

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

SECOND APPEAL NO. 61/2020

Abdul Mobin Abdul Ajij,
 aged 67 years, Occ. Retired Headmaster,
 r/o Habib Nagar No.1, Amravati,
 Tq. Dist. Amravati.

.....APPELLANT

...V E R S U S...

1. Education Officer (Primary),
Zilla Parishad, Amravati.
2. Chief Executive Officer,
Zilla Parishad, Amravati.
3. The Additional Collector,
Amravati District, Collector Office,
Camp, Amravati.
4. The Urdu Education Association,
through its President/Secretary,
Chandani Chowk, Amravati,
Tq. Dist. Amravati.

...RESPONDENTS

 Mr. P. S. Thakur, Advocate instructed by Mr. S. M. Vaishnav,
 Advocate for appellant.

Mr. Sunil Shinde, Advocate for respondent nos. 1 and 2.

Ms H. N. Jaipurkar, A.G.P. for respondent no.3.

CORAM:- ANIL L. PANSARE, J.

DATED :- 27.07.2023

ORAL JUDGMENT

On 17.02.2020, following order was passed.

“Heard Mr. S.M. Vaishnav, learned Counsel for the appellant. A suit was filed by the present appellant as well as the respondent No.4, before the Trial Court bearing Regular Civil Suit No.66/2009 questioning the levy of penalty upon the appellant, who was the plaintiff No.2, by the

respondents on the ground, that misappropriation in respect of 39.82 quintal of rice, which was to be provided to the school children under the scheme “Shaley Poshan Ahar”, was done by the plaintiff No.2/appellant. The suit was dismissed by the Trial Court. In the appeal, an application under Order XXXXI, Rule 27 Civil Procedure Code, was filed seeking to place on record a report by the Committee, appointed to enquire into this allegation of misappropriation, which had absolved the appellant/plaintiff No.2 from the charges of misappropriation.

Mr. Vaishnav, learned Counsel for the appellant has invited my attention to the order-sheet in Regular Civil Appeal No.97/2011, and specifically the one dated 11.07.2016, by which it was directed that the application under Order XXXXI, Rule 27 Civil Procedure Code (Exh.15), would be decided along with the main appeal. He submits, that in spite of this order, the application at Exh. 15 was not decided, resulting in illegality. He submits, that this was an act to be done by the Court and on failure to do so, it is the appellant, who has been prejudiced. It is further submitted, that Clause-14.4 of the Circular dated 27.08.2001, upon which reliance has been placed by the Appellate Court, provides a forum, to the contractor and not to the appellant and the finding rendered of absence of jurisdiction, is therefore, illegal.

The following substantial questions of law may arise for consideration :-

- (1) Whether in light of Clause-14.4 of the Circular dated 27.08.2001, which provides a forum to the contractor, the finding by the First Appellate Court that the Civil Court had no jurisdiction is legally sustainable ?*
- (2) Whether the First Appellate Court failed in its duty in not deciding the application under Order XXXXI, Rule 27 of the Civil Procedure Code, in*

spite of the obligation to do so under law and specifically in view of the direction that the same would be decided along with the appeal ?

Issue notice to the respondents, returnable on 02/03/2020.

The appellant is directed to place copy of the order-sheet of the First Appellate Court on record before the above period. The learned Counsel for the appellant is also directed to place on record the paper-book of the First Appellate Court as well as documents exhibited before the Trial Court.

Parties are put to notice that the matter may be heard and finally decided at the stage of admission itself.

Learned Assistant Government Pleader Mrs. Geeta Tiwari waives notice for Respondent No. 3. Notices be served upon the respondent Nos. 1, 2 and 4 by all modes permissible in law within the time stipulated above.”

2. Both the learned counsel are ad idem that application Exh.-15, has not been decided by the first appellate court. There is no dispute as regards the settled preposition of law that if the application under Order XLI Rule 27 of the Civil Procedure Code, 1908 (hereinafter referred to as the, “Code”), is filed the appellate Court is bound to decide the same, as laid down in **The State of Rajasthan Vs. T. N. Sahani and Ors.**¹. The appellate Court, therefore, failed in its duty by not deciding the said application despite the order having been passed that the application will be decided along with main appeal. The second substantial question

¹ 2001 (10) SCC 619

of law is accordingly answered in the affirmative. The matter, therefore, will have to be remanded back to the first appellate Court to decide the said application, in accordance with law.

3. Having said so, both the counsels submit that the first substantial question of law as formulated by this Court may be left open for decision by the first appellate Court.

4. In view of above following order is passed.

(i) The appeal is partly allowed.

(ii) Judgment and order dated 04.10.2019 passed by District Judge – 1, Amravati in Regular Civil Appeal No. 97/2011 is quashed and set aside. The appeal is remanded back to the first appellate Court and restored on its file.

(iii) The appellate Court shall decide the application filed by the appellant under Order XLI Rule 47 (Exh.-15), in accordance with the law.

(iv) The parties shall appear before the first appellate court on 17.08.2023.

(v) All the points are kept open.

(ANIL L. PANSARE, J.)

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