

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

**SECOND APPEAL NO.161 OF 2013
WITH
CIVIL APPLICATION NO. 4865 OF 2015**

1) Shaikh Rajmohammad Abdul
and Another **= APPELLANTS
(Orig.Plaintiffs)**

VERSUS

1) Shaikh Abeda Rahim & Ors. **= RESPONDENT/S
(Orig.Defendants)**

Mr.SV Natu, Advocate for Appellants;
Mr.Mukul S.Kulkarni, Advocate for Respondent Nos. 1 to 3;
Respondent Nos. 4 and 5 are served.

CORAM : SMT.VIBHA KANKANWADI, J.
DATE : 17th August, 2021.

PER COURT :-

1. Present appellants are the original plaintiffs. They had filed Regular Civil Suit No. 408/2005 for declaration, injunction and possession before Civil Judge, Junior Division, Rahata, District Ahmednagar. The said suit came to be dismissed. They had then challenged the said judgment and decree before the District Court, Kopargaoon by filing Regular Civil Appeal No. 39/2007. Learned District Judge-1, Kopargaoon dismissed the said appeal on 24.9.2012. Hence, the original plaintiffs have filed this Second Appeal.

2. Heard learned Advocates appearing for the respective parties. In order to cut short, it can be stated that both of them have made submissions in support of their respective contentions.

3. The plaintiffs had claimed that deceased Shaikh Abdul Rahimbhai was owner and possessor of the suit property. Though they had contended that it was his ancestral property, it appears that they intended to say that the said property had devolved on the deceased from his father. There is no concept of ancestral property in Mohammedan Law. They had then come with a case that Shaikh Abdul had partitioned the suit property on 4.4.1988 by a registered partition-deed and those details have been given. According to the plaintiffs, they were minors at that time and even in the partition-deed, deceased Shaikh Abdul disclosed that since he is getting pension, which is going on to maintain him, he is not taking any share in the estate. The said document appears to be liable to be interpreted. Then it is stated that on the same day, Shaikh Abdul sold the share of the minor plaintiffs and

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defendant Nos.4 and 5 in favour of deft.No.1. It was specifically contended that the partition-deed and the sale-deed were prepared on the same day. According to the plaintiffs, Shaikh Abdul had no right, title and interest to sell the property to deft.No.1. The said sale-deed is also challenged on the ground that deft.No.1 had no independent source of income and, therefore, had not paid the amount of consideration to deceased Shaikh Abdul. On that ground, they claimed declaration, injunction and possession. The defence was set up stating that the alleged partition-deed is hollow and never acted upon. The sale-deed is valid and legal and, therefore, deft.No.1 is owner of the suit property.

4. After considering the evidence on record, the learned Trial Judge held that the plaintiffs had failed to prove that the sale-deed dated 4.4.1988 is sham and bogs and will not bind them. The suit was held to be beyond the period of limitation. The plaintiffs are not entitled to get any kind of relief. Alternative plea, that was taken by deft.Nos.1 and 2 regarding acquisition of title by adverse possession, has been said to be

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rendered redundant and then the suit came to be dismissed.

5. As against this, when the matter was before the first Appellate Court, it has framed only three points, viz. -

I. Whether appellants prove that the learned Lower Court has not appreciated the facts, evidence and law properly?

II. Whether appellants prove that learned Lower Court has drawn wrong conclusion?

III. Is there any necessity to interfere in the order passed by the learned Lower Court?

6. It can be seen that the judgment of the first Appellate Court is totally cryptic and without proper discussion, findings have been given. In fact, the first Appellate Court, being the last fact-finding Court, should intrust much portion of its judgment in discussing the relevant facts and then take up the legal points for discussion. This has not been done by the learned Judge of the first Appellate Court. There is absolutely no compliance of Order XLI Rule 31 of

CPC by the learned first Appellate Court.

7. 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,- 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., 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."

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

"The Order 41 Rule 31 of the Code of

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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

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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)."

9. In view of the guidelines/observations referred above, this is a fit case, where the matter deserves to be remanded to the First Appellate Court for re-appreciation of the evidence and accordingly the matter is now remanded. There is no necessity for this Court to frame substantial question of law, answering it and then remanding the matter. For the discussion, as aforesaid, following order is passed, -

ORDER

1) The Second Appeal is hereby partly allowed. Pending Civil Application stands disposed of.

2) The Judgment and decree passed

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in Regular Civil Appeal No.39 of 2007, by learned District Judge, Kopargaon dated 24-09-2012, is hereby set aside.

3) The said appeal is remanded for its decision as per law to the concerned Court.

4) Parties to appear before the concerned Court on 05-10-2021.

5) It is clarified that, if any party remains absent then 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 proper compliance under Order 41 Rule 31 of the Code of Civil Procedure.

7) Since the Appeal of 2007 has been remanded, the concerned Court to give preference and decide it as early as possible and before 31-03-2022.

(SMT. VIBHA KANKANWADI)
JUDGE

BDV