

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

SECOND APPEAL NO.235 OF 1993

Premchand Lakhichand Jain,
Age 56 yrs., Occ. Agri. & Trade,
R/o Jamner, Tq. Jamner,
Dist. Jalgaon.

Since deceased through legal representatives -

- 1 Nirmalabai wd/o Premchand Jain,
Age 65 yrs., Occ. Household,
R/o Nirmal Peth Bhavan, Pachora Road,
At Post-Jamner, Dist. Jalgaon.
- 2 Mahendra Premchand Jain,
Age 45 yrs., Occ. Business,
R/o Mount World, 2nd A-Wing,
Flat No.45, Pashansus Road, Pune.
- 3 Urmila d/o Premchand Jain,
Age 47 yrs., Occ. Household,
- 4 Kalpana d/o Premchand Jain,
Age 43 yrs., Occ. Household,
- 5 Arpana d/o Premchand Jain,
Age 40 yrs., Occ. Household,
- 6 Sadhana d/o Premchand Jain,
Age 38 yrs., Occ. Business,
R/o Harshwilla, 361, Tilaknagar,
Main, Shwetamber Jain Mandir Galli,
Indore, Tq. & Dist. Indore (M.P.).

... Appellants

... **Versus** ...

Bansilal Manakchand Jain,
Age 60 yrs., Occ. Agri.,
R/o Shahapur, Tq. Jamner,
Dist. Jalgaon.

Since deceased through legal representatives -

- 1 Supadabai Bansilal Jain,
Age 76 yrs., Occ. Household,
- 2 Anokchand Bansilal Jain,
Age 33 yrs., Occ. Agri.,
- 3 Mangalbai Inderchand Zambad,
Age 42 yrs., Occ. Household,

Respondent Nos.1 to 3 are r/o Shahapur,
Tq. Jamner, Dist. Jalgaon.

- 4 Mandabai Rajendra Chhajed,
Age 37 yrs., Occ. Household,
R/o Muthainagar Jamner, Dist. Jalgaon.

... **Respondents**

...

Mr. P.R. Katneshwarkar, Advocate for appellants

Mr. S.S. Bora, Advocate for respondent Nos.1 to 4

...

CORAM : SMT. VIBHA KANKANWADI, J.

DATE : 09th SEPTEMBER, 2021

ORDER :

1 Present appeal has been filed by the original defendant, whose

legal representatives have now been brought on record, to challenge the concurrent Judgment and findings by the Courts below. Present respondent had filed Regular Civil Suit No.27/1982 before Civil Judge Junior Division, Jamner, Dist. Jalgaon for redemption of mortgage. The said suit came to be decreed on 26.07.1988. Present appellant-original defendant filed Civil Appeal No.256/1988 before District Court, Jalgaon. It was heard by learned 5th Additional District Judge, Jalgaon and was dismissed on 01.02.1993. Hence, this Second Appeal.

2 The Second Appeal was admitted by this Court on 06.07.1993. It will not be out of place to mention here that no specific substantial questions of law were framed, however, following order was passed.

“The S.A. is admitted vide ground Nos.2 to 18.”

Thereafter, this Court on 05.09.2019 passed detail order and framed following substantial questions of law :

- a) Whether the Courts below erred in treating the sale deed Exh.83 as a mortgage by conditional sale ?
- b) Whether the Courts below erred in passing the decree by relying upon oral evidence contrary to the terms of contract recorded in sale deed Exh.83 and thereby overlooked the mandate of Section 92 of the Indian Evidence Act ?

c) Whether the Courts below erred in passing the decree by overlooking the mandate of Section 53-A of the Transfer of Property Act ?

d) Whether the findings on facts recorded by the Courts below are perverse and liable to be interfered in exercise of appellate jurisdiction of this Court ?

3 It is necessary to consider the case put forth by both the parties before we proceed further. Plaintiff had come with a case that he is the owner of land bearing Sy.No.278/3 admeasuring 0.88 AAR and land bearing Sy.No.278/1 area admeasuring 2.77 Acres situated at village Shahapur and a house property bearing old Grampanchayat No.332 in the same village. It was then stated that the defendant is close relative of the plaintiff. Defendant used to advance loan to needy persons, though he was not having a money lending licence. According to the plaintiff, he gave Sy.No.278/3 as a security towards the loan taken in the year 1967-68. Land bearing Gat No.278/1 was adjacent to land Sy.No.278/3. The said land was owned by Atmaram Parashram, who was intending to sale it. Plaintiff was intending to purchase it and, therefore, initiated talks with Atmaram. He then obtained loan of Rs.9,000/- from the defendant. Defendant agreed to give that loan with interest @ 2% per month. Further condition was to be that plaintiff should execute a nominal sale deed of Gat No.278/3 and accordingly the

nominal sale deed was registered. According to him, he had no intention to sale the said land to the defendant. It is then the plaintiff's case that it was agreed between him and defendant that the possession will not be handed over in respect of residential house. However, possession of land Sy.No.278/3 would be given to the defendant. Defendant was allowed to take crops and also to keep account and adjust the same towards the loan. Accordingly, an agreement was made on 21.01.1971 and it is then said that amount of Rs.6,000/- was taken and sale deed in respect of house property was executed in favour of defendant. It is then stated that the plaintiff purchased land Sy.No.278/1 on 15.04.1974 from Atmaram. In 1974 when defendant started demanding the money and plaintiff was not having the same, plaintiff also delivered the possession of that land also to the defendant as a security of the loan. Defendant insisted to effect registered sale deed in respect of that land also, as the plaintiff was not in a position to repay the loan. According to the plaintiff, he made arrangement to pay Rs.3,000/- and accordingly, it was paid to defendant in 1975. He made application to the Grampanchayat on 03.02.1975 and got the name of the defendant deleted. According to him, even after his repeated request to the defendant to reconvey the property land Sy.Nos.278/3 and 278/1, it has not been conveyed and possession has not been handed over. Hence, he has filed the suit for redemption of mortgage.

4 Defendant filed written statement and took up the defence that he is not doing the money lending business. All the three transactions were out and out sale and he has paid due consideration to the same. There was no relationship of debtor and creditor and, therefore, suit for redemption of mortgage is not maintainable.

5 The learned Trial Court has framed as much as 17 issues and it was held that the transactions are mortgaged, those documents were executed as security and, therefore, the suit for redemption of mortgage was maintainable, within limitation. The counter claim of the defendant in respect of another land Sy.No.277/1 and refund of consideration was held to be not within limitation.

6 As aforesaid, the original defendant filed the civil appeal challenging the decree of the suit by the Trial Court and the appeal has been dismissed.

7 It is to be noted that the First Appellate Court has practically framed only one point and the second point is - "Whether the impugned Judgment and Decree in this appeal needs interference or modification ?" Therefore, only point No.1 which is - "Whether there is cogent and convincing evidence to prove that the transaction between the parties was

out and out sale ?” was the only point that was framed for determination.

8 Important point to be noted is that it appears that when four substantial questions of law were framed by this Court on 05.09.2019; yet it appears that the said fact that the First Appellate Court had considered only one point and whether it had complied with the provisions of Order XLI Rule 31 of the Code of Civil Procedure was not considered as substantial question of law by this Court while framing those four substantial questions of law. After hearing both sides and perusing the Judgment passed by the First Appellate Court, it can be seen that there is no compliance of Order XLI Rule 31 of the Code of Civil Procedure. In **Kirpa Ram (deceased) through L.Rs. and others vs. Surendra Deo Gaur and others, 2021(3) Mh.L.J., 250** it has been observed that the reformulation of the substantial question of law is permissible in terms of proviso and, therefore, Section 100 of the Code of Civil Procedure is reproduced along with observations of the Hon’ble Apex Court in para No.23 of **Kirpa Ram** (supra) :

“**100. Second appeal.**—(1) Save as otherwise expressly provided in the body of this Code or by any other law for the time being in force, an appeal shall lie to the High Court from every decree passed in appeal by any Court subordinate to the High Court, if the High Court is satisfied that the case involves a substantial question of law.

(2) An appeal may lie under this section from an appellate decree

passed ex parte.

(3) In an appeal under this section, the memorandum of appeal shall precisely state the substantial question of law involved in the appeal.

(4) Where the High Court is satisfied that a substantial question of law is involved in any case, it shall formulate that question.

(5) The appeal shall be heard on the question so formulated and the respondent shall, at the hearing of the appeal, be allowed to argue that the case does not involve such question :

Provided that nothing in this sub-section shall be deemed to take away or abridge the power of the Court to hear, for reasons to be recorded, the appeal on any other substantial question of law, not formulated by it, if it is satisfied that the case involves such question.”

23. Sub-section (1) of section 100 of the Code contemplates that an appeal shall lie to the High Court if it is satisfied that the case involves a substantial question of law. The substantial question of law is required to be precisely stated in the memorandum of appeal. If the High Court is satisfied that such substantial question of law is involved, it is required to formulate that question. The appeal has to be heard on the question so formulated. However, the Court has the power to hear appeal on any other substantial question of law on satisfaction of the conditions laid down in the proviso of section 100 of the Code. Therefore, if the substantial question of law framed by the appellants are found to be arising in the case, only then the High Court is required to formulate the same for consideration. If no such question arises, it is not necessary for the High Court to frame any

substantial question of law. The formulation of substantial question of law or reformulation of the same in terms of the proviso arises only if there are some questions of law and not in the absence of any substantial question of law. The High Court is not obliged to frame substantial question of law, in case, it finds no error in the findings recorded by the First Appellate Court.”

In view of this position of law following substantial question of law is reformulated in addition to the already formulated substantial question of law :

1 Whether there is compliance of Order XLI Rule 31 of the Code of Civil Procedure in the Judgment of the First Appellate Court ?

9 Learned Advocate for the appellants submitted that if we consider the fact that defence before the Trial Court, issues framed taking into consideration the averments in the plaint and the defence and the evidence led by the defendant before the Trial Court, it was expected from the First Appellate Court to deal with entire defence that was taken. Only one point has been framed about the transaction between the parties, as to whether it is out and out sale. When there were three different transactions, every transaction ought to have been considered separately and when there is documentary evidence, then the oral as well as contents of each document

ought to have been considered separately. When such consideration has not been taken and when such facts and evidence have not been considered and requisite points for determination have not been framed, then it cannot be said that there is proper compliance of Order XLI Rule 31 of the Code of Civil Procedure.

10 Per contra, the learned Advocate for the respondent Nos.1 to 4 vehemently submitted that the said point covers the entire defence that has been taken by the defendant into consideration. It is not necessary that every point should be framed separately and considered separately. There is sufficient compliance of Order XLI Rule 31 of the Code of Civil Procedure. After so many years it need not be taken into consideration that there is no compliance of Order XLI Rule 31 of CPC. When the material is already on record the remand should be avoided.

11 It is to be noted that taking into consideration the averments in the plaint and the defence that has been raised, the Trial Court has considered as many as 17 issues. Each transaction was considered separately by the Trial Court. Definitely, it was required to be dealt with separately, for the simple reason that the parties' intention at the time of each transaction would have been different or possibility cannot be ruled out. Further, the contents of each document requires to be considered separately. One

transaction and evidence for that transaction cannot over power or have bearing on the another transaction and, therefore, it was expected that each transaction, which was entered into on different occasions, ought to have been considered separately. It could not have been covered only in one point, as aforesaid.

12 This Court in **Barnes School and another vs. Arzoo Allan Baker, 2012 (3) Mh.L.J., 310** held that -

“The Lower Appellate Court has erred in dismissing the appeal without recording any findings in respect of the issues which were framed. Order 41, Rule 31, Civil Procedure Code, mandates the appellate Court to frame 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.”

12.1 Reliance was placed on the Hon’ble Apex Court’s Judgment in **Om Prakash Verma vs. State of Andhra Pradesh and others, 2010 (13) SCC 158**, wherein Apex Court has expounded the obligation of the Appellate Court in Order 41, Rule 31, CPC. In para 62 Hon’ble Apex Court held that Order 41, Rule 31 of the Code of Civil Procedure casts obligation on the author of the appellate judgment to state the points for determination, the decision thereon, reasons for the decision and when the decree appealed

from is reversed or varied, the relief to which the appellant is entitled.

12.2 Further reliance can be placed on **H. Siddiqui (dead) by L.Rs. vs. A. Ramalingam, (2011) 4 SCC 240**, wherein it has been observed that -

“21. The said provisions 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 aspects 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.”

12.3 Further, the Division Bench of this Court in **Khatunbi wd/o Mohammad Sayeed and others vs. Aminabai w/o Mohammad Sabir, 2006 (6) Mh.L.J., 759** reported that *compliance of Rule 31 of Order 41 is mandatory and failure to comply with the said provisions of law would not be a mere irregularity.*

12.4 Further, the three Judge Bench of Hon'ble Apex Court in **Santosh Hazari vs. Purushottam Tiwari (deceased) by L.Rs., 2001(2) Mh.L.J., 786** observed that the judgment of the Appellate Court must reflect its conscious application of mind and record findings supported by reasons on all issues arising in appeal.

In this case the principles of writing judgment of reversal by Appellate Court have been elaborately discussed. Though in the present case, there is no reversal of the findings of the Trial Court; yet, the First Appellate Court failed to formulate all points for determination arising in the matter. At the costs of repetition, it can be said that each transaction ought to have been considered separately to come to conclusion, as to whether while entering into each transaction there was relationship of debtor and creditor between the plaintiff and the defendant, so that the action by the plaintiff under Section 58-C of Transfer of Property Act would be maintainable. As aforesaid, in **Barnes School and another** (supra), **Om Prakash Verma** (supra),

the judgment of the First Appellate Court in the present case cannot be allowed to sustain and the matter deserves to be relegated back to the lower Appellate Court for *de novo* consideration of the appeal.

13 In view of the conclusion arrived at that the matter is required to be relegated back to the First Appellate Court, this Court would refrain itself from enter into the arena of discussion on the substantial questions of law, which are framed by order dated 05.09.2019 above.

14 In view of the above said conclusion and observations, following order is passed.

ORDER

1 Second Appeal is hereby partly allowed.

2 The Judgment and Decree passed in Civil Appeal No.256/1988 on 01.02.1993 is hereby set aside and the matter is relegated back to the Lower Court for *de novo* consideration of the appeal, with a direction that the learned First Appellate Court to frame appropriate points for determination in compliance with Order XLI Rule 31 of the Code of Civil Procedure, 1908, and decide the matter on merits.

3 Parties to appear before First Appellate Court on 25.10.2021.

4 Record and Proceedings be sent back to the First Appellate Court, immediately.

5 In view of the fact that the appeal, which was filed in the year 1988, would be restored.

6 The First Appellate Court is directed to expedite the hearing of the First Appeal and decide on its own merits, within a period of six months, from the date of receipt of Record and Proceedings.

7 Registrar (Judicial) to comply with the order in respect of sending the Record and Proceedings to the lower Appellate Court, within the time frame with a copy of this order.

(Smt. Vibha Kankanwadi, J.)

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