

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

10 SECOND APPEAL NO.362 OF 2020
WITH
CIVIL APPLICATION NO.6563 OF 2020
WITH
CIVIL APPLICATION NO.11464 OF 2021
WITH
CIVIL APPLICATION NO.11465 OF 2021

MOHAN BANDHU SANAP THROUGH POWER OF ATTORNEY VICKKI

MOHAN SANAP

VERSUS

CHAGAN HARIBHAU MANWATKAR

...

Mr. K.D. Khade, Advocate for the appellant

Mr. H.V. Tungar, Advocate for the sole respondent

...

CORAM : SMT. VIBHA KANKANWADI, J.

DATE : 20th OCTOBER, 2021

ORDER :

1 Present appeal has been filed by the original defendant to challenge the concurrent findings and decree. Present respondent is the original plaintiff, who had filed Regular Civil Suit No.94/2009 before Civil Judge Junior Division, Shirur Kasar, Dist. Beed for simplicitor injunction. It came to be decreed on 16.02.2016. The appeal filed by the present appellant

i.e. Regular Civil Appeal No.40/2016 has been dismissed by learned District Judge-5, Fast Track Court, Beed on 18.06.2020. Hence, this Second Appeal.

2 Civil Application No.11464 of 2021 has been filed for amendment of the Second Appeal and thereby certain typographical mistakes have been tried to be corrected, so also, the appellant intends to add one more substantial question of law. It is very much formal in nature and, therefore, it deserves to be allowed. Accordingly, it is allowed. Along with the said application, the appellant intends to file the photo copy of the roznama of the appeal. That can also be allowed to be produced. Civil Application No.11465 of 2021 has been filed by the appellant/applicant to place on record additional evidence in the form of certified copy of Judgment in Sessions Case No.44/1982 and sale deed dated 04.07.1981. This application would be considered during the course of the order. Civil Application No.6563 of 2020 was filed for stay to the impugned decree.

3 Heard learned Advocate Mr. K.D. Khade for the appellant and learned Advocate Mr. H.V. Tungar for the sole respondent. In order to cut short, it can be said that they have argued in support of their respective contentions.

4 Original plaintiff had come with a case that the suit land i.e. Gat

No.68 admeasuring 02 H 55 R situated at village Warangalwadi, Tq. Shirur Kasar, Dist. Beed was the ancestral property of the plaintiff and his father Hari Manwatkar. Hari was habitual drunkard and he sold area admeasuring 01 H 62 R from the suit land to one Kisan Khiraba Manwatkar by registered sale deed dated 04.07.1981. According to the plaintiff, though that document came into existence; yet, the actual possession of the suit land was with the father of the plaintiff. Plaintiff came to know about the said sale transaction in the year 2004 and in the same year he had refunded the amount which was taken by his father. His father had never obtained his consent before alienating the suit land and, therefore, the said sale deed is not binding on him. Kisan used to reside at Mumbai and, therefore, he never cultivated the suit land. According to the plaintiff, he filed Regular Civil Suit No.221/2008 for partition and separate possession and when Kisan got knowledge about the said suit, he executed sale deed in respect of the suit land in favour of defendant. However, the possession was never handed over to the defendant. Defendant started obstructing the possession of the plaintiff on 30.08.2009. Hence, the suit has been filed.

5 The defendant resisted the claim of the plaintiff by denying all the averments. He contended that plaintiff's father had alienated the entire suit land to Kisan Manwatkar on 04.07.1981, by registered sale deed, for

legal necessity, as Karta of the family. Possession was handed over to Kisan. Mutation Entry was effected by M.E. No.141, which was later on sanctioned in favour of Kisan. Thereafter, Kisan has alienated the suit land to him by two different registered sale deeds and had handed over the possession to him. He contended the suit is bad for non joinder of Kisan as party, so also, it is barred by limitation.

6 The learned Trial Judge held that the plaintiff is still the lawful owner of the suit property and proved that the defendant is obstructing his possession. Suit was held to be within limitation and, therefore, the suit came to be decreed. As aforesaid, the appeal filed by the present appellant was dismissed. The parties are before this Court.

7 At the outset, from the submissions on behalf of the appellant and the photo copy of the roznama of Regular Civil Appeal No.40/2016, it can be seen that the concerned learned District Judge never heard the submissions on behalf of the appellant. Till 12.02.2020 the matter has been shown for arguments and it has not been heard prior to that, as the Judge appears to be busy in the criminal matters. Thereafter, when the matter was adjourned to 07.03.2020, the appellant and his Advocate were absent, Advocate for the respondent was present and the submissions of the respondent were only heard and the matter was kept for Judgment. In

absence of the appellant and/or his Advocate the submissions on behalf of respondent could not have been heard by the learned First Appellate Court. If the appellant and/or his Advocate are absent, then at the most, the appeal can be dismissed in default, but it cannot be decided on merits. This basic principle has not been adhered to by the learned District Judge. Reliance can be placed on the decision in **Sri. Prabodh Ch. Das and another vs. Mahamaya Das and others** in **Civil Appeal No.9407 of 2019** decided on 13.12.2019, it has been observed by the Hon'ble Apex Court that -

Explanation to sub-rule (1) of Rule 17 was added by Act 104 of 1976. Prior to 1976 conflicting views were expressed by different High Courts in the country as to the purport and meaning of sub-rule (1) of Rule 17 of Order 41 of CPC. Therefore, the explanation was introduced w.e.f 01.02.1977, to clarify the law by making an express provision that where the appellant does not appear, the Court has no power to dismiss the appeal on merits. Thus, Order 41 Rule 17(1) read with its explanation makes it explicit that the Court cannot dismiss the appeal on merits where the appellant remains absent on the date fixed for hearing. In other words, if the appellant does not appear, the Court may if it deems fit dismiss the appeal for default of appearance but it does not have the power to dismiss the appeal on merits.

8 It can further be seen that after the matter was adjourned for the pronouncement of Judgment thereafter the Presiding Officer was on leave and thereafter national lock-down was declared. Even the Judgment has

been delivered on 18.06.2020 when the parties and their Advocates were absent. There is total non adherence of the basic principles of law as well as principles of natural justice by the learned First Appellate Court and, therefore, on this count itself the Judgment deserves to be set aside.

9 Another point, that is, required to be considered is, the Judgment by the First Appellate Court is as cryptic as it can be. Only one point has been framed, which is thus – Whether the impugned judgment and decree passed in R.C.S. No.94/2009, dated 16.02.2016 by the Trial Court, is perverse, illegal and needs interference ? And the finding is given in the negative. When in fact, the law requires that all those points arising for determination should be framed by First Appellate Court and then only there can be a complete Judgment. The principles and the requirements of Order 41 Rule 31 of the Code of Civil Procedure are not at all observed in this case. No point, especially the point of limitation and also for setting aside the sale deed firstly that was in favour of Kisan and secondly that in favour of the defendant, was prayed by the plaintiff in this case. That point appears to have not been considered by the learned Lower Court also. Under such circumstance, in fact, whether suit for simplicitor injunction was maintainable, was also a question involved in the case, which has not been addressed by both the Courts below. Both the Courts below, inspite of the

fact that the burden of proof would be on the plaintiff, have expected the defendant to adduce evidence. If we could get the things from the Judgment of the learned Lower Court, then the description of the suit land has been given admeasuring 02 H 55 R, but then it is said that out of that area admeasuring 01 H 62 R appears to have been sold out. Then whether the description of the property is correct, ought to have been seen. One more fact that was coming from the facts of the case was that the plaintiff had already filed suit for partition and separate possession. This suit was subsequent to that. Though, by any way, Kisan as well as the present defendant were the necessary parties to the said suit of partition, however, it appears that they have not been made parties. Yet, why a separate suit was required to be filed by the plaintiff, and why he could not have included the relief in the earlier instituted suit, was never considered by both the Courts below. In fact, it should be the endeavour of the Courts and also it is the cardinal principal in the Code of Civil Procedure to avoid multifarious litigations. There are provisions to that effect, which direct the parties that they should avoid subsequent litigations and, therefore, that point was also necessarily to be considered in this case.

10 This Court in **Barnes School and another vs. Arzoo Allan Baker, 2012 (3) Mh.L.J., 310** has held that - "*It is mandatory for the Court to state*

the points for determination, the decision thereon, reasons for the decision and where the decree appealed from is reversed or varied, the relief to which the appellant is entitled.”

10.1 Further, in **Hazrat Ali Mohamad (D) through LRs. vs. Prabhakar Dattaram Sirvoicar, 2015 DGLS (Bom.) 252** it has been held that - *“In absence of framing specific points for determination in terms of Order 41, Rule 31(a) or Order 20, Rule 4(2) of the Code of Civil Procedure the Judgment and Decree of the First Appellate Court would vitiate.”*

10.2 Further, in **H. Siddiqui (Dead) by LRs. vs. A. Ramalingam, (2011) 4 SCC 240** it has been held by Hon’ble Apex Court in respect of Order 41, Rule 31 of the Code of Civil Procedure 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.”

10.3 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** held that - *“Compliance of Rule 31 of Order 41, CPC is mandatory. Failure to comply with the said provision of law would not be a mere irregularity, but it vitiates.”*

11 In spite of these pronouncements, it is unfortunate that nowadays in many cases this Court is required to remand the matters to the First Appellate Court for formulating proper points for determination, to give findings thereon and decide the matters on merits afresh. This is not a proper scenario. It not only affects the rights of the parties but it would be unnecessary harassment for the litigants who are striving for early disposal of their cases as per the provisions of law. However, taking into consideration

all the above legal impediments, this Court cannot proceed further. No option has been left but to remand the matter, by setting aside the decision of the First Appellate Court. In view of these aspects and the conclusion by this Court that the matter deserves to be remanded, substantial questions of law are not framed.

12 The suit was filed in the year 2009 and, therefore, the First Appellate Court to give preference for disposing of this case, as the appeal of 2016 would be restored.

13 As regards the application filed for production of documents is concerned, liberty can be granted to the appellant to place those documents with appropriate application before the First Appellate Court and thereupon the said application can be considered on its own merits by the concerned Court.

14 For the above said reasons following order is passed.

ORDER

1 Second Appeal stands partly allowed.

2 The Judgment and Decree, passed in Regular Civil Appeal No.40/2016 by learned District Judge-5, Beed on 18.06.2020, is hereby set

aside.

3 The said appeal is restored on the File of District Court, Beed and made over to the learned Principal District Judge, Beed for its disposal, according to law.

4 Learned Principal District Judge, Beed to expedite the matter and decide it, on its merits, as early as possible and not later than March, 2022.

5 Parties to appear before learned Principal District Judge, Beed on 15.11.2021.

6 Liberty is granted to the present appellant to file appropriate application for production of documents, if advised. If such application is filed, it is to be decided on its own merits by the learned Principal District Judge, Beed.

7 Civil Application No.6563 of 2020 for stay and Civil Application No.11464 of 2021 stand disposed of.

(Smt. Vibha Kankanwadi, J.)

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