

IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
NAGPUR BENCH, NAGPUR

SECOND APPEAL NO.242 OF 2018

1.Raosaheb s/o. Ramrao Kite,
Aged 36 years, Occ. Service.

2.Mangesh s/o. Ramrao Kite,
Aged 32 years, Occ. Business.

Both r/o. Takali (Kite), Post Chanki
Kapra, Tq. Seloo, District Wardha. APPELLANT

// VERSUS //

1.Smt. Kantabai wd/o. Chaguram
Kurwanshi, Aged 63 years, Occ.
House work.

2.Rajesh s/o. Chhaguram Kurwanshi,
Aged 43 years, Occ. Business.

3.Ravi s/o. Chhaguram Kurwanshi,
Aged 37 years, Occ. Business.

4.Sau.Sulochana Ganesh Lonare,
Aged 40 years, Occ. Household.

5.Sau.Jyoti Sunil Dhiman,
Aged 38 years, Occ. Household.

6.Yogendra s/o. Chhaguram Kurwanshi,
Aged 36 years, Occ. Business.

Respondent Nos. 1 to 6 r/o. c/o.
Dr.Muzumdar Clinic, Near Mata
Mandir, Ram Nagar, Pandharabodi,
Nagpur.

..... RESPONDENTS

Mr.C.N.Deshpande, Advocate for the Appellants.
Mr.S.P.Chintakuntalwar, Advocate for the respondent nos. 1 to 6.

Date of reserving the order : 11.11.2019.
Date of pronouncement of the order : 25.11.2019.

CORAM : VINAY JOSHI, J.

ORDER :

1. This is original plaintiff's Second Appeal who failed in obtaining decree for specific performance in the trial Court as well as the first Appellate Court. Initially, the appellant (plaintiff) has filed Regular Civil Suit No.17 of 2012 seeking decree of specific performance of an agreement dt.12.2.1998 relating to immovable property namely land bearing Survey No.141 situated at mouza Waghada, Taluqa Seloo, District Wardha. At the time of execution of agreement, total consideration of

Rs.1,05,000/- was fixed, out of which the plaintiff had paid partial consideration of Rs.80,000/-. It was decided between the parties to execute the sale deed as per convenience of both on or before 1.2.1999. The plaintiff was put in physical possession of the suit property on the date of agreement. It is plaintiff's case that the suit property was jointly purchased by defendant's late father Chhaguram along with one Gulab. It was agreed that the suit property was to be separated from the property of Gulab by carrying necessary mutation entry to the revenue record of the suit property. It is plaintiff's case that, during the life time of Chhaguram, separate entry was not effected in the revenue record of the suit property. After his death, the defendants had also not separated the property and therefore, despite plaintiffs' readiness and willingness, the sale deed was not executed. It is plaintiffs' case that they requested many-a-times to the defendants to move to the Competent Authority for separation of 7/12 extracts, but latter failed.

2. It was the defence of respondents/defendants in the trial Court that their predecessor Chhaguram had borrowed Rs.80,000/- from the plaintiffs, against which the plaintiffs had obtained blank signed paper. Precisely, the defendants denied execution of agreement to sell as well as readiness and

willingness on the part of plaintiffs. Moreover, the suit was specifically resisted on the ground of limitation.

3. The parties went to the trial on such pleadings. The trial Court, having regard to the oral and documentary evidence, came to the conclusion that the plaintiffs failed to prove that the defendants' predecessor Chhaguram had executed the agreement to sell dated 12.2.1998 regarding the suit property. Moreover, it was held that the suit is barred by limitation and in consequence, the suit came to be dismissed by Judgment and Order dated 9.11.2017.

4. Being Aggrieved by the said Judgment and decree, the aggrieved plaintiffs filed First Appeal (Filing No. R.C.A. No.888 of 2017) in terms of Section 96 of the Code of Civil Procedure. Learned District Judge, before issuance of notice to the respondents, by resorting to provisions of Order XLI, Rule 11(i) of the Code of Civil Procedure, dismissed the appeal vide impugned order dated 22.12.2017 passed below Exh.1 of the appeal.

5. Heard both the sides at length. The main grievance of appellants/plaintiffs is that the impugned order is non-est in

the eyes of law. It is submitted that the first Appellate Court is duty bound to record adequate and satisfactory reasons for dismissal of appeal when it is summarily dismissed in terms of Order XLI, Rule 11(i) of the Code of Civil Procedure. It is his contention that, in view of sub-clause (4) of Rule 11 of Order XLI, it is mandatory on the Court not being the High Court to deliver a Judgment even if it is summary dismissal of the appeal. In that relation, the learned Counsel took me through the provisions of Order XLI, Rule 31 of the Code of Civil Procedure to point out that the Judgment of Appellate Court must consists points for determination, decision thereon and the reasons for the decision.

6. Without going into the merits of the case, the appellants strenuously argued that the learned trial Court erred in dismissing the appeal in limine by passing cryptic order. As against this, the other side supported the impugned order by stating that, in order to curb the uncalled litigation, the provision of Order XLI, Rule 11 of the Code of Civil Procedure has been intentionally provided under the Code. The respondents would submit that, the first Appellate Court has properly considered the entire material and having found the plaintiffs' case meritless, has dismissed the appeal which calls no interference.

7. So far as the factual aspect is concerned, there is no dispute between the parties. In the trial Court, both the sides led oral as well as documentary evidence. The trial Court has framed necessary issues which were required to decide a suit for specific purpose of contract. The trial Judge recorded a finding of fact that the plaintiffs failed to establish execution of agreement to sell, dated 12.2.1998, as alleged. Moreover, it is held that the plaintiffs also failed to prove payment of sum of Rs.80,000/- towards part consideration. Besides that, the trial Court recorded a categorical finding that the suit being filed after three years from the date of execution of agreement, it is barred by law of limitation and accordingly, the suit was dismissed.

8. Gone through one page impugned order passed by the first Appellate Court while dismissing the appeal. The learned Judge has stated that he has gone through the plaint, Written Statement and disputed documents namely agreement to sell which was marked Exh.34 in the trial Court. Further, it is expressed that the agreement to sell was dated 12.2.1998, whereas the time limit to execute sale deed was fixed upto 1.2.1999. The learned Judge expressed that the period of limitation would commence from 1.2.1999 and thus, the first part of Article 54 of the Limitation Act would apply. The suit

being filed after nine years from the date of agreement, it is barred by limitation. Hence, the appeal was summarily dismissed at the initial stage. The appellants mainly canvassed that the impugned order passed by the first Appellate Court is completely against the spirit and mandate of law. It is his contention that the right of first appeal under Section 96 of the Code against the decree passed by the court of original jurisdiction is a valuable legal right of litigant. It is duty of the first Appellate Court to appreciate entire evidence and has to record his own independent conclusion.

9. The learned Counsel would submit that the impugned Judgment being delivered by the Court not being the High Court, due to mandate of Order XLI, Rule 11, sub-clause (4) of the Code of Civil Procedure, should be in terms of Order XLI, Rule 31 of the Code of Civil Procedure. In other words, first Appellate Court is under obligation to pas a full fledged Judgment. He has pointed out that the learned District Judge neither framed points for determination nor considered the entire material while summarily dismissing appeal. The learned District Judge has not considered the oral evidence at all. Moreover, the suit was dismissed only on the point of limitation without giving regard to other aspects. In support of said contention, the appellants

relied on the reported case of **C. Venkata Swamy .vs. H. N. Shivanna (Dead) by Legal Representative and another, (2018) 1 SCC 604.** In the said case, the Hon'ble Apex Court has reminded about the duty of the first Appellate Court to appreciate entire evidence and arrive at its own independent conclusion as the first appeal is a valuable legal right of litigant. It is also observed that the first Appellate Court is the final Court of fact and therefore, litigant is entitled to a full, fair and independent consideration of the evidence at the appellate stage.

10. To the next, appellant relied on reported case of **U. Manjunath Rao .vs. U. Chandrashekhar and another, (2017) 15 SCC 309.** In the said case, the Hon'ble Supreme Court ruled that mere posing relevant question for ad-judication of appeal is not enough without proper analysis. Further it is observed that the first Appellate Court has defined role and its Judgment should show application of mind and reflect reasons on the basis of which it agrees or disagrees with the trial Court. On the same line, the appellants further relied on the reported case of **Union of India vs. K. V. Lakshman and Others, AIR 2016 SC 3139,** wherein it is ruled by the Apex Court that the first Appellate Court can appreciate the entire evidence while arriving

to the definite conclusion. Reliance is also placed on the reported case of **Umakant Vishnu Junnarkar .vs. Parashuram Damodar Vaidya**, AIR 1973 SC 218, in which the Hon'ble Supreme Court emphasized crucial role of first Appellate Court to consider entire material while summarily dismissing the appeal under Order XLI, Rule 11 of the Code of Civil Procedure.

11. It is worthwhile to refer the observations of the Apex Court in the case of **Santosh Hajari vs. Purushottam Tiwari**, (2001) 3 SCC 179, wherein it is held as under :

“15... The appellate court has jurisdiction to reverse or affirm the findings of the trial court. First appeal is a valuable right of the parties and unless restricted by law, the whole case is therein open for rehearing 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.... 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... “

These aspects needs to be considered while deciding first appeal.

12. The law as laid down by the Apex Court in various Judgments makes it explicitly clear that it is duty of the first Appellate Court to appreciate each and every point involved in the case and give its own reasons while arriving on the conclusion. The Court has to appreciate entire material on record even to consider the Judgment of trial Court. It is expected to appreciate both oral as well as documentary evidence and it's legal effect apart from factual points. Needless to say that law imposes upon Courts an imperative duty and obligation to give adequate and satisfactory reasons for a Judgment.

13. Though the first Appellate Court has power under Order XLI, Rule 11 (i) of the Code to summarily dismiss the first appeal without issuance of notice, yet the Court is not immuned from its duty to deliver full fledged Judgment. It is open for the Court to choose course of summary dismissal of appeal, but, at the same time, it must comply all the legal requirements. It is

worthwhile to note that amended sub-clause (4) to Rule 11 of Order XLI of the Code imposes a duty on a Court other than the High Court to deliver Judgment, though it proceeds under sub-clause (i) of Rule 11, Order XLI. The amended provision casts a duty on first Appellate Court to frame points for determination and consider entire material before dismissing the appeal. The first appeal has to be decided on facts as well as on law. Moreover, the first Appellate Court is required to address itself on all the issues and to decide the case.

14. After re-visiting the impugned order, though there is a reference that the Court has perused agreement, plaint and Written Statement, the order never reflects that the pleadings were considered. The impugned order is totally silent about the points for determination, evidence led by the parties and its effect. In fact, the points arising for determination must cover all the important issues involved in the case. Though the appellants had challenged negative finding recorded about execution of agreement and point of limitation, the impugned order reflects the dismissal by picking up the point of limitation. The learned District Judge neither framed the points for determination nor discussed the evidence adduced by the parties on execution of agreement and evidence supporting the point of limitation. The

learned trial Court, by making superficial exercise, referred to the date of agreement, time fixed to execute the sale deed and jumped on the conclusion. Basically the contract was relating to immovable property. It is settled proposition of law that time is not the essence of contract in cases of immovable property, unless exceptional case is made out. In the circumstances, the impugned order cannot be termed as a Judgment, as contemplated under Order XLI, Rule 11(4) r/w. Order XLI, Rule 31 of the Code of Civil Procedure. After going through the entire material, I am disposed to think that this is a case where the impugned order of summary rejection of appeal would not sustain in the eyes of law. As a natural corollary, the matter is required to be remitted to the District Court for fresh adjudication.

15. In view of above, the appeal stands allowed. The impugned order dated 22.12.2017 is quashed and set aside. The matter is remitted back to the District Court with a direction to re-consider the appeal in the light of above discussion and decide the same afresh in accordance with law. No order as to costs.

JUDGE

[jaiswal]

