in which the written statement is not filed and the case is decided under Order 8 Rule 10, the court has to write a judgment which must be in conformity with the provisions of the Code or at least set out the reasoning by which the controversy is resolved.” (Emphasis added)

8. *In Bogidhola Tea & Trading Co. Ltd. & Anr. v. Hira Lal Somani*, AIR 2008 SC 911, this Court while reiterating a similar view observed that a decree under Order VIII, Rule 10 CPC should not be passed unless the averments made in plaint are established. In the facts and circumstances of a case, the court must decide the issue of limitation also, if so, involved.

(See also: *Ramesh Chand Ardawatlya v. Anil Panjwani*, AIR 2003 SC 2508)

9. *In view of the above, it appears to be a settled legal proposition that the relief under Order VIII Rule 10 CPC is discretionary, and court has to be more cautious while exercising such power where defendant fails to file the written statement. Even in such circumstances, the court must be satisfied that there is no fact which need to be*

proved in spite of deemed admission by the defendant, and the court must give reasons for passing such judgment, however, short it be, but by reading the judgment, a party must understand what were the facts and circumstances on the basis of which the court must proceed, and under what reasoning the suit has been decreed."

12. There can be thus no dispute that Order VIII rule 10 CPC does not mandate the court to decree the suit for non filing of the written statement but gives it discretion either to pronounce the judgment against the defendant or to 'make such order in relation to the suit as it thinks fit. It is within the discretion of the court to call upon the plaintiff to prove the facts, to independently examine the case and satisfy itself as to the correctness and genuineness of the case of the plaintiff, even in the absence of the written statement. Hence, the observation of the first Appellate court that the trial court ought to have decreed the suit merely because the defendant had failed to present the written statement and or deny and rebut the case set up by the Respondent No.1, is totally erroneous.

13. The Appellate Court no doubt has jurisdiction to affirm or reverse the judgment of the Trial Court. The powers of the first appellate Court, while deciding the first appeal under Section 96 read

with Order XLI Rule 31 of the Code, are well defined by various judicial pronouncements of the Apex Court and are, no more res integra. In this regard it will be advantageous to refer to the decision of the Apex Court in ***B.V. Nagesh & Anr vs H.V. Sreenivasa Murthy (2010) 13 SCC 530***, wherein the Apex Court while deciding the appeal under Section 96 of the CPC has observed thus:-

"3. How a regular first appeal is to be disposed of by the appellate Court/High Court has been considered by this Court in various decisions. Order XLI of C.P.C. deals with appeals from original decrees. Among the various rules, Rule 31 mandates that the judgment of the appellate Court shall state:

- a) the points for determination;*
- b) the decision thereon;*
- c) reasons for the decision; and -*
- d) where the decree appealed from is reversed or varied, the relief to which the appellant is entitled.*

4. The appellate Court has jurisdiction to reverse or affirm the findings of the trial Court. A first appeal is a valuable right of the parties and unless restricted by law, the whole case therein is open for re-hearing both on questions of fact and law. The judgment of the appellate Court must, therefore, reflect its conscious application of mind and record findings supported by reasons, on all the issues arising along with the contentions put-forth and pressed by the parties for decision of the appellate Court. Sitting as a court of appeal, it is the duty of the High Court to deal with all the issues and the

*evidence led by the parties before recording its findings. The first appeal is a valuable right and the parties have a right to be heard both on questions of law and on facts and the judgment in the first appeal must address itself to all the issues of law and fact and decide it by giving reasons in support of the findings. Vide **Santosh Hazari vs. Purushottam Tiwari (2001) 3 SCC 179 = JT (2001) 2 SC 407 and Madhukar and Ors. vs. Sangram and Ors. (2001) 4 SCC 756.***”

14. These principles have been reiterated in subsequent decisions of the Apex Court in *State Bank of India and Anr. vs. Emmsons International Ltd. And Anr.* (2011) 12 SCC 174, *Vinod Kumar vs Gangadhar*, 2014(12) Scale 171, *Union of India vs K.V. Lakshman and Ors.* 2016 AIR SC 3139 and in *Laliteshwar Prasad Singh and Ors. Vs. S.P. Srivastava (deceased) through LRs.* 2017 (2) SCC 415.

15. In the instant case, the trial court in its discretion had decided not to act solely on the averments in the plaint and had called upon the Respondent no.1/plaintiff to prove her case by adducing evidence. The trial court after scrutinizing the pleadings and upon

appreciating the evidence, dismissed the suit mainly on two grounds i.e. the Respondent no.1 had failed to prove the factum of marriage between Bapu and Suman (R-3) and that even if the Respondent no.1 is held to be an illegitimate child, she would have no right to the suit property, which is admittedly an ancestral property. A perusal of the impugned judgment reveals that the first appellate court has reversed these findings solely on the basis of the averments in the plaint. The trial court having called upon the Respondent no. 1 to prove her case, as a final court of facts, it was duty of the appellate court to deal with, consider and appreciate the evidence on record and record findings with reasons while arriving at a different conclusion from that of the trial court. A plain reading of the impugned judgment indicates that the first appellate court has neither considered the evidence on record nor assigned reasons for reversing the findings of the trial court. The impugned judgment is cryptic and falls short of considerations expected from the first appellate court. The impugned judgment does not meet the essential requirements and does not confirm to the provisions of law and hence cannot be sustained.

16. As stated herein above, the Defendant Nos. 4, 8 and 9 had expired during the pendency of the appeal. They had not filed their

written statement and had not contested the suit. The advocate representing these respondents was not present at the hearing of the appeal and had not discharged his duty under order XXII rule 10 A CPC by informing the court about the death of these respondents. As a consequence thereof, the Respondent no.1/plaintiff did not file an application to bring on record the legal representatives of the deceased defendants. The Respondent No.1 also did not file an application under Order XXII rule 4 (4) CPC seeking exemption from the necessity of substituting the legal representatives of the defendants who had failed to appear or contest the proceedings. Omission to either implead the legal representatives or to seek exemption from the necessity of substituting the legal representatives of the deceased defendants has resulted in abatement of the appeal against these defendants.

17. The next question which arises is whether non-substitution of legal representatives of the deceased defendant Nos.4, 8 and 9 has resulted in abatement of the appeal in its entirety or only qua the deceased defendants. In this regard it would be advantageous to refer to the decision in **Budh Ram & Ors vs Bansi & Ors 2010 (11) SCC 476** wherein after considering previous judgments on the issue the Apex Court has held thus:

"17. Therefore, the law on the issue stands crystallised to the effect that as to whether non-substitution of LRs of the defendants/respondents would abate the appeal in toto or only qua the deceased defendants/respondents, depend upon the facts and circumstances of an individual case. Where each one of the parties has an independent and distinct right of his own, not inter-dependent upon one or the other, nor the parties have conflicting interests inter se, the appeal may abate only qua the deceased respondent. However, in case, there is a possibility that the Court may pass a decree contradictory to the decree in favour of the deceased party, the appeal would abate in toto for the simple reason that the appeal is a continuity of suit and the law does not permit two contradictory decrees on the same subject matter in the same suit. Thus, whether the judgment/decreed passed in the proceedings vis-à-vis remaining parties would suffer the vice of being a contradictory or inconsistent decree is the relevant test."

18. In the instant case, the Respondent No.1 has challenged the validity of the sale deeds executed by the Respondent No.2 in favour of the Defendant Nos.4, 5 and 8 and sought declaration that the said sale deeds are not binding on her. As a consequential relief the Respondent No.1 has sought partition and separate possession of her undivided share. The nature of the pleadings and the prayers indicate that the Respondent could not have brought the suit only against the other Defendants. The deceased Defendants were necessary parties to the suit as the relief sought by the Plaintiff could not have been granted in the absence of the deceased Defendants. Having failed to substitute

the legal representatives or seek exemption under Order XXII Rule 4(4) of CPC the relief could not have continued with the suit only against the other Defendants.

19. Thus upon considering the pleadings and the prayers and considering the principles in **Budh Ram** (supra) there can be no escape from the conclusion that the appeal abates in its entirety.

20. The first appellate court, not being aware of the death of these defendants and consequent abatement, heard and decided the appeal against persons who were dead. Needless to state that a judgment passed against a dead person is nullity and inoperative. Under the circumstances and in view of discussion supra, without going into the merits of the case, the first appeal needs to be remanded to the District court for its fresh disposal in accordance with law. Hence, the following order:-

- i) The appeal is allowed.
- ii) The impugned judgment and decree is set aside. The matter is remanded to the District Judge, Sangli.
- iii) Liberty is given to the Respondent No.1-Plaintiff to file application under Order XXII Rule 4 a/w 9 or rule 4(4) of CPC before the District Court, Sangli, either to

set aside abatement and to bring on record the legal representatives of the deceased defendants or to seek exemption from bringing on record the legal representatives of the deceased Defendant Nos.4, 8 and 9.

- iv) The learned District Judge shall first decide the said application/applications and thereafter to hear and decide the appeal on merits in accordance with law.
- v) Both the parties are directed to appear before the District Court, Sangli on 20/9/2019.
- vi) Considering that the suit is of the year 1999, the District judge shall endeavor to dispose of the appeal preferably within a period of six months from the date of appearance of the parties.

21. In view of disposal of the second appeal, the civil application does not survive and hence stands disposed of.

(SMT. ANUJA PRABHUDESSAI, J.)